

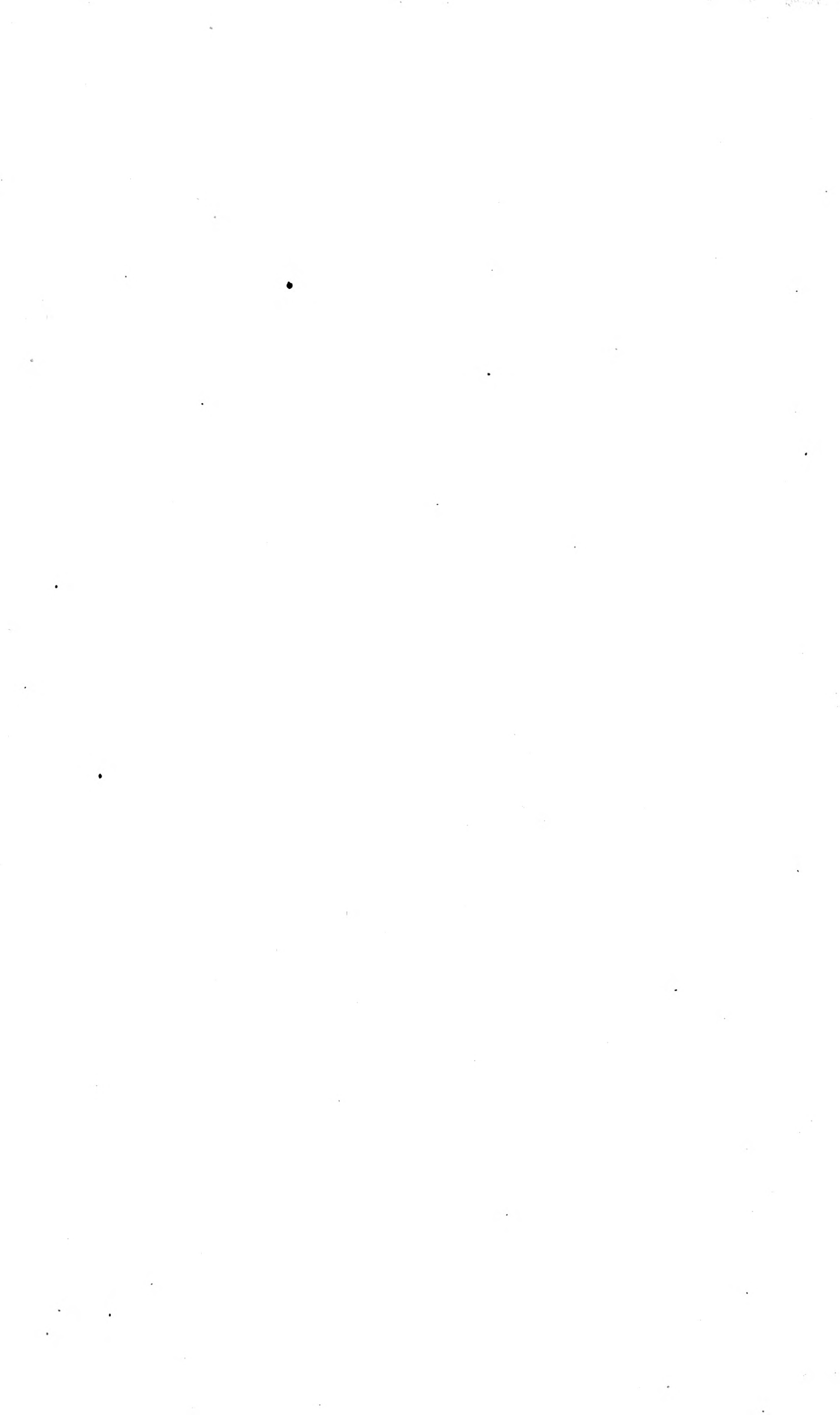
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A N
A B R I D G M E N T
O F T H E
C O M M O N L A W :

B E I N G A

Collection of the Principal C A S E S
Argued and Adjudged in the several Courts
of *Westminster-Hall*.

The Whole being digested in a clear and
Alphabetical M E T H O D, under Proper Heads, with several
Divisions and Numbers under each Title, for the more
ready finding any Judgment or Resolution of the L A W
C A S E S.

Whereby the Opinion and Judgment of the Courts may be
seen in an exact Series of Time, and what Alterations have been made in the
Law by subsequent Statutes and Judgments, brought down to the Year 1725.

By *WILLIAM NELSON*, of the
Middle Temple, Esq;

V O L. II.

In the S A V O R :

Printed by E. and R. NUTT and R. GOSLING (Assigns of *Edw. Sayer, Esq;*)
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the *Flower de Luce* against *St. Dunstan's Church* in *Fleet-street*. MDCCXXVI.

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Where it lies, where not, and of Writs of Error in the Exchequer-Chamber, and in *B. R.* See *Sci. fa.* (C) 33. *Writ of Error*, per totum.

1. **B**Y the Statute 27 *Eliz.* the Exchequer-Chamber hath Power to examine Errors of Judgments in *B. R.* and after such Judgments are affirmed or reversed, then to send back the Record into the King's Bench; so that by the Words of this Statute, 'tis not to be sent back, unless the Judgment be affirmed or reversed; but yet, by the Equity of that Statute, if the Plaintiff in the Writ of Error is nonsuit, or if the Suit is discontinued, the Record shall be sent back, and the Court of Exchequer shall give Costs and Damages to the Plaintiff in the Original Action for his Delay and Vexation upon the Statute 3 *H. 7. cap. 10.* but if the Plaintiff in Error was Plaintiff in the Original Action, then no Costs shall be given. 2 *And. 122.*

1 And 43.
Peacock
v. Punter.

2. Error in the Exchequer-Chamber, upon a Judgment in *B. R.* for that one of the Parties died before Judgment; it was objected, they had no Authority to examine such Errors; but adjudged they had Authority, tho' they had none to bail the Defendant, because their Power was only to reverse or affirm the Judgment. *Cro. Eliz. 731. Price's Case.*

3. By the Statute 27 *Eliz.* 'tis enacted, that where a Judgment is given in the Queen's Bench, the Plaintiff or Defendant in the Action may bring a Writ of Error in the Exchequer-Chamber, and there the Judgment shall be either affirmed or reversed; about eight Years after the making this Statute, it was a Question, whether an Administrator could have this Writ of Error upon a Judgment obtained against his Intestate, because he was not the Defendant in the Action, and the Writ of Error in the Exchequer-Chamber, is given only to the Plaintiff or Defendant himself by this Statute; it doth not so much as mention an Administrator, nor an Executor or Heir; and before this Law was made, erroneous Judgments in the Court of King's Bench were examinable only in Parliament; but adjudged, that an Administrator, tho' not named, was within the Intent and Meaning of this Statute, which was made to prevent Delays of Justice, where the Subjects were grieved by erroneous Judgments, and which could not otherwise be reformed at that Time, because the Parliament did not often meet, and when they did, they were employed about more weighty Matters. *Cro. Eliz. 294. Scroggs versus Lord Mordant.*

4. Error of a Judgment in a Writ of Partition, if 'tis brought after the first Judgment, which is *quod partitio fiat*, and before the second Judgment, which is *quod partitio facta sit firma*, it comes too soon, because the first Judgment is not final; therefore it will not lie till after the second Judgment. 2 *Bullst. 104, 114 Rawlins versus Barret. Moor 643. Cro. Eliz. 635. Lord Berkley versus Warwick. 11 Rep. 38. in Metcalfe's Case. S. P. Style 290. Spittlehouse versus Farmery. S. P.*

5. So where Tenant in Dower brought a Writ of Error before Enquiry was made of the Value and Damages found; it was adjudged, that it did not lie, because the Judgment was not perfect. 1 *Brownl. 127. Cleford versus Carr. Style 385. Rawlins versus Wivers, S. P.*

6. Judgment *quod computet*, and before the final Judgment a Writ of Error was brought; adjudged, that it did not lie, because the Writ is, *si judicium inde redditum sit*, which must be intended

tended the final Judgment : Now the Judgment *quod computet* is not *ad grave damnum*, and 'tis not properly a Judgment, but an Award of the Court ; but where a Writ of Error lies, the Judgment must be entire ; therefore where two are sued, and one of them pleads to Issue, and the other confesses Judgment, he shall not bring Writ of Error before the Plea is determined against the other. 11 Rep. 38. *Metcalf's Case*.

* Godb. 147. S. C. 7. It will not lie in the Exchequer Chamber, upon a Judgment in *B. R.* but in *Trespass, Detinue, Ejectment, Covenant, Debt, Actions on the Case*, and in Account ; for these are the Actions mentioned in the Statute, 27 Eliz. 2 *Bristl.* 162, 175. * *Sir Christopher Heydon's Case*.

8. Error in the Exchequer-Chamber, on a Judgment in *B. R.* in Ejectment upon the Demise of *B. G.* and the Error assigned was, that he was seised only in the *Right of his Wife*, and that she died before the Judgment was given, so that the Demise was void ; but the Judgment was affirmed ; for tho' the Exchequer-Chamber may reverse Judgments for Errors in Fact, as for the Death of either Party to the Suit, yet there is no Colour to reverse them, for the Death of one who is no Party to the Suit, as the Wife in this Case was not. *Hob.* 5. *Wilks versus Jordan*.

9. in *Trespass* in *B. R.* Judgment was given for the Defendant, and upon a Writ of Error in the Exchequer-Chamber, that Judgment was reversed, and the Record returned into *B. R.* and that Court gave Judgment *quod querens recuperet* ; for a new Judgment must be given to put the Plaintiff into Possession of what he demands ; but if Judgment had been for the Plaintiff, and reversed upon a Writ of Error in the Exchequer-Chamber, in such Case there is no Occasion for a new Judgment, because the Defendant is *in statu quo prius*, &c. *Yelv.* 74. *Shalloe versus Ridge*, and *Faldo versus Ridge*.

10. Error in the Exchequer-Chamber to reverse a Judgment against the Defendant in a *Scire facias*, &c. adjudged, that it did not lie, because it was not any of the Actions mentioned in the Statute 27 Eliz. which gives the Writ of Error to that Court ; neither will it lie there upon a Judgment in a Writ of *Refious* for the same Reason. 2 Cro. 171 *Vaughan versus Williams*. *Moor* 694. *Ody versus Yates*, *S. P.* *Yelv.* 157. *Prowse versus Turner*, *S. P.* *Postea* pl. 32.

11. Upon a Writ of Error in the Exchequer-Chamber, on a Judgment in *B. R.* that the Court cannot award Execution, they have Power to reverse or affirm, and then to remand the Record which is removed ; therefore if such Writ of Error be discontinued, the Party shall not have a new Writ, *coram nobis residen'* ; for if he should, the Plaintiff in Error might discontinue, and then bring a new Writ, and so delay the Defendant *in infinitum*. 2 Cro. 620. *Cave v. Polwheell*.

Postea 17. S. C. 12. Error of a Judgment in Ejectment in *B. R.* brought in the Exchequer-Chamber, and the Error assigned was, that the Plaintiff being an *Infant*, sued *per Attornatum*, when it should be *per Guardianum*, or *Prochein Amy* ; but this being an Error in Fact, it was a Question, whether such an Error was assignable in the Exchequer-Chamber upon the Statute 27 Eliz. cap. 5. because that Statute gives Authority only to examine Matters in Law ; but adjudged, that it was assignable ; for the Statute giving the Writ of Error, doth likewise give Authority to examine Errors in Fact, as Errors in Law ; and this Error in Fact shall be tried by *Nisi prius* in the Exchequer ; and the rather, because the Statute gives Authority to the Exchequer-Chamber to reverse or affirm the Judgments, which implies, that it allows the Means of doing it. 2 Cro. 5. *Row versus Long*. *Postea* Infant. (H) 3. S. C.

13. In *B. R.* the Case was, a Statute-Merchant was sent by *Mittimus* out of Chancery into the Court of Common Pleas, and Judgment and Execution given in that Court, and upon a Writ of Error brought in *B. R.* Execution was there awarded *super tenorem Recordi*, for the Original Record was still in Chancery, the Question was, whether this Writ of Error would lie ? and adjudged, that it would, and that if Diminution should be alledged, the Court of *B. R.* might write to the Chancery for the Record it self ; the Error assigned in *B. R.* was, that the Statute wanted one of the Seals which ought to be put to it ; but adjudged, that the Conusor could not assign this for Error, because he had admitted it in the Common Pleas to be perfect ; for upon the *Mittimus* out of Chancery the Statute it self is always shewed. *Moor* 570. *Worsley versus Charnock*.

14. The Plaintiff had a Verdict in an Action on the Case for Words, and 1000 *l.* Damages, and afterwards he took out Execution by *Elegit* on the Lands of the Defendant, who died, and his Administrator brought a Writ of Error in the Exchequer-Chamber ; the Defendant in Error pleaded in Abatement this Execution, by which he intended, that the Administrator had no Loss but the Heir at Law, and therefore a Writ of Error would not lie by the Administrator ; but upon a Demurrer to this Plea, it was adjudged for the Administrator ; for upon Eviction of the Lands the Plaintiff might resort to the Goods. *Moor* 686. *Lord Mordant versus Bridges*.

15. The Plaintiff obtained Judgment in the Common Pleas in an Action of Debt, which was affirmed upon a Writ of Error brought in *B. R.* afterwards the Defendant died, and then a *Scire facias* was brought against the Son and the Tertenants, and Judgment against them ; and upon a Motion for a Writ of Error in the Exchequer-Chamber, upon the Judgment in the *Scire facias*, it was denied, because the Record came into *B. R.* by Writ of Error, and not by Bill, as by the Statute 27 Eliz. cap. 8. is required. 1 Roll. Rep. 264. *Harvey versus Williams*.

16. Judgment in *B. R.* in *Replevin* ; adjudged, that a Writ of Error in the Exchequer-Chamber doth not lie on such Judgment, because *Replevin* is out of the Statute. 2 Roll. Rep. 434. *Farnell's Case*.

* Antea 12. S. P. 17. But that Statute gives the Exchequer-Chamber Authority to examine as well Errors in Fact, as in Law. Cro. Car. 369. * *Row versus Long*. See *Tit. Infant.* (H) 3. *Smith v. Merchant*. S. P.

18. A *Sci. fa.* being an Action grounded upon a Judgment in Debt, it hath been doubted, whether a Writ of Error * *quod coram vobis residet*, will not lie in such Case upon the Equity of the Statute 27 Eliz. Cro. Car. 286. *Nevill versus Delabar*, 219, 334. * *Lancaster versus Keighley*, and *Hob. 72. Forest versus Sandilands*, S. P.

* See Har-
top v.
Holt.

* W. Jon.
325. That
within the

the Principal and the Bail cannot join in a Writ of Error in the Exchequer-Chamber, and that the Bail are not Statute.

19. In Account against the Defendant, as Receiver, &c. to render an Account *quando ad hoc requisitus fuerit*, there was Judgment against the Defendant, and upon a Writ of Error brought, the Error assigned was, that the Writ was too general, and that the Jury had assessed Damages where there ought to be none in this Action; but adjudged, that neither of these were Error. 2 Leon. 118. *Collet versus Robson*.

20. In Replevin, the Plaintiff had Judgment in the Common Pleas, and a Writ of Inquiry of Damages, and before the Return thereof the Defendant brought a Writ of Error in B. R. and afterwards the Writ of Inquiry was returned; adjudged, that a Writ of Error would not lie before the Writ of Inquiry was returned; for 'tis not a compleat Judgment till then, and if so, the Record is not removed. *Latch. 133. Colmore versus Hobbs*.

21. But 'tis otherwise in Ejectment; for in that Action the Judgment is perfect enough to bring an *Habere facias possessionem* before the Return of the Writ of Inquiry, because the Words of the Judgment are, *quod recuperet Terminum*; and if a Writ of Error should not lie till after the Return of the Writ of Inquiry, this Inconveniency would follow, (*viz.*) The Plaintiff may get Possession upon an erroneous Judgment, and never bring a Writ of Inquiry, and then the Defendant would be without Remedy. *Latch. 212. Smith versus Amys*.

22. The Statute 27 H. 8. gives the Exchequer-Chamber Authority to reverse or affirm Judgments, either in Actions on the Case, Account, Debt, Detinue, Ejectment or Trespass; the Lord Viscount Say obtained a Judgment in an Action of * *Scandalum Magnatum*, grounded on the Statute 2 R. 2. and the Defendant brought a Writ of Error in the Exchequer-Chamber; it was objected, that it ought not to be allowed, because the Judgment was not had upon either of those Actions mentioned in the Statute; 'tis true, a *Scandalum magnatum* is called an Action on the Case, but 'tis founded on a Statute, and for that Reason 'tis of a higher Nature than an Action on the Case; and so it was adjudged. Cro. Car. 101, 135. *Lord Say versus Stephens*. See *antea pl. 5.* it will not lie upon a Judgment in a *Sci. fa.* or Replevin. *Postea pl. 31.*

W. Jones
194.
* Palm.
565.

23. The Plaintiff recovered in B. R. and the Defendant brought a Writ of Error in the Exchequer-Chamber, and after the Record was satisfied, the Writ was discontinued, and then the Defendant brought a Writ of Error in the Exchequer-Chamber, *coram vobis residen'*, and adjudged, that it did not lie, for a Writ of Error in the Exchequer-Chamber is given by the Statute 27 Eliz. in a Special Manner, either to affirm or reverse the Judgment, and the Execution thereof is referred to B. R. therefore *nullum coram vobis residen'* lies; but upon a Discontinuance or Miscontinuance, the Transcript of the Record is remanded to B. R. *W. Jones 14. Polbill versus Cate*.

24. Judgment against the Defendant, and before Execution taken out, he brought a Writ of Error in the Exchequer-Chamber, and the Record was removed thither; yet the Plaintiff took out Execution, and the Sheriff levied the Money, which remaining in his Hands, the Defendant moved for Restitution; 'tis true, by the Statute a Writ of Error is no *Superfedeas*, after a Verdict Time before the Court; therefore being removed before the Execution taken out, it was not at that Time, and a Rule to take the Money out of the Sheriffs Hands. *Style 414. Wingfield versus Valence*.

25. Writ of Error in the Exchequer-Chamber doth not lie to reverse a Judgment given in an Action *Qui tam*, &c. nor upon a Judgment given in an Action de *Scandalo Magnatum*. 1 Vent. 34, 49. *Raym. 275. contra*.

26. Where a Writ of Error is brought upon a Judgment in Debt in B. R. it still remains a Record of B. R. and an Action of Debt may be brought on that Judgment. 1 Vent. 34. S. P. 1 Lev. 153. S. P. 1 Sid. 236. S. P. 3 Lev. 396. *Adams versus Fumlinson*. See *Superfedeas*. See 4 Mod. 247. S. P.

27. The Exchequer-Chamber doth not award a *Scire facias ad auferend' Errores*, but Notice is given to the Parties concerned. 1 Vent. 34.

28. In Trespass upon the Statute 8 H. 6. the Plaintiff had Judgment, it was a Question, whether a Writ of Error would lie in the Exchequer-Chamber; for tho' a Trespass is one of the seven Cases mentioned in the Statute which gives this Writ of Error, yet it may be intended Common Trespasses, and not those which are founded on a Statute. 1 Vent. 34. *Skier versus Skes*.

29. *Scire facias* against the Bail, and upon two *Nichils* returned, there was a Judgment against them; adjudged, that no Writ of Error can be brought in the Exchequer-Chamber upon that Judgment, but in Parliament only; and that after such a Return of two *Nichils*, it cannot be assigned for Error, that there was no *Capias* against the Principal; but the Bail may be relieved by an *Audita querela*. 1 Vent. 38. *Wingate versus Stanton*.

30. Judgment in *B. R.* in an Action on the Case, and a *Scire facias quare Executionem*, &c. and there was a Judgment upon that; and upon a Writ of Error brought in the Exchequer-Chamber, the Judgment in the *Scire facias* was affirmed; then the Defendant died, and a *Scire facias quare Executionem*, &c. was brought against his Administrator, and Judgment had upon that *Sci. fa.* upon which the Administrator brought a Writ of Error; and adjudged, that it did not lie in the Exchequer-Chamber, because it was brought upon a Judgment already affirmed in the Exchequer-Chamber. 1 *Vent.* 168. *Skinner versus Webb.* 1 *Mod.* 79. *S. P.*

Lev. 56.

31. The Plaintiff had Judgment in *B. R.* in an Action *De Scandalo Magnatum*, and the Defendant brought a Writ of Error in the Exchequer-Chamber; but the Court would not allow it, because the Statute did not extend to this Action. *Sid.* 143. *The Earl of Stamford versus Needham.* See *antea pl.* 22.

32. The Plaintiff obtained Judgment in an Action of Debt upon the Statute of *Usury* for taking more than 6 *l. per Cent.* and the Defendant brought a Writ of Error in the Exchequer-Chamber; but adjudged, that no Action which concerns the King is within the Statute 27 *Eliz. cap.* 8. which gives a Writ of Error in the Exchequer-Chamber. *Sid.* 240. *Whitton versus Preston.* See *antea pl.* 10.

33. The Defendants were convicted upon an Indictment for seducing an Apprentice to Bawdy-Houses, and causing him to spend his Master's Money there; and now they brought a Writ of *B. R.* it was objected, that this Writ would not lie in *B. R.* because the Indictment and Conviction was in that Court; but adjudged, that more Writs of Error have been brought upon Judgments in *B. R.* than in Parliament, and for Error in Fact it cannot be brought elsewhere; and till the Errors are assigned *Non constat*, whether 'tis Error in Law or not; and the Judgment being *quod capiantur*, the Court directed, that the Writ of Error should not be allowed till the Defendants appeared personally, and that Process shall go to bring them in to hear Judgment. *Sid.* 208. *The King versus Cornwall & al.*

1 Lev. 34.

34. Error to reverse a Judgment given in the Palace Court, and the Record was certified, together with the Recognisance entered into by the Bail, and the Judgment was affirmed in *B. R.* whereupon a *Sci. fa.* issued against the Bail, who pleaded *null tiel Record*; it was insisted, this was a good Plea; for the Recognisance being collateral is not removed, it would be mischievous if it should. because then all the Estate of the Bail would be liable; whereas if the Recognisance is not removed, then so much thereof would only be liable, which is within the Jurisdiction of the Court when it was taken; but adjudged, that where a Judgment in an Inferior Court is affirmed upon a *Writ of Error*, Execution may be taken out any where, because that Affirmance adds Strength to the Judgment; but where a Record is removed out of an Inferior Court by *Certiorari*, there no Execution can be sued, but in the Place from whence it was removed. *Sid.* 213. *Herbert versus Alcock.* See *Hutt.* 117. *Risam versus Goodwin.* *S. P.*

35. In Debt upon the Statute of *Usury*, the Plaintiff had Judgment in *B. R.* and the Defendant brought a Writ of Error in the Exchequer-Chamber; the Question was, whether it should be allowed, because 'tis not one of the Actions mentioned in the Statute 27 *Eliz. cap.* 8. which gives a Writ of Error there, therefore it will not lie upon a Judgment of *Scandalum Magnatum*; which is very true; but it hath been adjudged to lie on a Judgment in an Action on the Statute for Tithes. *Sid.* 240. *Whitton versus Preston.* See *Crr Sur.* 135. See *Sid.* 143.

2 Lev. 15.

36. *Mandamus* to restore Dr. Patrick to the Mastership of *Queen's College* in Cambridge, to which there was a long Return of Charters and local Statutes; and upon the arguing it the Court was divided; and the Question was, whether it might be adjourned into the Exchequer-Chamber for Difficulty; it was objected, that it could not, because it was amongst the Pleas of the Crown; but adjudged, that it might, for the Statute extends as well to the Pleas of the Crown, as to Civil Pleas, and to all, except those of the Ecclesiastical Courts. *Sid.* 346. *The King versus Dr. Patrick.*

37. Judgment in Trespass against the Defendant in *B. R.* and upon a Writ of Error brought in the Exchequer-Chamber, the Defendant of one of the Defendants, before Judgment was assigned for Error; the Defendant pleaded *in nullo est Erratum*, which is a Demurrer, and confesseth *Errors in Fact*; but the Court affirmed the Judgment, because *B. R.* had Power to examine Errors in Fact, and therefore the Exchequer-Chamber cannot try such Errors; and the Statute which gives a Writ of Error in the Exchequer-Chamber, extends only to such Cases where no other Remedy could be had but in Parliament; whereupon the Plaintiffs brought a Writ of Error *coram vobis residen' in B. R.* but adjudged, that it did not lie, because such Writ must be brought upon, and recite the whole Proceedings in the Exchequer-Chamber. 2 *Lev.* 38. *Hopkins versus Wrigglesworth.*

38. Debt on a Judgment in *B. R.* the Defendant pleaded in Abatement, a Writ of Error depending in the Exchequer-Chamber, and adjudged good, but he must not conclude his Plea *Respondere non debet.* 5 *Mod.* 68. *Dalwood's Case.*

39. Where an Ejectment is brought in *B. R.* and upon a Special Verdict, Judgment is given for the Defendant, which is afterwards reversed in the Exchequer-Chamber, that Court may give Judgment, and enter it; but if the Judgment had been in *B. R.* upon a Demurrer, and reversed, then *B. R.* must have entered the new Judgment, because the Exchequer-Chamber could not have

have awarded a Writ of Inquiry of Damages, *per Holt Ch. Just.* 1 *Salk.* 403. In the Case of *Phillips versus Berry.* *Postea Error.* (N) 10. S. C.

40. Adjudged, that a Writ of Error lies against the King, without Petition, tho' anciently the Course was by Petition, but ever since the Year 1640, Writs of Error have been made *ex Officio.* 1 *Salk.* 264.

41. Adjudged, that where-ever a new Jurisdiction is created by Act of Parliament, and the Court acts as a Court of Record, according to the Course of the Common Law, and not in a summary Way, a Writ of Error lies on their Judgment; but if in a summary Way, then it must be a *Certiorari.* 1 *Salk.* 263. *Groenvelt versus Burwell.*

42. Judgment was given against *W.* and against *R.* who died, and a *Sci. fa.* was brought against his Administrator, and after two *Nihils* Execution was awarded; but this *Sci. fa.* suggesting the Judgment to be against *W.* and *R.* and that *R.* died and *W.* survived, and afterwards died Intestate; now the Administrator of *R.* brought a Writ of Error *coram nobis residen'*, for Error in the Award of Execution, and assigned for Error, that *W.* survived, upon which they were at Issue, and the Plaintiff in Error had a Verdict, but yet the Writ of Error was quashed, because this being Matter contrary to the very Suggestion in the *Sci. fa.* is not assignable for * Error; 'tis true, if the *Sci. fa.* had been returned, he might have pleaded it, but since that was not done, he must now bring an *Audita querela*, if he would be relieved. 1 *Salk.* 262. *Lampton versus Collingwood.* 4 Mod. 314.

turned, is a Judgment by Default after Notice, and for that Reason a Writ of Error comes too late to reverse that Judgment.

43. Judgment by Default in an Action of Trespas, and on a Writ of Error brought, the Error assigned was, that the Person who returned the Original was *not Sheriff*; adjudged, that if this had been objected in proper Time, it had been irregular; now the proper Time is in all that Term in which the Writ came in, but when that Term is past, and the Writ is filed, 'tis then a Record, and every one is estopped to say, that the Sheriff did not return it; besides, the Defendant admitted the Original by appearing, and not challenging it. 1 *Salk.* 265. *Andrews versus Lynton.*

44. Judgment in Debt in *B. R.* for the Plaintiff, afterwards the Defendant brought a Writ of Error in the Exchequer-Chamber, and there the Judgment was affirmed, and thereupon the Plaintiff brought a *Scire facias* in *B. R.* and had an Award of Execution; then the Defendant brought another Writ of Error in the Exchequer-Chamber, *tam in redditione judicii quam in adjudicatione Executionis*; but notwithstanding this Writ the Plaintiff took out Execution; and upon a Motion to set it aside, because taken out pending the Writ of Error, it was adjudged, that the Intent of the Statute 27 *Eliz.* was only to relieve upon the Merits of the Cause, as it stood on the first Judgment, and that there could be no new Writ of Error after that Judgment was affirmed or reversed: now in this Case the Merits of the first Judgment were examined before the *Scire facias* taken out, and thereby the Exchequer-Chamber had executed their Authority; and if so, then by Consequence the second Writ of Error can be no *Superfedeas* to the Execution. 1 *Salk.* 263. *Hartopp versus Holt.* 5 Mod. 227.

45. Error in the Exchequer-Chamber upon a Judgment in Trespas in *B. R.* against four Defendants; this Writ depended for a Year, and then abated by the Death of one of the Plaintiffs in Error; then another Writ was brought, which depended half a Year, and that abated by the Death of another of them; and there being no new Writ brought afterwards, the Plaintiff in the original Action brought a *Ca. fa.* against the two Survivors; but it was adjudged erroneous, because the Judgment is still in the Exchequer-Chamber till there is a *Remittitur* entered, for till such Entry it cannot appear to *B. R.* but that the Writ of Error is still depending in this Case. 4 *Leon.* 197, was denied to be Law. 1 *Salk.* 261. *Howard versus Pitt.* 2 Cr. 364. Yelv. 7.

46. Judgment was obtained in *B. R.* against the Defendant, at the Suit of two Plaintiffs; a Writ of Error was brought in the Exchequer-Chamber, the Writ was allowed; but before any Transcript made of the Record, one of the Defendants in Error died, and the Survivor brought a *Scire facias quare Executionem, &c.* and upon two *Nihils* returned, had an Award of Execution, and took the Plaintiff in Error upon a *Ca. fa.* but it was set aside: It was agreed, that the Writ of Error did not abate by the Death of one of the Defendants in Error, but that the Plaintiff in Error might bring a *Scire facias, ad audiendum errores* against his Executor, and he might have pleaded to the *Scire facias, quare executionem, &c.* and shewed the Death of the Defendant in Error, but he loses the Benefit of any Matter pleadable to such *Scire facias* after an Award of Execution on the *Scire facias* returned; but where such Award is on two *Nihils* returned, (as in this Case) he may relieve himself by an *Audita querela*; and unless the Ground of it is a Release, or some other Matter in Fact, the Court will relieve him upon a Motion, without an *Audita querela.* 1 *Salk.* 264. *Wickett versus Cremer.*

(B)

Who may have a Writ of Error, and who not, and who shall join in it.
See *Scire facias*. (A) 20.

1. **T**enant in Tail suffered a Recovery, and *released all Errors*; now, tho' this Release shall bar him to bring a Writ of Error, yet it shall hinder the Issue in Tail, and if there are no such, it shall not hinder him in Remainder, because one claims not only as Heir, but *per formam doni*, and so doth the other. *Dyer* 188. *Sir Ralph Rowlett's Case*.

2. Feoffment to the Use of himself and *M. G.* his Wife, and to the *Heirs of their two Bodies, Remainder to the right Heirs of the Husband*, they had Issue a Daughter, the Husband died, the Wife sold the Lands, and the Daughter and her Husband joined in a Fine to confirm the Sale; then the *Daughter died without Issue*, so that the Estate-tail was spent, and the Husband, with a collateral Heir to the Daughter brought a Writ of Error to reverse the Fine; but adjudged, that it would not lie, because it must always be brought by him who is right Heir to him in *Remainder*, and not by his collateral Heir. *Dyer* 89. *Vurney's Case*.

3. The Defendant was in Execution, and yet he brought a Writ of Error. *Dyer* 196. *Bateman's Case*.

4. There could be no Remainder limited upon an Estate-tail at Common Law, therefore the *Statute de donis, &c.* enabled the Donor to limit such Remainder, and he shall have a Writ of Error upon a Judgment given against the Tenant in Tail, because all Actions which the Common Law gave to Privies in Estate, are by that Statute implicitly given as Incidents, &c. 3 *Rep. Marquess of Winton's Case*.

5. Where a Judgment is had, either upon any erroneous Process or Verdict, he who is grieved shall redress it by a Writ of Error, tho' he is neither Party or Privy to the Judgment. *Owen* 64. *Henningham versus Windham*.

6. A Man shall not reverse a Thing for Error, unless he can shew that the Error is to his Prejudice. 5 *Rep.* 38. *Tey's Case*.

7. Yet in *Beecher's Case* it was held otherwise, for there the Plaintiff in an Action of Debt *Retraxit se per Attornatum*, and by the Judgment was not amerced, both which were erroneous, for a *Retraxit* cannot be *per Attornatum*, but must be *in propria persona*; and tho' it was for the Advantage of the Plaintiff not to be amerced, yet he may assign it for Error. 8 *Rep.* 58. *Beecher's Case*.

8. The Son and Heir was outlawed upon an Indictment for Felony, in the Life-time of his Father, who was seised in Fee, and upon his Death the Son entered and devised it to *B. G.* in Fee, who conveyed it to *W. S.* who brought a Writ of Error to reverse the Attainder by Outlawry; but adjudged it did not lie, because if the Attainder should be reversed, the Heir must be restored in Blood, and none can do that but he who is Privy in Blood. *Godb.* 376. *Brooker's Case*.

9. Writ of Error on a Judgment in a *Quare Impedit* brought by the Bishop and the Incumbent; the said Bishop having pleaded in the Action, that he claimed nothing in the Church but as Ordinary, and now concluded the Writ of Error, *ad grave damnum Episcopi*, which is directly contrary to his Plea, for he could not be grieved by the Judgment, when he claimed nothing but *Institution and Admission*; but it was adjudged, the Writ of Error was well brought. 3 *Leon.* 176. *The Queen versus Bishop of Gloucester*.

10. The Plaintiff had a Judgment in Debt, and afterwards the Defendant made a Feoffment to him of his Lands, then the Plaintiff sued an *Elegit* upon the Judgment, but *before it was executed* the Defendant brought a Writ of Error, and assigned Error in the Judgment; adjudged, that a Writ of Error would not lie, unless it be for Error in *suing out Execution*, which was not done in this Case, for *before Execution* he is not a Party grieved, which is the true Reason why he in Reversion or Remainder shall not have a Writ of Error in the Life-time of the Tenant for Life, upon a Judgment given against such Tenant for Life, because neither of them can be a Party grieved in his Time. *Cro. Eliz.* 289. *Charnock versus Sherrington*.

11. In a *Præcipe quod reddat*, *T. S.* was vouched, who entered into Warranty, and pleaded to issue, and it was found against him; now, if Judgment is given against him, in such Case he shall never have a Writ of Error, notwithstanding the Statute 32 *H. 8. cap.* 32. for this is out of the Statute, which only gives the Writ where a Verdict is found for or against the Demandant or Tenant, and a Vouchee is neither of them. 1 *And.* 26, 27.

See Stat.
18 Eliz.
cap. 15.

12. The Plaintiff and Defendant were Patentees claiming under the Queen, and Judgment was given for the Queen in a County Palatine; and in a Writ of Error brought it was objected, that it did not lie against the Queen, but that the Party ought to sue by *Petition*; but adjudged, that the Writ did lie, for the Queen would not be prejudiced, whether there was Error, or not, because both claimed under her; besides, a Writ of Error would lie against her, where she hath an immediate Interest, without any Petition, as where a Judgment is given for her in the Exchequer upon a Writ of Intrusion, and many Outlawies have been reversed for Error. 2 *Leon.* 194. *Hurleston's Case*.

13. The Difference between an Appeal in the Spiritual Court and a Writ of Error is, that the Judgment is not impeached upon a Writ of Error, until 'tis reversed; but the very Bringing an Appeal is a Suspension of the Sentence in the Spiritual Court for the principal Matter, but not for the Costs. *Goldsb. 119. Willoughby's Case.*

14. The Principal and Bail cannot join in a Writ of Error, because there are several Judgments against each. *Cro. Car. 219. Lancaster versus Keileigh, and 295, Busbell versus Crosthwait.* W. Jones 360. Pollex versus Busbell. S. P.

15. The Bail cannot bring a Writ of Error for any Error in the principal Judgment, but they may for an Error in the Judgment in the *Scire facias*. *Cro. Car. 345, 482. South versus Gifford, 396. 415, Smith versus James. S. P. 2 Cro. Sanderfon versus Deverton. Hob. 72. S. C. Cro. Eliz. 730. Cockein versus Hawkins. S. P.*

16. An Assise was brought against Five for 100 Acres of Lands; three of the Defendants were found not Tenants, and so were acquitted of the Disseisin; two other were found guilty, quoad three Acres, and for the Residue Not guilty; a Writ of Error was brought, in which all of them joined; adjudged, that it ought to have been brought only by those Two who were found guilty, and the Three who were acquitted ought not to have joined. *Mich. 5 Car. 2 Cro. 138. Vaughan versus Lorrimer. Style 190. Barnwell versus Lorimer contra.*

17. Error of a Judgment in Ejectment against several Defendants, and the Writ concluded *ad grave damnum ipsorum*, which must be intended of all the Defendants, when it appeared upon the Record, that the Judgment was only against Three, and all the rest were acquitted; adjudged, that the Writ was well brought, for it being only in the Nature of a Commission to examine Errors, this is not very material; besides, *ad damnum ipsorum* may be intended only of those who were convicted, but they must all join in the Writ, and the Judgment must be reversed against all; in this Case the Error was assigned in the Nonage of the Three. *1 Vent. 165. Brell versus Richards.*

18. Trespass against Three, one of them pleaded Not guilty, upon which they were at Issue, and the Defendant had a Verdict; there was Judgment by Default against the other Two, and a Writ of Inquiry, and they only brought a Writ of Error, and assigned for Error the Want of an Original; 'tis true, if the Verdict had been for the Plaintiff, it had cured the Want of an Original, but it was for one of the Defendants, and so not cured by the Verdict or aided by the Statute, and the other Two may bring a Writ of Error without the Third, for he cannot be joined, because he is acquitted, and therefore cannot say that the Judgment is to his Damage. *1 Lev. 210. Cannon versus Abbot.*

(C)

For Faults and Variance in the original Writ, Declaration, and other Process. See (F) 22.

1. ERROR of a Judgment in Trover, for that there was no Bill filed, nor no Bail, but the Judgment was affirmed in the Exchequer-Chamber, because the Want of a Bill was remedied by the Equity of the Stat. 18 Eliz. and the Want of Bail was not material, the Defendant being in *Custodia Mar'*. *Hob. 264. Willis versus Woodhouse.*

2. Error of a Judgment in a Writ of Entry in the *Quibus*, for that it bore Date 13 Feb. and was returnable in *Cro. Pur.* in the same Year; so the Return was before the *Teste*, and it was reversed. *Dyer 129. Marrow versus Drew.*

3. Error of a Judgment in Debt, for that the Record was, *obtulit se in placito debiti de 10 l.* and the Declaration was upon a Debt of 20 l. and for this Reason the Judgment was reversed. *Cro. Eliz. 434. Staughton versus Newcomb. Cro. Eliz. 185. S. P.*

4. Judgment against the Defendant, who appeared *per R. B. Attornatum suum*; and upon Error brought, it was assigned for Error, that there was not any such Person as R. B. in *rerum Natura*: The Defendant pleaded *In nullo est erratum*, which is a Confession that there was no such Person, and yet the Court held it no Error, because it was against the Record; but it had been better to have assigned for Error, that R. B. had not any Warrant of Attorney. *Cro. Eliz. 665. Croffe versus Tyke.*

5. The Plaintiff in the original Writ was named Sadler, and in the *Scire facias* to have Execution he was named Salter, and in the Writ of Error he was named Salter; adjudged, that this Variance between the Original and *Sci. fa.* is erroneous, and not amendable by the Statute 18 Eliz. *Dyer 173.* for that gives a Remedy where there is no Original, but not where there is one, and Faulty. *5 Rep. 37. Bishop's Case.*

6. Error on a Judgment in Debt, the Original was against B. G. *nuper de London*, Yeoman, *alias dict' B. G. de Reading in Com' Berks*, Yeoman, and the *Ca. fa.* against him was by the Name of B. G. *nuper de London*, Yeoman, but there was a Variance in the *alias dict'*, for that was B. G. *nuper de Reading, &c.* but because this Variance was not in the Name, but in the Addition, it was no Error. *Goldsf. 140. Latham's Case.*

7. In Dower, the Original was by *Frances Fulgam*, Widow, when it ought to be *quæ fuit Uxor*, &c. and tho' the subsequent Words were, *quod reddat rationabilem dotem ten'orum, quæ fuerunt Francisci Fulgam quondam viri sui*, yet it was resolved to be Error. 2 *Brownl.* 300. *Fulgam versus Harris*.

8. In Replevin there were two Avowants, one of them was an Infant, and appeared by Attorney when he should appear by Guardian, and this was assigned for Error; but in the Assignment of it he concluded *& hoc paratus est verificare*, when he ought to have concluded to the Country, because the Error which he assigned is an *Error in Fact*, and the Court are not Judges of such Errors, but only of Errors in Law, therefore 'tis as if there had been no Error at all, and so it was adjudged. *Yelv.* 58. *King versus Gospar*.

9. An Action of Assault was brought before the Mayor of *Plimouth*, and Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages was awarded to the *Serjeant of the Mace*, returnable at the next Court before the Mayor, &c. and upon the Record certified it appeared, that the Writ of Inquiry was executed before *the Mayor himself*, who was the Judge of the Court, and for that Cause the Judgment was reversed upon a Writ of Error, for the Inquiry before the Mayor was not warranted by the Writ. 2 *Brownl.* 203. *Baily versus Moon*.

10. Error to reverse a Judgment in Debt, &c. and the Error assigned was, because there were no *Pledges* on the original Writ, and every Plaintiff is to have *Pledges*, because he is to be amerced if Judgment is given against him, and for that Reason the Judgment was reversed. *Mich.* 11 *Jac.* *B. R.* *Vaughan versus Delahay*. 3 *Bulst.* 175. *Hussey versus Moor*. *S. P.*

1 Roll.
Rep. 205.

11. 'Tis a Question, whether the omitting *Pledges* in an Action brought by Bill, as by an Attorney, &c. shall be Error, or not, for there is a Difference as to this Matter between an Action brought by Bill and by Writ, for the Writ is, *si querens fecerit te securum*, &c. but the Bill is not so. 3 *Bulst.* 61. *Havers versus Gibbons*.

12. Error of a Judgment in Debt in *B. R.* the Error assigned was, because the Bill was filed 11 *Feb.* and the Bail a Day after, so as the Bill was before any Bail, and it did not appear that the Defendant was in *Custodia Marefcalli*; but adjudged, that the very Day of filing the Bill is not material, for when-ever 'tis filed, it hath Relation to the first Day of the Term. 2 *Cro.* 384. *Platt versus Plummer*, and 568. *Webley versus Gilman*. *S. P.*

13. Error upon a Judgment by Default in Debt, the Error assigned was, that the Original was against *F. H. of Browton*, and the Declaration was against *F. H. de Brownton*, and for this Variance the Judgment was reversed. 1 *Bulst.* 184. *Harris versus Sherley*. 1 *Brownl.* 59. *S. C.* by the Name of *Serle versus Harris*.

14. Error in *B. R.* of a Judgment in Trover, the Error assigned was, that the Writ was, Whereas the Plaintiff was possessed of several Goods and Chattels, *ad valenciam* 20 *l.* and the Declaration was, that he was possessed of two Hogsheads of Claret Wine, and did not mention any *Value*, so that this Declaration could not be founded on that Writ; and this being Matter of *Substance*, is not helped by the Statute 18 *Eliz. of Jeofails*, which helps only where there is no Original, or where that and the Declaration vary in *Form*; but adjudged, that *ad Valentiam* is not Matter of Substance, and this being after Verdict, is helped by the Statute. 2 *Cro.* 653. *Bradford versus Ramsey*.

15. The Plaintiff, who was a Bishop, declared upon a Lease made by himself, whereas in Truth it was made by his Predecessor; after a Verdict for the Plaintiff a Writ of Error was brought, and this Variance between the original Writ and the Declaration was assigned for Error, and so it was adjudged to be, and not aided by the Statute 18 *Eliz.* the Judgment was reversed. *Mich.* 14 *Jac.* *Young versus Bishop of Rochester*. 3 *Bulst.* 224.

16. Error on a Judgment in an Action of Debt upon a Bond, and the Error assigned was, that the *Teste* of the Original was before the Day limited for the Payment of the Money by the Condition of the Bond, for which Reason the Judgment was reversed, tho' the Writ was returnable after the Day of Payment. *Moor* 598. *Williams versus Bentley*.

17. Where Part of a Trespass is done in the preceding King's Reign, and Part in the present Reign, there the Writ must conclude *contra pacem* of the late King, & *contra pacem Domini Regis nunc*; but where the whole Trespass was done in a preceding Reign, there, if the Plaintiff concludes his Writ in such a Form, 'tis *Surplusage*. 1 *Roll. Rep.* 259.

18. Where a Writ of Error is made returnable longer than the subsequent Term, this must be on Purpose to delay the Plaintiff, and in such Case the Court may award Execution. *Hetley* 17. 3 *Car.*

19. Error in *B. R.* of a Judgment in the Common Pleas, in an Action of Trespass for Breaking and Entering his Close, &c. the Writ concluded *contra pacem Domini Regis nunc*, &c. and the Trespass in the Declaration was laid in the last Reign; the Plaintiff in Error had Costs, tho' the Writ in the Common Pleas was amended, according to the Instructions given the Curfitor, (*viz.*) *contra pacem nostram necnon contra pacem Car. nuper Regis*, &c. 2 *Vent.* 49. *Sid.* 253. *contra*.

20. Error of a Judgment in Dower in the Grand Sessions in *Wales*, where the Judgment was by Default *Ideo consideratum est quod tertia pars*, &c. *Capiatur*, and Day given *ad audiend' judicium*, at which Day Judgment was given, *quod recuperet*; the Error assigned was, that the Court had awarded a *Petit Cape*, which they ought not to do, because that is always awarded for a Default after Appearance, and here the Tenant had appeared; but adjudged, this is not Error, for 'tis only Awarding a Process more than should be. 1 *Vent.* 60. *Williams versus Gwyn*. 2 *Saund.* 45. *S. C.*

21. Therefore where in Trespass the Writ concluded *contra pacem Domini Regis nunc*, and the Declaration was for a Trespass done 29 Septemb. 34 Car. 2. and upon Demurrer it was objected, that this could not be an Original to Warrant this Declaration; but adjudged, that since the whole Trespass appears by the Declaration to be done in a former Reign, the Words *Domini Regis nunc* shall be Surplusage, and void; and so the Plaintiff had Judgment. 2 Lutw. 1355. *Clerke versus Johnson*.

22. The Writ was *Quare vi & armis*, he broke the Plaintiff's Close, and took and carried away *Bona sua*; and the Declaration was for Breaking the House, and for taking *Bona & catalla*, leaving out *sua*, and also the Words *Vi & armis*; there was Judgment by Default; and upon a Motion in Arrest of Judgment, it was objected, that the Declaration was ill, because of those Omissions; 'tis true, it was so formerly, even after a Verdict, because the Queen being chief Guardian of the Peace, was entitled to a Fine upon all Manner of Force: But now by the Statute 16 & 17 Car. 2. this Defect is cured by a Verdict, and by the Statute 4 & 5 Anna, 'tis enacted, that no Exception shall be taken of or for the Omission of the Words *Vi & armis*; then as to the Omission of the Word *sua*, it was objected, that made the Declaration ill, because the Plaintiff did not alledge, that he had any Property of the Goods; but adjudged, that in the Common Pleas the Writ is Part of the Declaration, to which it properly refers; and therefore the Declaration is good. 2 Lutw. 1509. *Daile versus Contes*. Sid. 150. S. P. Sid. 187. S. P.

(D)

For Faults in the Imparllance and Plea-Rolls.

1. Debt on a Bond, which in the Imparllance-Roll was alledged to be made at *New-Castle*, and in the Plea-Roll at *York*; and after Trial this was alledged for Error, and adjudged, that it was so. 1 Brownl. 66. *Fetherston versus Tapsall*.

2. In Trover, &c. the Declaration upon the Imparllance-Roll had Spaces left for the Day and Year, but the Issue-Roll was perfect; adjudged, that the Imparllance-Roll could not be mended by the Plea-Roll, because it was the Original, and the very Warrant to the other. Hob. 76. *Parker versus Parker*. Cro. Car. 65. *Wolfe versus Hales*. S. P.

3. The *Venire facias* was returnable the first Day of the Term, but in the Issue-Roll Day was given before the Term, and the Issue was joined and tried; now the Issue-Roll being the Warrant for the *Venire facias*, the Day must be the same in both; but in this Case the Day given in the Roll was *not in Term-Time*, and therefore it doth not warrant this *Venire facias*, which was returnable the first Day of the Term; so that this Writ issued *Erronice* to try an Issue without any Warrant on the Roll, and is not aided by the Statute 18 Eliz. for that aids Miscontinuances, Discontinuances, and misconveying Process. Moor 402. *Besey versus Hungerford*.

4. In Assault the Plaintiff had Judgment upon Demurrer, and a Writ of Inquiry of Damages returnable *die Martis prox' post tres Trin'*, and in Fact the Writ it self was returnable *die Mercurij*, &c. but the Inquisition was taken on Tuesday the 26th Day of June, which was the very Day awarded on the Roll; and the Plaintiff had 40*l.* Damages and Costs; and upon a Writ of Error brought in the Exchequer-Chamber, this was assigned for Error; but adjudged only *vitium Clerici*, and amendable. Moor 711 *Wolley versus Moosley*.

5. Upon a Plea in Abatement there was Judgment to answer over, then the Defendant pleaded to Issue, and at the Trial the Plaintiff had a Verdict; but the Judgment was set aside, because the Plea in Abatement was not entered on the *Nisi prius* Roll; 'tis true, the Plea-Roll was right, but the *Nisi prius* Roll is not amendable by the Plea-Roll. 5 Mod. 392. *Dubartine versus Chancellour*.

(E)

For Faults in the Venire facias, Habeas Corpora, and Distringas, and Returns of Jurors. See *Venire facias*.

1. A Juror was returned by the Name of *Kidman* in the *Ve. fa.* and *Bidman* in the *Distringas*; but it appearing that the same Party was sworn, it was adjudged no Error. Goldf. 184. *Brewster versus Beak*. Owen 62. *Hugo v. Paine*. S. P. 2 Cro. 244. *Bowes v. Cannington*, S. P.

2. The *Venire facias* was awarded on the Roll, returnable *Die Mercurij proxime post Crastin' Trin'*, but the Writ it self was returnable *die Veneris prox' post Crastin' Trin'*; and upon a Writ of Error brought, this was assigned for Error, and so it was adjudged; for the Court is to credit the Roll, and not the Writ, and if that be ill, it shall be amended by the Roll. Cro. Eliz. 433. *Hungerford versus Vefie*.

3. Error of a Judgment, &c. because the *Venire facias* bore Date 24 December, which was out of Term, and that it was returnable *coram Justitiariis nostris*, and did not say *apud Westm'*; then it was, *Quod habeas ibi nomina*, leaving out *Juratorum*; but adjudged no Error; for since made returnable *coram Justitiariis*, it shall be intended at *Westm'*; and tho' the Word *Juratorum* is omitted, that is only the Misprision of the Clerk, and shall be amended. Cro. Eliz. 467. *Wiltoughby versus Grey*.

Palm.
378.
2 Cro.
669.

4. In Trespass, upon Not guilty pleaded the Parties were at Issue, and the Record of *Nisi prius* was *Graves End Lane*, when it should be *Grey's Inn-Lane*, and thereupon the Plaintiff was nonsuited; it was the Opinion of the Chief Justice, that if the *Venire facias* varies from the Record, the Plaintiff could not be nonsuit, because there is no Record upon which the nonsuit should be; but at last a *Venire facias de novo* was granted in this Case. *Godb. 328. Young versus Eaglesfield.*

5. Error of a Judgment, for that there were but 23 Names returned by the Sheriff on the Panel, where there ought to be 24, and the Trial was had by ten of the Principal Panel, and by two *Tales Men*; but because this Fault was in the *Habeas Corpora*, and because the *Venire facias* was right, there being 24 Names in that Writ; therefore it was amended. *Mich. 40 Eliz. Cro. El. 586. Pawlett versus Christmas.*

6. The Condition was to put in Bail; the Defendant pleaded, that the Term was adjourned to the *Castle of Hartford*, where he appeared and put in Bail, upon which Issue was taken, and the Plaintiff had a Verdict and Judgment; but it was reversed, because the *Ve. fa.* was *de vicineto de Hartford*, when it ought to be *de Castro de Hartford*; for *Castrum* is a distinct Name of a Place. *2 Cro. 239. Cunningham versus Hare.*

7. Error to reverse a Judgment, for that after the *Habeas Corpora* awarded, a *Superfedeas* was delivered to the Sheriff to stay the Return of it; but yet he returned the Writ, and a Trial was had at the Assises, and Judgment thereon; adjudged to be Error. *2 Cro. 43. King's Case.*

8. In the *Venire facias*, *Constantinus Callard* was returned, and so named in the *Distringas*, but in the Panel annexed by the Sheriff *Constantius Callard* was returned and sworn; adjudged erroneous. *2 Cro. 116. Blunt versus Snedstone.*

9. Error of a Judgment in an Action of Trover, which Action was brought in the Time of Queen *Elizabeth*, and the Parties were then at Issue, and a *Ve. fa.* returned; afterwards, in the Reign of King *James*, an *Habeas Corpora* was awarded, with a *Tales*, which recited *Quod habeas corpora juratorum summonit' in Curia nuper Reginae*, which was true as to the Jurors, but not as to the *Tales*; therefore the *Ve. fa.* which is the first Process, but no Summons, doth not Warrent the *Tales*; and for that Cause the Judgment was reversed. *2 Cro. 83, 88, 161. Knowles Sir Fra. versus Beckenharw.*

10. A *Ve. fa.* issued in the Reign of Queen *Elizabeth*, and a *Distringas* and *Nisi prius* in the Time of King *James*, reciting *Quod distringat Juratores nuper summonitos in Curia nostra*, when in Truth there was no such Summons, because the *Ve. fa.* was in the Reign of the Queen; after Judgment for the Plaintiff, and a Writ of Error brought in the Exchequer-Chamber, the Judgment was reversed, because the *Distringas*, with a *Nisi prius*, was a Special Authority to the Judges to try the Cause by a Jury summoned before in *Curia Regis*, and there was no such Jury summoned, therefore the same could not be amended; but the Trial was erroneous. *2 Cro. 162. Goodwyn's Case.*

11. Error in the Exchequer-Chamber on a Judgment in an Action of Debt, for that the *Venire facias* was awarded *die Martis post Quinden' Trinitatis*, and the *Venire facias* it self was made returnable *die Jovis post Quinden' Trin'*; but the Judgment was affirmed; for this is but a Misawarding of Process, which is helped by the Statute. *Moor 696. Folsowe versus Thorney.*

12. In Debt, the *Venire facias* was filed in *Trinity-Term*, Anno 38 *Eliz.* for a Trial at the Assises between *R. Cundey* Plaintiff, and *Peter Edgcomb* of *Mount Edgcomb* in *Com' Devon'* Defendant; the Writ was directed to the Sheriff of *Cornwall*, and in *Hilary-Term*, 39 *Eliz.* the Continuance on the Roll was entered thus: *Jur' inter R. Cundey de B. in Com' Cornub' Quer', &c. Et Petrum Edgcomb de Mount Edgcomb in Com' Devon' Ar' Def. ponitur in respectu, &c. nisi Justitarii Dom' Reginae ad Assisas in Com' praed'*, and *Cornubia* was written in the Margin; after a Verdict for the Plaintiff, it was assigned for Error in the Exchequer-Chamber, that *ad Assisas in Com' praed'*, must refer to the County of *Devon*, for that was the next Antecedent; but the Judgment was affirmed; for *Cornubia* being written in the Margin, and in the Addition to the Name of the Plaintiff, the Words *Com' praed'* may refer to *Cornwall* as well as *Devon*. *Moor 696. Cundey versus Edgcomb, and 700. Bear versus Beecher, S. P.*

13. The *Venire facias* was *Hieronymus*, and the *Distringas* was *Jeremias*; and for this Cause the Judgment was arrested. *Moor 762. Townsend versus Priddy.*

14. Error in a Judgment in *Waste*, for that upon the Writ of Inquiry of what Waste done there were 13 Jurors returned to be sworn, where there should be only twelve; it was said, this was not like other Writs of Inquiry, which were only an Inquest of Office, and therefore the Sheriff might have more or less than twelve, but here was a Verdict, that the Defendant had committed Waste, upon which an Attaint lies; yet the Court held it good. *Cro. Car. 229. King versus Fitch.*

15. In the *Venire facias* the Word *Vicecomiti* was omitted, and yet the Sheriff of *Suffolk* returned the Panel, and his Name was endorsed; this was adjudged Error; but because on the Roll the Writ was awarded *Vicecomiti Suffolk*, and the Omitting the Name in the *Venire facias* was the Default of the Clerk, it was amendable. *Sloper versus Child. H. 16 Car.*

(F)

For Faults in the Record of *Nisi prius* and Judgments in the Courts at Westminster.

1. Error on a Judgment in a *Sci. fa.* upon a Recognisance, because the Writ bore Date *die festis*, which is not *dies juridicus*; it was reversed. *Dyer* 168. *Barett's Case*.

2. Error of a Judgment given for the Plaintiff, and in the entering it was, *Quod præd' Defen' recuperet*; it was argued, that it was amendable, being only the Mis-entry of the Clerk; but adjudged, not to be amended, because the Judgment was the Act of the Court. *Golds.* 124. *Welcom's Case*.

3. Error of a Judgment in *B. R.* upon an Information for buying Cattle, and selling them alive in the same Market; the Judgment was entered, *quod sit in misericordia*, when it ought to be *quod Capiatur*; for being upon an Information, 'tis a Contempt, and punishable by Imprisonment. *Godb.* 349 *Pye versus Bonner*.

4. The Entry of the Judgment against the Defendant was, *Ideo videtur Justitiariis*, that the Plaintiff should recover, instead of *Ideo consideratum est per Cur'*, &c. and there being a Judgment in a *Sci' fa'* against the Bail, that Judgment was reversed upon a Writ of Error brought by them, because there was no good Judgment against the Principal. 2 *Leon.* 1. *Thacker v. Dainport*.

5. Error of a Judgment in a *Writ of Partition*, which was, that the Plaintiffs *in simul & pro indiviso tenent cum Defendente*, and it doth not shew of what Estate, or of whose Inheritance: but adjudged, that in this *Writ* 'tis not necessary to shew it, but that the Tenant in Common ought to shew it in the Declaration. 2 *Leon.* 118. *Yates's Case*.

6. In Debt against the *Earl of Lincoln*, the Judgment was *quod capiatur*, and upon Error brought, this was assigned for Error, that a *Capias* did not lie against a Peer; but adjudged, that because a Fine is due to the Queen by this Judgment, a *Capias pro Fine* will lie. *Cro. Eliz.* 503. *Earl of Lincoln versus Flower*.

7. Error of a Judgment in a Writ of Entry *sur disseisin*; the Error assigned was, for that the Sheriff had not returned the Names of the *Summoners and Veitors*; adjudged to be Error; for if there is no Summons, the Party may have a Writ of Deceit, and *Non constat de Record* against whom to bring it. *Pasch.* 39 *Eliz.* *Cro. Eliz.* 557. *Meryll versus Robbins*.

8. Error of a Judgment in Debt, for that the Record was *obtulit se in placito debiti* 10*l.* and the Declaration was for a Debt of 20*l.* adjudged a manifest Error, and the Judgment was reversed. *Mich.* 38 *Eliz.* *Cro. Eliz.* 434. *Staughton versus Newcomb*.

9. In Debt the Judgment was, *Ideo consideratum est quod* (the Plaintiff) *recuperet 40 s. pro mis' & custag'*, omitting the Words *ex assensu suo per Curiam adjudicat'*; the Judgment was reversed, because the Words omitted are a material Part of the Judgment; for if it doth not appear, that the Plaintiff consents to take so much for Damages, a Writ of Inquiry may Issue. 2 *Cro.* 415 *Machin's Case*.

10. The Judgment in an *Action on the Case* was, that the Defendant *capiatur*, where it should be in *misericordia*; and for that Reason it was reversed. 2 *Bull.* 133. *Kirkby versus Ungle*. *Cro. Eliz.* 84. *S. P. Crow's Case*.

11. The Defendant died after the Day of *Nisi prius*, and before the Day in Bank, and yet Judgment was entered against him; but it was erroneous for that Reason. 2 *Bull.* 241. *Jordan versus Dennis*, *Lewis versus Smith*. *Cro. Eliz.* and *Isley versus Pelham*, *S. P.* *Leon.* 187.

12. The Judgment was, *Quod querens & plegii sui sunt in misericordia pro falso clamore*, where as it ought to have been *quia non prosecuti sunt*; for it ought not to be *pro falso clamore*, but where the Judgment is upon Demurrer. 2 *Cro.* 213.

13. The Plaintiff died after the Verdict, and within two Days after the Rule given for Judgment; and tho' the Defendant had four Days allowed, by the Course of the Court, to move in Arrest of Judgment, yet they would not grant a Writ of Error, but cause the Judgment to be entered, and that it should relate to the Rule given. *Poph.* 134. *Earl of Shrewsbury's Case*.

14. So where he brought the like Action, and had Judgment by *Non sum informatus*, and upon a Writ of Error brought, and *nullum est erratum pleaded*, and it being certified, that the Plaintiff did not find Pledges *de prosequendo*, the Judgment was reversed. 2 *Cro.* 329. *De la Hay versus Vaughan*.

15. Error in the Exchequer-Chamber of a Judgment in *B. R.* for that the Entry was of the Jury, *qui electi & jurati dicunt super sacramentum*, omitting these Words, *qui ad veritatem de infra contentis dicend' electi*, &c. the Judgment was reversed. *Sparrow versus Stepney*. 2 *Cro.* 119.

16. The Defendant being an Attorney of the Common Pleas, appeared in *propria persona*, and being at Issue, the Record of the *Nisi prius* was, *quod tam præd' (the Plaintiff) quam præfat' defend'*, appeared *per Attornatos suos*; this was amended. 2 *Cro.* 265. *Heyward versus Hayward*.

17. When a Record is removed into the Exchequer-Chamber, 'tis not a Record of that Court till the Error is determined; and if there is a Fault in the Transcript, by the Negligence of the Clerk, he may be sent for and amend it in the Exchequer-Chamber; but if the Fault is in the Prin-

Principal Record, then to amend it, and thereupon to alledge Diminutions, and upon Certificate thereof, the Transcript shall be amended. 2 Cro. 429.

18. In *Dower* there was a Judgment by Default, and a Writ of Seisin to the Sheriff, &c. and also a Writ of Inquiry, whether the Husband died seised, and of what Estate, either in Fee, or in Tail; the Jury found, that the Husband died seised, but could not tell of what Estate, and they found the Value of the Lands, & *quantum temporis elabitur*, &c. Upon a Verdict Judgment was given, that the Widow should recover Costs and Damages to 60 l. and upon a Writ of Error brought, and the Record being removed, the Widow died, whereupon the Plaintiff in Error brought a *Sci. fa.* against her Executor *ad audiend' Errores*, and upon two *Nihil's* returned, he assigned Error, (*viz.*) That in this Case there ought to be no Judgment to recover Damages, and that the Jury had not found of what Estate the Husband died seised; for if he did not die seised of an Estate of Inheritance, the Widow shall not be endowed; and this was adjudged Error. *Telv. 112. Bromley versus Littleton.*

19. The Plaintiff had Judgment in an Action of Debt, and there was a Space left in the Roll for the Costs; after a Year and a Day a *Sci. fa.* was brought on the Judgment, as well for the Debt as Costs, and in that Action there was a Judgment against the Defendant by Default; then a Writ of Error was brought, and the Error assigned was, that there was no Costs entered in the principal Record; and this was adjudged to be Error. 1 Brownl. 75. *Elhat versus Golding.*

20. The Plaintiff declared for a Trespass done 12 Jan. 45 Eliz. and the Record of *Nisi prius* was of a Trespass done 12 Jan. 25 Eliz. Upon Not guilty pleaded, the Plaintiff had a Verdict, and on the Day in Bank he moved the Court, that the Record of *Nisi prius* might be amended; but it was not allowed, this being a Variance not amendable. *Moor 681.*

21. In Trespass, &c. for taking away Goods, &c. upon Not guilty pleaded, the Jury found the Defendant guilty, as to the Taking Part of the Goods, and as to the Rest Not guilty; and the Judgment was, that the Plaintiff should recover his Damages against the Defendant, as to Part, & *quod præd' defendens capiatur & præd' (the Plaintiff) in misericordia pro falso clamore* (against the Defendant) *pro residuo transgressionis*, and this was assigned for Error upon a Writ of Error in the Exchequer-Chamber; for that it ought to be *quod querens nihil capiat per Billam pro residuo transgressionis*; but the Judgment was affirmed. *Moor 692. Palmer versus Sherwood.*

22. After a Verdict for the Plaintiff in an Action of Assault, a Writ of Error was brought in the Exchequer-Chamber, and the Error assigned was, that there were no Bail entered in B. R. for the Defendant; whereupon a *Certiorari* was awarded to the Chief Justice, who certified the Bail of John Hayes, but without any Addition of Title, Occupation, or Place of Habitation; and thereupon the Judgment was reversed, because it did not appear, that they were Bail for the Party who was sued; and so he was never in the Custody of the Marshal, and if not, then he could not be sued in that Court. *Moor 694. Bucknell versus Hayes.*

23. Debt by an Executor upon a Penal Bill due to his Testator, in which he declared, that the Defendant *debit* to the Testator, and *detinet* from him, &c. the Defendant pleaded in Bar, *per minus*, upon which Issue was joined; but afterwards, *relicta verificatione*, before the *Nisi prius* was awarded, he confessed the Action, which was entered *non potest dedicere*; but that the Bill Obligatory *est factum suum nec quin ipse debuit* to the Testator in his Lifetime, &c. and thereupon the Judgment was, that *præd' (the Plaintiff) recuperet*, &c. and upon a Writ of Error brought in the Exchequer-Chamber, the Error assigned was, that the Confession of the Action was not pursuant to the Declaration, for that was in the *Debet* and *Detinet*, and the Confession was in the *Debet* only; but the Judgment was affirmed; for where the Defendant pleads in Bar to the Action, the Court must intend, that which is pleaded, and nothing else obstructs the Plaintiff to recover: Now when the Defendant relinquishes what he hath so pleaded in Bar, then the Declaration must be taken to be true, and then the Court may give Judgment upon it; and so they may where the Confession is imperfect. *Moor 697. Joyner versus Ognell.*

24. In Trespass against two, after Issue joined one of them died, and the *Venire facias* was awarded to try the Issue against two, and the Trial went on, and Judgment; yet this was held no Error, one of the Defendants being living. *Cro. Car. 308. Tyffin's Case.*

25. An Attorney brought an Action by Writ of Privilege, and the Defendant had Judgment on a Demurrer, which was entered *quod querens nil capiat per Breve*, and this was assigned for Error; for that it should be *nil capiat per Billam*; the Judgment was reversed, for this could not be taken to be the Entry of the Clerk, but it was Part of the Judgment given by the Court. *Cro. Car. 419. Raymond versus Burbridge.*

26. Upon a *Sci. fa.* on a Judgment, the Sheriff returned A. L. Tertenant, who being warned, appeared and pleaded, and there was Judgment against him; the Sheriff also returned B. and M. his Wife, Tertenants, who appeared, and pleaded, and Judgment was given for them; then R. L. brought a Writ of Error upon the Judgment given for B. and M. the Tertenants, and assigned for Error, that B. died before the Trial; but adjudged, the Death of B. if it was true, was not material to R. L. especially since the Verdict had found, that B. was not Tertenant. *Cro. Car. 372. Angell versus Sir William Cooper.*

27. The Commission of *Nisi prius* was directed to *Francis Harvey Esq*; one of the Justices of the Common Pleas, and the Return was, that the Trial was had *coram Francisco Harvey, Milite*, one of the Justices, &c. and upon Error brought, this was assigned for Error, but adjudged a good Return; for it may be he was an Esquire at the Time of the Commission awarded, and knighted before the Trial. *Latch 161. Petty versus Hobson. Postea (M) 9.*

28. The Mayor, Commonalty, and Citizens of *London* brought an Action of Debt on a Bond, and the Judgment was, that they naming them all, should recover the Debt and 6*l.* Costs, *eisdem Majori & Communitat' adjudicat'*, omitting the Word *Civibus*; adjudged Error, but it appearing on the Docket-Roll to be right, it was amended. *Cro. Car. 413. Heeling v. Mayor of London.*

29. *Assumpsit*, &c. for so many Horse-shoes and Removes, there was a Verdict for the Plaintiff and 50*s.* Damages, which were encreased, but in the Record it was entered *ex assensu partium*, or *ad requisitionem quarentis*, and thereupon a Writ of Error was brought in *B. R.* and this was assigned for Error, and for that Reason the Judgment was reversed. *Palm. 148. Conslade versus Ayres.*

30. Error to reverse a Judgment in *C. B.* in which the Plaintiff alledged Diminution for Want of an Original, and upon a *Certiorari* to the *Custos Brevium*, he certified, that there was no Original, and because there were no Pledges, that was assigned for Error; but adjudged, that Pledges shall be intended to be on the Original (tho' it could not be found) because in the *C. B.* they are always entered on the Original, and not on the Roll; and where there is no Original, that is a Fault which is aided by the Statute, but a bad Original is not. *Sid. 84. Wheeler versus Wilkinson. See Hutt. 92, and 3 Bull. 61, 275.*

31. Error to reverse a Judgment in *Assumpsit* in an *inferior Court*, wherein the Plaintiff declared on two Promises, and the Jury, as to one Promise, found for the Plaintiff, and as to the other for the Defendant; and Judgment was given for one, and not for the other, (*viz.*) that the Defendant *eat inde sine die*, or that the Plaintiff be amerced *pro falso clamore*, for which Reason it was insisted, that the Judgment was defective, and the Court seemed of that Opinion, and that it should not be reversed, *quoad* one Promise, and affirmed for the other. *1 Vent. 27, 39. Gregory versus Eades. See Jacob versus Mills's Case, and Slocomb's Case.*

32. Error to reverse a Judgment against several *Quakers*, for refusing to take the Oath of Allegiance in the Statute 3 *Jac.* tendered to them at the Quarter-Sessions; one appeared, and the Entry was *Nil dicit ideo remansit versus eum Dominus Rex indefens'*, the others were convicted, and Judgment given, that they should forfeit their Goods and Chattels, Lands and Tenements to the King, &c. the Error assigned was, that the Entry of the Judgment against him upon the *Nil dicit* was *Ideo remansit*, &c. which is more like a History of the Record than any express Judgment, for it should be *Ideo remanet*, &c. in the present Tense, as in an Indictment where the Award of the *Venire* is * *præceptum fuit Vic'*, this is ill, for it should be *præceptum est*, and this the Court held to be Error. *1 Vent. 171. The King versus Green & al'. The King versus Alway. 2 Saund. 393. S. C. 1 Mod. 81. S. C.*

Raym.
212.
2 Saund.
389.

33. Error in *B. R.* to reverse a Judgment in the Common Pleas in an Action of Debt for an Escape, wherein the Plaintiff declared, that he had recovered 55*l.* 10*s.* against one *Travers*, for Damages in an Action of Trespass brought against him, and that he had taken out a *Capias ad satisfaciend'* directed to the Sheriff of *Kent*, commanding him to take the said *Travers*, *ad satisfaciend'* *Alano Lockhart* (the Pronotary) *de 88 s.* and to the Plaintiff *de 51 l. 2 s. in toto se attingen'* *ad 55 l. 10 s. unde convictus est*, by Virtue of which Writ the Defendant did take the said *Travers* in Execution, and suffered him to escape without paying the Debt; there was Judgment by Default in *C. B.* for the Plaintiff to recover the said 55*l.* 10*s.* and the Error now assigned was, that it appears, that the Plaintiff demanded and had Judgment to recover more than was due to him, as it appears upon his own Shewing, for the *Ca. fa.* upon which *Travers* was taken, was to satisfy the Plaintiff *de 51 l. 2 s.* and yet he demanded and had Judgment for 55*l.* 10*s.* in the Action for the Escape, which ought not to have been, because *Travers* was never in Execution at the Plaintiff's Suit for so much, but only for 51*l.* 2*s.* and the Sheriff had not taken Advantage of this Error in the *Ca. fa.* adjudged, that he could not take Advantage of an Error in Process, so this Exception was over-ruled, and the Judgment was affirmed. *2 Saund. 100. Jaques v. Casar.*

34. In Trespass, &c. the Defendant justified by Process out of an *inferior Court*, setting forth, that at a Court of *William Collins, nuper Vic'*, &c. a Plaint was levied against the now Plaintiff, for a Cause arising within the Jurisdiction of that Court (but did not say where) and that *Taliter processum fuit*, &c. that the Plaintiff in that Action got Judgment, under which Judgment the Defendant justified; and upon Demurrer to this Plea it was objected, that the Defendant had alledged the Plaint to be levied *ad Curiam W. C. nuper Vic'*, when it should be *ad tunc Vic'*, and that the Defendant ought to have set out the Proceedings at large, and not with a *Taliter processum est*, because 'tis no Court of Record; but adjudged, that was the safest Way; then 'tis said, that the Plaint was levied for a Cause of Action arising within the Jurisdiction of the Court, but names no certain Place, nor any Place where the Sheriff made his Warrant, and that is issuable; but for the first Objection, and other Objections as to the *Levari facias*, (which see in tit. *Execution.* (D) 13. S. C.) the Plaintiff had Judgment. *2 Lutw. 1410. Walker versus Treeby. 2 Jones. 185. S. P. 2 Mod. 102, 105. S. P.*

35. The Plaintiff had a Verdict at the Assises, and upon a Motion to stay Judgment till he brought in the *Postea*, because it did not appear on what Day the Assises was held, for the Record of *Nisi prius* was, *Nisi Justitiarum Domini Regis ad Assisas in Com' præd' capiend' assign' Die Jovis decimo*

decimo sexto die Martii, &c. The *Distringas* was *Die Jovis vicesimo sexto die Martii*, and so was the *Jurata*; adjudged, that the Defendant cannot take Advantage of this Error after a Verdict; but if the Clerk of Assize enter Judgment for the Plaintiff instead of the Defendant, he hath no Remedy but by Action, 5 *Mod.* 198. *Addingson* versus *Oakley*.

36. Writ of Error upon a Judgment in *C. B.* by *Nil dicit*, the Error assigned was Want of an Original; the Defendant in Error pleaded a Release of Errors; the Plaintiff replied, that the Release set forth by the Defendant recited a Judgment recovered by him for 600*l.* for Debt and Damages, *ultra mis' & Custagia*, and that the Release was of the Errors in that Judgment, but that the Judgment on which this Writ of Error was brought was of 600*l.* *pro debito & damnis* only, and so a Variance between the Judgment, the Errors whereof were released, and the Judgment now in Question; adjudged, that in *C. B.* if the Judgment is by Confession, 'tis always entered as a Judgment *pro debito & damnis*, without any Thing more, but in *B. R.* 'tis *tam pro debito & damnis, quam pro mis' & custagiis*, but Damages include Costs, and so no material Variance; besides, the Release now pleaded, reciting the Judgment, doth not set forth, that any Costs at all were recovered, for 'tis 600*l.* *ultra mis' & Custagia*. *Mod. Cases* 236. In *Davenant* and *Rafter's* Case.

37. Judgment was obtained in an Action of Debt upon a Bond, and by Virtue of a *Fi. fa.* the Sheriff had taken and sold some Cattle, the Judgment was reversed; and a Motion was made to bring the Money into Court for which the Cattle were sold, but it was denied; then it was offered to pay the Money to the Defendant, but that was likewise denied, for the Cattle might be sold for less than they were worth, therefore to prevent an Action of Trespass, the Plaintiff must agree with the Defendant. 4 *Mod.* 161. *Westerne* versus *Creswick*.

38. Where there is a Demurrer, or Judgment by Default, and a Writ of Inquiry executed on the last Day of the Term, the Plaintiff may enter his Judgment the fifth Day afterwards, but not before, there must likewise be four Days exclusive between the Day in Bank and Signing the Judgment where there is a Verdict, for that Time is allowed either to move in Arrest of Judgment, or to bring a Writ of Error; and therefore the Course is for the Plaintiff to give a Rule to enable him to enter his Judgment, (*viz.*) *Nisi causa offensa sit in contrarium infra quatuor dies*. 1 *Salk.* 399. *Clerk* versus *Rowland*.

39. In a *Quare Impedit*, the Defendant pleaded *Misnomer* in Abatement; the Plaintiff demurred to this Plea, and gave the common Rule to the Defendant to join in Demurrer; adjudged, that in such Case he could not enter Judgment without a Motion, if the Defendant did not join in Demurrer; but in personal Actions 'tis otherwise, neither doth this extend to Pleas in Abatement, because final Judgment is never given on such Pleas. 1 *Salk.* 399. *Cook* versus *Cook*.

40. Debt for Rent upon two Demises, one whereof was *Reddendum* after the Rate of 18 *l.* per Annum; the Plaintiff had a Verdict and Judgment, and the Defendant brought a Writ of Error in *B. R.* and adjudged, that the * *Reddendum* was void for Incertainty; then the Question was, what Judgment the Court should give, whether a bare Reversal, or Judgment for Part, and *Nil capiat* as to the rest, as the Court of *C. B.* should have done; and adjudged, that where a Defendant brings a Writ of Error, as in this Case, the Judgment in *B. R.* shall be only to reverse the former Judgment, because his bringing a Writ of Error is only to be eased of the Judgment had against him; but where the Plaintiff in the original Action brings a Writ of Error in *B. R.* there the Court may not only reverse the Judgment given against the Defendant, but may likewise give such Judgment as the *C. B.* should have given, because his Writ is to recover what he ought to have recovered in the first Suit. 1 *Salk.* 262. *Parker* versus *Harris*.

41. Error in *B. R.* of a Judgment in *C. B.* the Declaration was *Trin. 1 Annae*, and Want of an Original was assigned for Error; and upon a *Certiorari* the Original was returned, with the Continuances by which it appeared, that the Declaration was * *Hill. 13 Will. 3.* with Imparlanes to *Trin. 1 Annae*, and the Original of that Term, so that the Suit was depending in the Reign of King William, before any Original taken out, for that was in the Reign of Queen Anne; but adjudged, that on the *Certiorari* the Original only ought to have been returned, without any Continuances, that this Return was contrary to the Record, and therefore the Imparlanes shall be intended to be in another Cause. 1 *Salk.* 269. *Tyson* versus *Hilliard*.

42. Upon a Writ of Error in *B. R.* the Want of an Original was assigned for Error, and the Defendant, before the Return of the *Certiorari*, came in *gratis*, and pleaded a Release of Errors, to which Plea the Plaintiff in Error demurred, and the Defendant joined in Demurrer; this Release was agreed to be mispleaded for Want of a *Venne*; then the Question was, whether *B. R. ex officio*, might award a *Certiorari*, that it might appear whether there was an Original, or not; *Holt Ch. Just.* held they could not, because the Defendant, by Pleading a Release, had admitted the Want of an Original; besides, the Question was not, whether Error, or not, but whether barred by the Release, or not, and therefore the Court cannot depart from the Point referred to their Judgment; for if they do, then they give Judgment on the * *Certiorari*, and depart from the Plea and Demurrer, and Joinder in Demurrer: But the other Judges were of a contrary Opinion, (*viz.*) that the Parties might foreclose themselves by their own Act, but not the Court; for they are to give Judgment upon the whole Record, and may Award a *Certiorari ad informandum conscientiam*. 1 *Salk.* 268. *Carlton* versus *Mortagh*.

* See Bishop's Case. Error (O) 5. and Done and Smith's Case. Error (O) 1.

43. The Plaintiff had a Judgment in Ejectment, and the Defendant brought a Writ of Error, and assigned the general Error, and upon *In nullo est erratum* pleaded, it appeared, that the Declaration set forth a Demise, &c. but did not shew that the Plaintiff *entered and was possessed*; and the Truth was, that the *Declaration was right*, but the Line in which those Words are, was omitted in the *Transcript*; thereupon the Plaintiff moved for a *Certiorari ad informandum conscientiam*, which was opposed, because after *In nullo est erratum* pleaded, the Defendant affirmed the Record to be perfect, and therefore he is now foreclosed to say, that there is Error by Reason of such a Defect, so that is directly against his Plea, which is very true; but yet the Court is not foreclosed by this Admission of the Party; for the Writ of Error being a Commission to them to examine the Record, the Parties cannot restrain them from looking into it; and that where-ever by inspecting the Court may affirm the Judgment, they ought to award a *Certiorari*, and a Rule was made accordingly for a *Certiorari*, upon an Affidavit, that the Record was right below. 1 *Silk.* 270. *Meredith versus Davis.*

44. The Plaintiff brought an Action by the Name of *Giggeer*, and the Writ of Error was brought by the Defendant in an Action between *Giggure* and him the said Defendant; and for this Reason it was moved in Behalf of the Plaintiff, that he might have Leave to take out Execution; 'tis true, the Court held this was a fatal Variance, and that the Record was not removed by this Writ of Error, therefore they would not meddle with the Execution; but the Record was amended. 1 *Silk.* *Giggeer's Case.*

(G)

For Faults in the Stile, Pleadings, &c. and Judgments in inferior Courts of Record. See *False Judgment per totum. Judgment.* (C) 8.

1. TO reverse a Judgment in the Court of *Picpolders* in *Sturbridge-fair*, in an Action in which the Plaintiff declared on a Contract made the last Fair, and there was no Plaintiff then entered, neither was the Defendant *amerced*; it was reversed. *Dyer* 132.

2. Error of a Judgment in *Lynn Regis*, for that the Court was held before the Mayor and B. G. and two other capital Burgeffes, and the Parties being at Issue, the Cause was tried, and a Verdict for the Plaintiff, and that the said B. G. who was one of the Judges, was also one of the Jury, and for this Cause the Judgment was reversed. *Cro. Eliz.* 850. *Michell versus Woodroffe.*

3. Error of a Judgment in *Assumpsit* in *Plimouth*, the Error assigned was, for that the Stile of the Court was *Burgus Domine Regine, Burgi sui de Plimouth, ten' ibidem apud Guildhall, coram B. G. majore ejusdem Burgi, 4 die Januarii, &c.* and did not shew by what Authority the Court was held, either by *Prescription* or *Charter*, whereas in all inferior Courts, their Authority to hold Pleas ought to be shewed; this was adjudged Error. *Cro. Eliz.* 489. *Holman versus Collins.* *Moor* 422. *S. C. Trin.* 2 *Jac. Yelv.* 46. *Monsie's Case.*

4. Error to reverse a Judgment in *Leicester*, for that there was no *Plaint* in the Suit, for it did not say B. B. *queritur de R. W.* but only that the Defendant *summonitus fuit, &c.* now in all inferior Courts, the *Plaint* is in Nature of an original Writ, and no Process can issue without it, for which Reason the Judgment was reversed. 1 *Leon.* 302. *Savage versus Knight.* 4 *Leon.* 78. *S. C.* 2 *Cro.* 261. *S. C. Palm.* 449. *S. C.*

5. In *Replevin*, the Defendant avowed for Damage-feasant, and thereupon they were at Issue, and the Cause was tried in the three Weeks Court at *Windsor*, and found for the Plaintiff; the Error assigned by the Defendant was, that the Entry of the *Plaint* in the said Court was on the seventh Day of *May*, and the Plaintiff declared for the Taking his Cattle the twenty-fifth Day, so that this being a three Weeks Court, the Entry of the *Plaint* was not at a Court-Day, as it ought, but between two Court-Days, for there are not three Weeks between the seventh and twenty-fifth of *May*, and for that Cause the Judgment was reversed. *Godb.* 266. *Brook versus Gregory.*

6. *Trover, &c.* was brought in the Court of the *Marshalsea*, and the *Trover* and *Conversion* were laid to be in *Southwark within the Verge*; there was a Verdict for the Plaintiff, and a Writ of Error brought, and the Error assigned was, that neither of the Parties were of the King's Household; adjudged, that if the Action is not maintainable there, a Writ of Error will lie; two Judges were of Opinion, that the Action did lie, *Gawdy* doubted. *Mich.* 39 *Eliz.* *Cro. Eliz.* 502. *Bayliffe versus Mickton.* 6 *Rep.* 20. *S. P.*

7. Error to reverse a Judgment in *Abington-Court*, for that the said Court is mentioned to be held before the Mayor *secundum consuetudinem Burgi, &c.* and it doth not appear, that there was any such Custom there; but this being directly against the Record, it was not allowed. 2 *Cro.* 359. *H'ystler versus Lee.*

8. Error to reverse an *Amerciament* in a Court-Leet, because it was unreasonable; but adjudged, that after an *Amerciament* is once *affeced*, the Writ of *Moderata misericordia* doth not lie. 1 *Bulft.* 125. *Stulbs versus Flower.*

9. Error of a Judgment in the Court of *Burton on Trent*, because it is not shewn in the Stile of the Court, by what Authority it was held, either by *Charter* or *Prescription*, and that it was held *coram Seneschallo Ballivo*, without setting forth their Names, and the Judgment was reversed for these Reasons. 2 *Cro.* 184. *Jarrett versus Cadwell.* 2 *Lutw.* 1452. *Hargrave versus Ward.* *S. P.* 451. *S. P.*

10. The Declaration in an inferior Court was, & unde (the Plaintiff) per B. G. *Attornatum suum*, leaving out the Word *Dicit* after a Judgment for the Plaintiff, and Error brought, the Judgment was reversed, because this Omission was Matter of Substance. 1 *Brown* 96. *Feild* versus *Hunt*. *Yelv.* 103. S. C.

11. The Plaint in the Court in *Norwich* was, that the Defendant *attachiatus fuit*, &c. the Plaintiff had a Verdict, and upon Error brought, this was assigned for Error, that there was no Summons, for it was *attachiatus fuit*, instead of *Summonitus fuit*, &c. adjudged, that this was not helped by the Statute 18 *Eliz.* for that extends to *original Writs*, which are sued out of Chancery, and not to other Process, which is in Nature of an Original, therefore the Want of Summons in this Case is the Want of such an Original, which is not helped by the Statute, and so the Judgment was reversed. 2 *Cro.* 108. *Pratt* versus *Dixon*.

12. Error of a Judgment in an inferior Court, and the Error assigned was, for that the first Process was a *Capias*, when it ought to have been a *Summons*, and for that Reason the Judgment was reversed. 2 *Cro.* 260. *Ward* versus *Ellis*.

13. Error of a Judgment in *Bristol*, in an Action on the Case for Words, where, upon Not guilty pleaded, the Plaintiff had Judgment; and the Error assigned was, that after an Attachment a *Capias* was awarded in that Action for the second Process, whereas no *Capias* lay in such Actions till the Statute 19 *H. 7.* which extends to those Actions brought in the Courts at *Westminster*, and not elsewhere; but adjudged, that it might be by Custom in that Town. 2 *Cro.* 222. *Tutbill* versus *Milton*. *Yel.* 158. S. C.

14. Error of a Judgment in *Assumpsit* in *Tewksbury-Court*, where the Jury gave a Verdict for 8 *l.* Damages, and 2 *d.* Costs; and the Judgment was entered, that the Plaintiff should recover his Damages, assessed by the Jury, to 8 *l.* and also 20 *s.* for Costs *de incremento*, omitting the 2 *d.* given by the Jury for Costs, and for that Cause the Judgment was reversed. *Yelv.* 107. *Haines* versus *Guies*.

15. Error of a Judgment obtained in the Court at *Ludlow*, in a popular Action, upon the Statute 4 & 5 *Mar. cap. 5.* which Court is a Court of Record; the Errors assigned were, that by the Statute 18 *Eliz. cap. 5.* the Plaintiff ought to have sued by Original, or by Information, and not by Bill; and that this Judgment was not obtained in such a Court as is intended by the Statute, for the Courts of Record therein mentioned must be the Courts at *Westminster*, *propter excellentiam*, and the Information ought to be in such a Court where the Attorney General may reply, or where he can attend, and that shall be only at *Westminster*. 6 *Rep.* 20. *Gregory's Case*. *Moor* 412. S. C.

16. Error to reverse a Judgment in *Assumpsit*, in a Court held at *Leicester*, because it did not appear in the *Stile of the Court*, by what Authority it was held, whether by Custom or Letters Patents; for tho' it was insisted, that they may take Cognisance of their own Jurisdiction, without being inserted in the *Stile of the Court*; yet that was adjudged, that they ought to shew their Jurisdiction. 2 *Cro.* 493. *Johnson* versus *Underwood*.

17. Error of a Judgment in the Court at *Nottingham*, in a Plaint of Debt levied in that Court, for that the Defendant had no *Addition*, it was thus: *ss. H. H. queritur de Wilhelmo Preston, alias dict' W. Preston de, &c.* so that the *Addition* came after the *Alias dict'*, yet the Judgment was affirmed, for an *Addition* is not necessary to a Defendant in an inferior Court, because Process of Outlawy doth not lie in such a Court. *Moor* 354. *Preston* versus *Hinde*.

18. Error to reverse a Judgment in a Court of Piepowders, because in the Adjournment it was *idem dies datus est*, when it should be *eadem hora*; but adjudged well enough. *Moor* 459.

19. Error to reverse a Judgment in *Assumpsit* in the Borough Court of *Reading*, for that the Certificate was *Placita, &c. ad Curiam Dominae Reginae Burgi sui de Reading tent' per consuetudinem & libertat' majori & Burgensibus concessus, &c.* without saying *per consuetudinem ex antiquo usitat'*, and without alledging by whom their Liberties were granted; and this was adjudged erroneous. *Moor* 601. *Smith* versus *Johnson*.

20. Error of a Judgment in *Lincoln*, the Error assigned was, that the Plaint was, *In placito transgressionis super casum*, and the Declaration was in *Trespas Vi & Armis: Sed per Curiam*, 'tis all one in Effect; then it was objected, that the *Stile of the Court* was *Curia forinseca Civitatis Lincoln*, without shewing whose Court it was: *Sed per Curiam*, 'tis said to be held, * *coram Majore & Ballivis*, and it appears to be a Court of Record, and such Court is the King's Court. 1 *Roll. Rep.* 334. *Oglethorp* versus *Askue*.

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T. S. W. W. & R. R. Majore & Ballivis by Prescription, not good. Thurston v. Vincent.

21. Error of a Judgment in *Litchfield* against an Heir, who pleaded *Riens per Descent*; the Plaintiff replied *Assets*, but did not say *in what Place*, or that the *Assets* were within the Jurisdiction of the Court, but the Jury found *Assets*, and gave no Costs and Damages to the Plaintiff; and adjudged, that both these Matters were erroneous, and the Judgment was reversed. 2 *Roll. Rep.* 48. *Brown* versus *Carrington*.

22. Error of a Judgment in C. B. in *Replevin*, removed out of the Hundred-Court by *Recoredare*, and no *Pledges* returned upon the Plaint; but this being at the Sheriff's Peril, it was held no Error. *Cro. Car.* 431. *Tregose* versus *Wenell*.

23. Error to reverse a Judgment in Debt in an inferior Court, for that the Plaint was entered generally *in placito Debiri*, so as the Defendant cannot know what is demanded; the Judgment was reversed. *Hales* versus *More*. *Style* 86.

24. The Stile of the Court was, that it was held *per consuetudinem & literas patentes*; and this was held to be Error; for if it was held by Custom, and afterwards they procured a Grant, the Custom is gone. *Style 131 Tomkins versus Jurdan.*

25. Error to reverse a Judgment in *Bristol* brought against an *Executor*, upon a Custom to pay a Debt upon a *concessit solvere*, due by the Testator on a simple Contract; such a Custom hath been allowed against the Party who made the Contract, but never against an Executor. *Style 155. Trigg versus Roberts.*

26. The Jury in assessing Damages say, *pro mis' & custag'* omitting the Words *circa sectam expenditis*, and so it doth not appear for what the Costs and Damages were assessed; the Judgment was reversed. *Style 164. Crible versus Orchard.*

27. The Issue was, *De injuria sua propria absque tali causa*, and the Jury found the Defendant not guilty generally; this was Error, because it was not a direct Finding the Issue, but only argumentatively. *Style 167. Hobbs versus Blanchard.*

28. The Time of the Judgment and the Sum recovered, were entered in Figures, and it did not appear, that the Cause of Action did arise *infra jurisdictionem*, &c. all which were held for Error. *Style 187. Jenkinson versus Porter.*

29. Error of a Judgment in Debt in the Court at *Coventry*, by *nil dicit*; the Error was, for that the Continuance was taken till the next Court, whereas it ought to have been on a Day certain; and therefore it was insisted, that this was a *Discontinuance*; but adjudged no Error, because the Court was seldom held at a certain Time. *Cro. Car. 184. Jefferson versus Laxon.*

30. The Issue was tried by six Jurors only, in an Action of Debt on a Bond in an Inferior Court in *Cornwall*; and tho' it was *secundum cons' Cur'*, which was held by Prescription, yet the Judgment was reversed by Writ of Error, because the Custom was void against the Common Law. *Cro. Car. 188. Tredymock versus Periman.*

31. The Stile of the Court was, *Placitum coram J. C. Majore, B. G. Recordatore, & J. D. & R. B. Aldermanis*, &c. and the Plaintiff entered upon the Summons, and a *None est inventus* was returned, at a Court held before *J. C.* the Mayor, and *J. D.* and *R. B.* Aldermen, omitting the Recorder, and this was assigned for Error, but not allowed; because the Court is well held before the Mayor and Aldermen, without the Recorder, who may be present at one Court, and not at another. *Cro. Car. 413. Brian versus Wykes.*

32. The Verdict in an Action for Words in the Court at *Bath* was for the Plaintiff, but entered for the Defendant; and the Entry was, *Ideo concessum est quod querens nil capiat per Billam*, it should have been, *Indeo consideratum est*; and for this Cause it was reversed. *Cro. Car. 319. Slocumb's Case. 1 Bulst. 125. Fuller versus Righthoufe, S. P. Horn versus Warden. Latch 83. S. P.*

33. In Case, there was a Judgment in the Palace-Court at *Westminster*, and the Objection to it was, that the Declaration did not set forth, that it was *infra jurisdictionem Palatii*, and that there was not fifteen Days for the Return of the *Ve. fa.* but adjudged well enough; for the Plaintiff alleged the Court to be held by Letters Patents, and in such Case the *Ve. fa.* may be returned within fifteen Days, tho' it cannot be so at Common Law. *Style 39. Morefield versus Webb.*

34. Error of a Judgment in Debt upon a Lease for Years brought by the Assignee of the Reversion; one Error assigned was, for that the Plaintiff set forth the Court to be held by *Letters Patents*, and the Process awarded *secundum consuetudinem Curia*, which cannot be where the Court began within Time of Memory; and this was adjudged erroneous, *Cro. Car. 101. Long versus Nethercote. See Remainder. (D) 13. S. C.*

35. Error of a Judgment in an Inferior Court; the Error assigned was in a Continuance, which was entered *ad proximam Curiam 16 die Augusti*, &c. when in Truth the Court was not held on that Day; besides it ought to be *ad proximam Curiam*, and not at a Day certain. *24 Car. Stile 122. Pimley versus Robinson, and 97. Pay versus Paxtasse, S. P.*

36. Case, &c. in an Inferior Court, &c. after a Verdict for the Plaintiff, the Judgment was reversed, because the first Process was a *Capias*. *Palm. 449. Marget versus Harvey.*

37. Error of a Judgment in the Court at *Hull*, wherein the Plaintiff declared, that in Consideration the Defendant in such a Place *infra jurisdictionem Curia*, had promised to pay to the Plaintiff so much *per Yard*; he the said Defendant promised to deliver to the Plaintiff so many Yards of *Kersey*, which he had not done, and the Error assigned was, that the Plaintiff had not declared, that the Delivery was to be *infra jurisdictionem Curia*; and for this Reason the Judgment was reversed. *1 Vent. 2 Heely versus Ward. Sid. 65. S. C.*

38. Error of a Judgment in an Action of Debt on a Bond given in *Rippon* Court, for that the Record was, *assidet damna ultra misas & custagia ad 10 l.* and did not say, *occasione detentionis debiti illius*, and the Judgment was *quod recuperet damna prædict'*, and did not say *per juratores assess'*, but the Judgment was affirmed. *1 Vent. 5. Baines versus Biggersdale.*

39. In False Imprisonment, &c. the Defendant pleaded, that the Castle and Manor of *St. Bre-wall* in *Com' Gloucester* was an antient Castle and Manor, &c. and prescribed to have a Court there every three Weeks, to be held before the Constable or his Deputy, & *duobus sectoribus*, for the Trial of all personal Actions; that a Plaintiff was levied at such a Court held there before the Deputy and two Suitors, & *diversis aliis sectoribus*, &c. and that *Taliter processum fuit*, &c. that the Plaintiff had Judgment, and that the Defendant was taken in Execution, &c. and upon Demurrer to this Plea the Plaintiff had Judgment for two Causes; first, because the Record in the Inferior Court was recited only by *Taliter processum fuit*, without setting forth the Declaration

tion and Appearance, &c. the next Cause was, because the Defendant had brought himself within the Prescription, which was, to have a Court every three Weeks, to be held before the Constable or his Deputy, and two Suitors; and the Court set forth in the Plea, that it was not only before two Suitors, but *coram diversis aliis sectatoribus*, which is larger than the Prescription. 2 *Lutw. Rep.* 913. *Dennis versus Rowls*.

40. Trespass upon the Case brought against the Defendant in an Inferior Court for Spaying a Sow inartificially; and upon Demurrer to the Declaration the Plaintiff had Judgment, and a Writ of Inquiry of Damages; and upon a Writ of False Judgment (when it should have been a Writ of Error, because upon the Pleading it appeared to be a Court of Record,) it was objected, that upon the Demurrer Day was given *ad proximum Curiam*, without mentioning any certain Day; and this was held an incurable Fault. 2 *Lutw.* 951. *Buzard versus Bull*. See Justification. (B) *pl.* 8. 18. *Cro. Car.* 284.

41. In Trespass for taking a Gelding, the Defendant justified by Virtue of a Judgment obtained in an Inferior Court, *coram sectatoribus*, (without naming them) and that upon a *Fi. fa.* on that Judgment he took the Gelding; and upon Demurrer this Plea was held ill, because the Names of the Suitors, before whom the Court was held, were not named; besides, 'tis not alledged, that Plaintiff was levied, &c. 2 *Lutw.* 1351. *Poplewell versus Gosling*.

42. In Trespass, the Defendant justified under a Judgment in a Hundred Court held by Prescription, and thereupon a *Levari facias* was awarded against the Goods of the Plaintiff, by Virtue whereof the Defendant took them; there was a general Demurrer to this Plea, but no Judgment given. 2 *Lutw.* 1369. *Simpson versus Merrils*.

43. In Trespass, &c. The Defendant justified, for that the Earl of Newport was seised in Fee of the Hundred of Stottesden, and that King Charles the Second, by Letters Patents, granted to him and his Heirs a Court of Record, &c. with Power to make Serjeants at Mace to execute all Attachments and Procefs issuing out of that Court; then he sets forth, that a Plaintiff was levied there against the now Plaintiff, and that a Precept was directed to the Serjeant at Mace, and to John Chetwyn, to attach the Goods, &c. and that the Precept was delivered to Chetwyn, who by Virtue thereof took the Goods *quæ est eadem transgressio*, &c. and upon Demurrer it was adjudged, that the Plea was ill; for by Virtue of this Grant all Procefs was to be executed by the Serjeant at Mace; but here the Attachment was directed not only to him, but to another, (*viz.*) To John Chetwyn, and executed by him alone, which is not pursuant to the Power given by this Grant. 2 *Lutw.* 1461. *Selman versus Perry*.

44. Error to reverse a Judgment in the Court of York in Debt, for that there was a Variance between the Count and Plaint, for that was, *Ad banc Curiam venit & queritur de placito debiti super demand'* 141. and the Count was for 12 *l.* but it was said, that the certain Sum need not be mentioned in the Plaint; and so 'tis but Surplage. 1 *Vent.* *Billingham versus Vavasor*.

45. Error to reverse a Judgment in the Court at Warwick in an *Assumpsit* upon three Promises, wherein the Jury found two for the Plaintiff, and as to the Third Promise, *Non Assumpsit*, and Judgment was given for the two Promises, that the Plaintiff should recover, but as to the third there was no Judgment; it should have been, that the Plaintiff be amerced *pro falso clamore*, or that the Defendant *eat inde sine die*; and this was assigned for Error, and so it was adjudged, tho' it was insisted, that Judgment might be affirmed as to the two Promises, and reversed as to the other; but the Court held this Judgment altogether imperfect. 1 *Vent.* 27, 39. *Gregory versus Eades*. See Judgment. (C) *per totum*.

46. Error to reverse a Judgment in *Assumpsit* in an Inferior Court, wherein the Plaintiff, in Consideration the Defendant would sollicite a Cause in Chancery for him, promised to pay, &c. the Judgment was reversed for want of Jurisdiction; and because it was *Defendens in misericordia*, when it should be *capitur*. 1 *Vent.* 28. *Berkley versus Paine*.

47. Error to reverse a Judgment in Hull, for that the Precept to the Serjeant at Mace for returning the Jury was, *qui nulla affinitate attingen*, when it should be *attingunt*; and the Entry was *ad quem diem venerunt* the Plaintiff and Defendant, when it should be *Veniunt*; but the Judgment was affirmed. 1 *Vent.* 55. *Ely versus Ward*. *Sid.* 438. *S. C.* 1 *Mod.* 32. *S. C.*

48. Writ of Error upon two Judgments in an Inferior Court; they returned two Records, but not the right; and upon Complaint to the Court it appeared, that those for which the Plaintiff in Error brought this Writ were not determined; for there were Writs of Inquiry of Damages in both, but no Judgments entered; adjudged, that if there be several Judgments between the same Parties, the inferior Court may return which Record they please; and if Judgment is given in these Courts after the *Teste* and before the Return of the Writ of Error, the Record must be removed, but if after the Writ of Error is returnable, then the Writ must be returned; but in this Case after the Writ of Inquiry was returned the Plaintiff ought to have prayed Judgment, and 'tis his Fault if he did not see the Judgment entered. 1 *Vent.* 96. *Pridyard versus Thomas*. 1 *Lev.* 466. *S. C.* *Raym.* 189. *S. C.*

49. Judgment by Default in an Inferior Court was reversed, for that the Writ of Inquiry of Damages was only by two Jurors; 'tis true, that Writ is *per sacramentum proborum & legalium hominum*, and doth not say *duodecim*, as a *Venire*; but yet, tho' they alledged a Custom to inquire by two Jurors, adjudged, there cannot be less than twelve. 1 *Vent.* 113.

50. The Defendant was arrested upon a Precept to the Bailiff of a Franchise, who took Bail for his Appearance, but at the Day the Defendant did not appear, and thereupon Judgment was given against him by Default; and now a Writ of Error was brought, and the Error assigned was, that
such

such Judgment ought not to be given in Personal Actions before Appearance, because there can be no Default till there is an Appearance; that giving Bail is no Appearance, but admitting it was; then Judgment ought to be entered upon *Nil dicit*, and not upon *defaultum fecit*; for which Reason it was adjudged erroneous. *Sid.* 16, 32. *Burges versus Perce.*

51. Error to reverse a Judgment in an *Assumpsit* in an Inferior Court; for that the Time of the Promise set forth in the Declaration was in *Figures*, and for that Cause the Judgment was reversed. *Sid.* 40. *Duckett versus Bland.*

52. Error of a Judgment in the Palace-Court in *Assumpsit*, wherein the Plaintiff declared upon a Promise to pay him so much Money, if he could procure for the Defendant a *Lease of such a House in Middle-Row in Holborn*, and did not shew, that *Holborn* was within the Jurisdiction of the Court; and for that Reason it was reversed. *Sid.* 65. *Romsey versus Atkinson.* 1 Lev. 50. *Whitehead versus Brown.* S. P. Raym. 75. S. C.

53. Error to reverse a Judgment in the City of *Excester*, for that the *Venire facias* was returnable *coram Majore & Ballivis*, without saying *Hic*, or in *Curia*; and this appearing upon reading the Record, was adjudged Error, for the Writ might be returned in a Tavern. *Sid.* 77. *Davis v. Pits.*

54. Error to reverse a Judgment in the Palace-Court, where the Plaintiff declared, that the Defendant was indebted to him *apud Southward infra jurisdictionem Cur'*, &c. in so much Money upon a Contract for a Cow; the Error assigned was, that it did not appear, that the Contract was made within the Jurisdiction, but only that he was indebted, when a Debt is so every where; and this was held Error. *Sid.* 87. *Godfrey versus Saunders.*

55. Error to reverse a Judgment in the Marshal's Court, in an Action on the Case, wherein the Plaintiff declared, that in Consideration he had promised the Defendant *infra jurisdictionem Curia*, that he would not disturb any of the College of the *English Jesuits*, and that he would deliver up a Bond of 300 l. to the Defendant, in which some of the said College were bound to him, the Defendant promised to pay the said 300 l. the Defendant pleaded, that the Plaintiff did disturb one of the College, upon which they were at Issue, and the Evidence was, that one of the College was arrested by Process out of B. R. at the Suit of the Plaintiff, who demurred upon this Evidence, for that the Defendant did not produce the very Process, which being Matter of Record, could not be tried but by it self; thereupon the Defendant assigned for Error, that the Consideration of his Promise was not laid within the Jurisdiction; for some of the Jesuits might be sued any where in *England*, which that Court could not try; besides, the last Part of the Promise was not within the Jurisdiction, (*viz.*) the Promise to deliver up the Bond; for which Reasons the Judgment was reversed. *Sid.* 105. *Brian versus Fitzharris.* See Evidence. (D) 23. S. C. 1 Lev. 52.

56. Error to reverse a Judgment in *Durham*, for that it was, *Ideo consideratum est*, without saying *per Curiam*; but adjudged, that tho' this is Error in other Inferior Courts, yet 'tis not so in the Courts of Counties Palatine, as *Durham* is, nor in the Courts of *Wales*. *Sid.* 147. *Smith v. Smith.* See *Sid.* 143. S. P. 1 Lev. 105.

57. Error to reverse a Judgment in *Excester* in an Action of Debt for Rent, in which the Plaintiff declared upon a Lease made in *Excester* of Lands in *Topsham*, and because it did not appear that the Lands leased were within the Jurisdiction of the Court, the Judgment was reversed. *Sid.* 151. *Drake versus Beer.* 1 Lev. 102. 1 Vent. 207.

58. Error to reverse a Judgment in *Excester* Court in an Action of the Case for scandalous Words spoken of the Surveyor of the Customs in the Port of *Excester*; the Words were laid to be spoken within the Jurisdiction; but the Error assigned was, that the Port of *Excester* was not laid to be within the Jurisdiction, and that the Plaintiff laid the Word to be spoken of him to defraud the King of his Customs *infra Portu' Exon'*; but adjudged, that since the Matter which is actionable is expressly laid to be within the Jurisdiction, if other Matter in Aggravation of the Words are not laid so, yet the Declaration is good. *Sid.* 342. *Corbin versus Merson*; they relied on *Ireland and Blackwell's Case.* 1 Lev. 153.

59. The Defendant was indicted and convicted at the Sessions, for speaking scandalous Words of the Justices of Peace, and upon a Writ of Error brought, the Error assigned was, *Ideo venit inde jurata*, when it ought to be, *Ideo præcept' est Vic' quod Venire faciat* 12, the first being the Form in the Courts at *Westminster*, and the other the Form in Inferior Courts; the Judgment was reversed. *Sid.* 364. *The King versus Knott.*

60. Error of a Judgment in *Wallingford* Court, in which the Plaintiff declared, that the Defendant being indebted to him at *Wallingford*, for Goods sold and delivered; but did not say where the Goods were sold and delivered, and so may not be within the Jurisdiction of the Court; and for this Reason the Judgment was reversed. 1 Lev. 137. *Price versus Hill.* 1 Lev. 156. *Stone versus Waddington.* S. P. 2 Lev. 87. *Hanslip versus Coater.* S. P.

61. Error of a Judgment in the Court of *Lyme*, for that the *Venire facias* was *per quos rei veritas melius scire poterit*, for *Sciri*; besides, in the Entry of the Jury, 'tis *qui electi*, &c. & *jurati dicunt super sacramentu'*, omitting *ad veritatem de infra content' dicend'*, and for these Reasons the Judgment was reversed. 2 Lev. 85. *Bedingfield versus Berrisford.*

62. Error of a Judgment in *Excester* Court, where the Plaintiff declared on two Promises, (*viz.*) on an *Indebitatus Assumpsit* and *Quantum meruit*; the first he alledged to be *infra Jurisdictionem Curia*; but the Words *adunc & ibidem* were left out in the second Promise; and for this Reason the Judgment was reversed. 5 Mod. 78. *Cutmore versus Tripe.*

63. Error of a Judgment in the Palace-Court, for that the Jury *assident damna*, &c. instead of *Assidunt*; it should have been in the present Tense, and therefore *recuperaret damna*, instead of *recuperat*, hath been adjudged ill; but it was ruled, that *Assident* is the proper Word, for it comes from the Verb *assideo*, which is to assesse. 5 Mod. 323. *Redwood versus Coward.* 64. Writ 1 Salk. 328. False Latin. (A) 2

64. Writ of Error of a Judgment in an Action of Debt on a Bond in the Court at *Bristol*, held *secundum legem mercatoriam secundum consuetudinem Civitatis* *præd' tempore cujus*, and this was before the Sheriffs, &c. of *Bristol*; the Error assigned was, that a Court *secundum legem mercatoriam* could not be held before the Sheriff, but before the Mayor of the Staple only, and in Matters concerning Staple-Transactions; but adjudged, that it being * *secundum consuetudinem Civitatis*, 'tis well enough. *Mod. Cases* 61. *Evans versus Roberts*.

1 Cro.
S. P.
Saund. 87,
311. S. P.

* W. Jon.
451. Hub-
bin's Case.

65. *Indebitatus Assumpsit infra jurisdictionem Curiae*, for Wares sold and delivered; there was a Verdict and Judgment for the Plaintiff in the Court of *Carlisle*, and upon a Writ of Error brought, the Error assigned was, that 'twas not alledged, that the Wares were sold * *infra jurisdictionem*, for 'tis upon that Contract on which the *Assumpsit* rises; the Judgment was reversed. *T. Jones* 230. *Wallis versus Squire*.

T. Jones
14, 215.
S. C.

66. In *False Judgment*, the Defendant justified by Virtue of a *Capias* directed to him out of an *Inferior Court*, &c. and upon Demurrer to this Plea, it was objected, that it was ill, because the Defendant did not shew, that a *Summons* first issued against the Plaintiff, and *Inferior Courts* cannot award a *Capias* before a *Summons*; for which Reason the Plaintiff had Judgment; 'tis true this Matter is not assignable for Error in a Writ of Error brought, because 'tis only a Fault in the Process, and 'tis aided by Appearance; but *False Imprisonment* lies, and the Officer cannot justify as those may for executing Process out of the Courts at *Westminster*; for in such Case a Sheriff may justify the Arrest upon a *Capias*, without an Original. 1 *Vent.* 220. *Read versus Wilmott*. 1 *Mod.* 81. *S. P.*

67. Case, &c. for suing him in an *Inferior Court*, for a Cause arising out of their Jurisdiction; upon Not guilty pleaded the Plaintiff had a Verdict; and in Arrest of Judgment it was insisted, that the Declaration was ill, because the Plaintiff did not set forth, that the Defendant did know that they had no Jurisdiction; but adjudged, that the Plaintiff ought to have Recompence for the Injury done, for he might be compelled to put in Bail, where Bail by Law is not required above. 1 *Vent.* 369. *Hodson versus Read*.

68. It cannot be assigned for Error in *Fact*, that the Cause of the Action did arise without the Jurisdiction, &c. neither is the Officer punishable who executes such Process; but an Action lies against the Party for suing in an *Inferior Court*, when the Cause of Action did arise without their Jurisdiction. 1 *Vent.* 369. *Cowper versus Cowper*, cited in the Case of *Hodson and Cook*.

69. In Debt upon a Record in an *Inferior Court*, if the Defendant plead *Nul tiel Record*, they certify only *Tenorem Recordi*, and grant Execution afterwards. 1 *Vent.* 212.

2 Lev. 87.
S. C.

70. Error of a Judgment in the Court at *Coventry*, wherein the Plaintiff declared, that the Defendant being indebted to him *infra jurisdictionem Curiae pro diversis mercimoniis & bonis ad tunc venditis & deliberatis* did then and there promise to pay; after a Verdict for the Plaintiff the Error assigned was, that the Plaintiff did not alledge the Goods were sold *infra Jurisdictionem Curiae*; the Judgment was reversed. 1 *Vent.* 243. *Hauslap versus Cater*.

Raym.
233.
1 Lev. 98.
3. C.

71. Error of a Judgment in Dower given in *New-Castle*; the Error assigned was, because the Proceedings were by *Pleit*, without Writ Original, and no special Custom alledged to maintain it, and Pleas of Freehold cannot be held without Writ, and this was held Error. 1 *Vent.* 267. *Loman versus Armorer*. See 3 *Cro.* 101.

72. In *Trespas*, &c. the Defendant justified under a *Pleit* in the County-Court for a Debt of 39 s. 11 d. and that *taliter processum fuit*, that *T. P.* the Plaintiff in that *Pleit* recovered, &c. and thereupon, *quoddam præceptum emanavit* out of that Court, &c. and upon Demurrer to this Plea it was held ill, because the Judgment was pleaded in an *Inferior Court*, not being a Court of Record, with a *taliter processum fuit*, when the Proceeding should be set at Large; besides, 'tis not set forth, that the Debt did arise within the Jurisdiction of the Court, neither did it appear that the *Præcept* was awarded by the Court; for it should be *quoddam præceptum direct' fuit per præsen' Curiam*, &c. 2 *Vent.* 100. *Pinager versus Gale*.

73. Error to reverse a Judgment given in the Court of *Hull*, wherein the Plaintiff declared, that there being a Discourse between him and the Defendant, concerning an House at *Hull-Bridge*, which the Plaintiff had sold to him, and the Purchase-Money not being paid, and the Defendant being unable to pay it, in Consideration the Plaintiff would release the Debt, the Defendant promised to deliver up the Possession of the House, &c. by a certain Day, which he had not done *licet sapius requisitus*; the Error assigned was, that the Plaintiff did not alledge the House to be situate within the Jurisdiction of the Court, for the Performance of the Promise must be within the Jurisdiction as well as the Making the Promise; and *Twisden* Justice, was of that Opinion, but *Keyling contra*; then it was objected, that here was no Special Request laid, which ought to be done, because to deliver up Possession of an House was a *Collateral Thing*; but adjudged, that this being to be done at a certain Time, the general Allegation, *licet sapius requisitus*, is sufficient; but if no certain Time had been set, he would have Time during Life, unless hastened by a Special Request. 1 *Vent.* 72. *Bernard versus Bernard*. 1 *Lev.* 289. *S. C.*

74. Error of a Judgment in an *Indebitatus Assumpsit* in the Court of *Marlborough*, for that it was said to be held *coram Majore & Burghensibus Burgi præd', secundum consuetudinem Burgi ejusdem a tempore quo*, &c. and the Name of the Mayor was omitted; and for this Cause the Judgment was reversed. *Raym.* 395. *Durnford versus Ivisb.* See *Jarret versus Calderwell*. *S. P.*

75. Error of a Judgment in a *Scire facias* upon a Recognizance against the Bail in the Court of *Boston*, and that Court not only certified the Judgment upon the *Sci. fa.* but also the Judgment in the Principal Action, and the Proceedings thereon, and this was held good; for if they should

certify

certify only the Judgment upon the *Sci. fa.* this Court might not understand it, because in inferior Courts there are not several Rolls to enter the Judgments for the Principal, and another for the Bail, and another for the *Sci. fa.* but all are entered in one Book, and never at large, but when a Writ of Error is brought, and then they make up a whole Record. *Raym.* 431. *Johnson v. Tayler.*

76. Upon a Writ of Error of a Judgment in the Court of *Berwick*, the Proceedings were returned in *English*; adjudged, that *B. R.* is to take Notice of the particular Laws and Customs of the Place where the Judgment is given, that if the Proceedings below were in *English*, they may be so entered here; 'tis true, upon the Return of an *Habeas Corpus*, the inferior Jurisdiction must set forth the particular Law and Custom of the Place by which they justify the Commitment, otherwise the Court is not to take Notice of it; but upon a Writ of Error the Court takes Notice of the Custom of inferior Courts. 1 *Salk.* 269. *Redham versus Waters.*

77. Error of a Judgment in *Bristol*, in an Action of Debt on a Bond; the Objections were, that the Stile of the Court is laid to be *secundum legem mercatoriam*, that the *Dies datus est partibus præd'* is not alledged to be *per Curiam datus*, that the *Certiorari* was awarded to the Sheriff of the County of *Bristol*, and the Record was returned by the Sheriff of *Bristol*, but none of these Objections were allowed; first, because a Court may be held *per legem mercatoriam*, and yet not a Court of Staple, that a *dies datus* must be given by the Court, tho' it may be *prece partium*; 'tis true, where an Award of Process or Judgment is alledged, it must be said *per Curiam*, but a *dies datus* need not; and lastly, the Court takes Notice of Sheriffs of Counties, that the Sheriff is their Officer, and that they award Process to him every Day. 1 *Salk.* 265. *Gibbons versus Roberts.*

78. Error of a Judgment in an inferior Court, where the Judgment was given upon a Demurrer to the Plea, and the Entry was, *Ideo consideratum est, &c.* omitting *& quia videtur Curia hic quod placitum præd' præfat' Defendantis minus sufficiens in lege existit*, which is erroneous, because upon a Demurrer joined, the Court ought first to determine the Matter in Law, whether 'tis sufficient, or not, before they give Judgment. 1 *Salk.* 402. *Attwood versus Burr.*

79. Error of a Judgment in the Palace-Court, in an Action on the Case, wherein the Plaintiff declared, that on such a Day, Parish, and County, he delivered to the Defendant (being an Inn-keeper) a Gelding, *safely to be kept in the Inn*, and that he suffered it to be taken out of the Stable and *rid so immoderately*, that it was spoiled: The Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought, it was objected, that it did not appear that the *Riding was within the Jurisdiction* of the Court; adjudged, that every Part of the * Gift of an Action in an inferior Court must appear to be *within their Jurisdiction*; but Matters which are inserted to aggravate Damages, need not; now, in the principal Case, the Neglect of the Defendant in not keeping the Horse safe, is the Gift of the Action, and the Taking him out of the Stable and Riding him immoderately, is a subsequent Wrong, and a Measure only of the Damages; the Judgment was affirmed. 1 *Salk.* 404. *Stannian versus Davis.*

80. Error of a Judgment in an inferior Court in an Action on the Case, wherein the Plaintiff laid his Damages to 30 *l.* there was a Verdict for the Plaintiff; and now the Exceptions were, that 'tis not said the Jurors were *electi ad triand'*, &c. besides, the Damages are laid to be to * 30 *l.* whereas, if above 40 *s.* all is *coram non iudice*, and for these Reasons the Judgment was reversed. 2 *Mod.* 101. *Rider versus Bradley.*

81. Error of a Judgment in the Palace-Court, for that the Plaint was at the Suit of *W. R. generally*, and the Declaration was at the Suit of *W. R. Executor, &c.* so that the Plaint was in his own Right, and the Declaration was as Executor; adjudged, that if this Variance had been in a Record certified from the *C. B.* (*viz.*) between the *Original* and the Declaration, where the *Original* is only a Recital, the Party might alledge *Diminution*, and have the right *Original* certified, but no *Diminution* can be alledged of a Record certified out of an inferior Court, so that this Variance is fatal; for Want of *Plaint* in an inferior Court, is like Want of an *Original* in a superior Court; but probably this had been cured by a Verdict. *Mod. Cases* 149. *Hale versus Claro.*

(H)

To reverse Judgments given in Ireland, and of other Matters concerning Ireland.

1. Upon a Writ of Error to reverse a Judgment in *Ireland*, the Record it self remains there, and a Transcript thereof is sent hither. 2 *Bulst.* 118. *Tayler versus Terry.* *Palm.* 1. *S. P.*

2. Where upon a Writ of Error brought in *B. R.* to reverse a Judgment given in *Ireland*, and 'tis reversed, there must be a Writ directed to the Chief Justice in *Ireland* to reverse it, commanding him to award Execution, so that it cannot be * reversed by the Court here, but there. *Cro. Car.* 368. *Mulcarry versus Eyre.*

3. Judgment was given in the *C. B.* in *Ireland*, and upon a Writ of Error in *B. R.* there, the Judgment was affirmed; and now a Writ of Error was brought in *B. R.* here, and the Error assigned was, because the Writ of Error to the *C. B.* in *Ireland* was directed *Roberto Booth Militi & Sociis suis, &c.* and the Judgment certified to the King's Bench there, appeared to be in an Action commenced in the Time of *Sir R. Smith*, who died, and *Sir R. Booth* was made Chief Justice before Judgment was given; adjudged, that the Record was not well removed into the King's Bench there,

there, so the Affirmance of the Judgment there was reversed. 1 Vent. 206. *Fitzgerald versus Marshall*. 1 Mod. 90. S. C.

4. Writ of Error to reverse a Judgment given in *Ireland*, it was held, that a Day ought to be given to the Plaintiff by Rule of Court to assign Errors, or else to be nonsuit, because the Defendant cannot have a *Sci. fa.* into *Ireland*. 1 Vent. 53. *Dyer* 76. 2 Bulst. 118. S. P.

5. Error to reverse a Judgment in *B. R.* in *Ireland*, on a Writ of Error on a Judgment in *C. B.* there, which was affirmed in *B. R.* there, and Costs awarded to the Defendant in Error; and the Error assigned here was, that Costs ought not to be awarded upon such Affirmance, because our Statute which gives such Costs doth not extend to Actions there; adjudged, that the Judgment in *B. R.* in *Ireland* be reversed, *quoad* the Costs only. *Sid.* 357. *Exham versus Coniers*.

3 Mod. 336. 6. Lease for Years of Lands in *Ireland*, in which the Lessee covenanted to pay the Rent in *London*, the Lessor assigned the Reversion, and the Assignee brought an Action of Covenant in *London* for the Rent; the Defendant pleaded, that the Lands lay in *Ireland*, and upon Demurrer to this Plea it was adjudged good, because 'tis a * *local Covenant* and adheres to the Land, that the Lessor himself could not have brought such Action in *England*, and the Statute transfers it to the Assignee in the same Manner as the Lessor had it. 1 Salk. 80. *Barker versus Damer*. See Shower Rep. 191. S. C.

* See
Thursby
2. Plant.

7. Error of a Judgment in Ejectment in *Ireland*, for that one of the Parcels in the Declaration was called a *Kneave* of Land, which is an insensible Word, but the Chief Justice of *B. R.* in *Ireland* certified, that it was well known there. Mod. Cases 140. *Huines versus Hancock*.

5 Mod. 421.

8. Upon a Writ of Error in *B. R.* of a Judgment in *Ireland*, it was affirmed here, and Costs taxed, and a *Ca. fa.* out of *B. R.* here, directed to the proper Sheriff in *Ireland*, to take the Defendant; but upon Motion this Execution was set aside, because there can be no such Writ; for upon the Affirmance of the Judgment, the Course is to have a Writ, reciting all the Proceedings here, and directed to the Judges of *B. R.* in *Ireland*, requiring them to issue Process of Execution. 1 Salk. 321. *Coot versus Lynch*.

(I)

For Faults in Verdicts.

1. THE Entry in the Record was, *ad quem diem* such of the principal Panel (naming them) *veniunt & jurati existunt*, and because the rest did not appear, *B. G.* and *R. B.* *de novo* *apponuntur qui ad veritatem de infra content' electi, triari jurati dicunt super sacram' suum*, omitting these Words (*simul cum aliis juratoribus prius impanellat'*) so that this was the Verdict of the *Tales* only, and this was held to be Error. 2 Cro. 207. *Kempton versus Bartell*.

2. In *Trespas*, &c. the Plaintiff had a Verdict, and upon a Writ of Error brought by the Defendant, he assigned for Error, that the Plaintiff had declared to his Damage of 40 *l.* and that the *Damages* assessed by the Jury were 35 *l.* and Costs increased by the Court were 6 *l.* in all 41 *l.* so that he had recovered more than for what he declared, for that was but for 40 *l.* but adjudged, that the *Damages* assessed by the Jury being less than for what the Plaintiff had declared, tho' the Costs amount to more, 'tis not material. Cro. Eliz. 866. *Comb versus Carew*. *Postea* *Ve. fa.* (A) 4. S. C. *Yelv.* 70. * *Vale versus Eagles*. S. P.

Postea
3. S. C.
2 Cro.
69. S. C.

3. Error of a Judgment in *Assumpsit*, the Error assigned was, for that the Plaintiff had declared *ad damnum* 10 *l.* and the Jury gave him 10 *l.* *Damages*, and 13 *s.* 4 *d.* for Costs, which is more than what he had declared for, but adjudged no Error; 'tis true, if they had found *more Damages* than for what the Plaintiff had declared, that would have been erroneous; but if they had found *more Costs* than the *Damages* had amounted too, it had been otherwise, for it may be, that the Costs of Suit long depending might exceed the *Damages* laid in the Declaration. *Vale versus Eagles*. *Yelv.* 70. S. C.

(K)

For Faults in Executions.

1. *Sci. fa.* against *B. G.* the Sheriff returned *H. S.* *Tertenant* of all the Lands, &c. *quæ fuerunt præd. B. G.* and thereupon Judgment was given, that the Plaintiff should have Execution against the said *H. S.* and he prayed an *Elegit*, which was entered on the Roll, *Elegit sibi liberari medietatem* of all the Lands in the County of *B.* omitting (*quæ fuerunt præd. B. G.*) and for this Cause the Judgment was reversed *quoad executionis adjudicationem* upon the *Elegit*, yet the *Elegit* it self, and the Return was well. *Hob.* 90. *Ker versus Owen*.

2. The Plaintiff had a Judgment for 400 *l.* and by Virtue of a *Fi. fa.* he levied 100 *l.* Part of the Debt, which appeared upon the Return of the Writ; afterwards he took out a *Ca. fa.* against the Defendant, for the whole 400 *l.* upon which he was outlawed; and on a Writ of Error brought he assigned for Error, that 400 *l.* was not leviable, because 100 *l.* Part of the Debt, was paid, as appeared upon Record, for which Reason the Judgment to have Execution was reversed. *Moor* 598. *Wells versus Denny*.

(L)

For faults in Indictments.

1. **I**ndictment at *Hicks's Hall* against the Defendant, for Speaking Scandalous Words of the Lord *Fairfax*, was held good, the Words tending to the Breach of the Peace; and he being convicted, a Writ of Error was brought, and the Exception was, (*viz.*) *Juratores jurat' electi, &c. ad veritatem dicunt*, it should be *ad veritatem dicend'*, *super sacram' suum dicunt*. *Style 244. Williams's Case*, it was reversed.

2. Error of a Judgment upon an Indictment for common Barretry, because it was *Ideo in mi'a*, when it ought to be *quod capiatur*, the Defendant being fined; but if he is present in Court, and the Entry is *Ideo remittitur Gaolæ & in mi'a*, there 'tis but *Surplusage*, and shall be rejected. *Cro. Car. 248. Chapman's Case*.

3. Error to reverse a Judgment in an Indictment for Barretry, for that the Judgment was, that the Defendant shall be fined 100 *l.* & *ulterius* that he be of the Good Behaviour, but did not say how long; adjudged, that as this is entered, the *Uterius* is no Part of the Judgment, for 'tis *Uterius ordinatum est*; but if it had been Part of the Judgment, it had been void for the Incertainty, how long he should be of the Good Behaviour. *Sid. 214. The King versus Rainer*.

4. Error to reverse a Judgment in an Indictment for a Libel, (*viz.*) *You are desired to bewail the Sodomy, Wickedness, &c. that is of late broken out in this formerly well-governed City, &c. which go unpunish'd by the Magistrate*; he was convicted at the Sessions in *Excester*, upon his own Confession, and fined 100 *l.* the Error assigned was, that it was not any Offence, for tho' he said that Wickedness was unpunished by the Magistrate, yet he did not say that the Magistrate knew it; then as to the Judgment, 'tis *quod solvet 100 l.* it should be *solvit*; the first Exception was over-ruled, and as to the Judgment, if 'tis Faulty, yet the Indictment shall stand, and a new Judgment shall be given and entered. *Sid. 219. The King versus Pym*.

5. Indictment in *London* for seducing the Prosecutor into an ill House, and cheating him of 300 *l.* *Sid. 208.* which being brought into *B. R.* by *Certiorari*, the Defendant was convicted, and afterwards brought a Writ of Error in the same Court, it was objected, that it would not lie upon a Judgment given by themselves; but adjudged, that it might in criminal Cases, but not in Civil, unless it be for Errors in Fact triable by a Jury. 1 *Lev. 149. Cornhill's Case*.

(M)

To reverse Fines and Recoveries.

1. **T**enant in Tail died seised, leaving Issue two Sons, the eldest Son levied a Fine of the Lands, and afterwards levied another Fine of the same Lands, and died without Issue; the surviving Son brought two Writs of Error to reverse both these Fines, and the Defendant in the Writ of Error pleaded the first Fine in Bar to the Second, and that in Bar to the First; but he was advised by the Court not to rely upon it, but to plead that the first Fine was erroneous. 2 *Leon. 211. Meulton's Case*.

2. Error to reverse a Fine levied upon a Plaintiff in a Writ of Covenant in *Excester*; the Plaintiff was, *quod tenet conventionem de duobus Tenementis*, which Word Tenement is very uncertain, for it comprehends every Thing which lies in Tenure, and for that Reason it was reversed. *Leon. 188. Steed versus Courtney*.

3. A Common Recovery was suffered to bar the Issue in Tail; the Warrant of Attorney was, *Quod Alicia ponit loco suo, &c.* where her Name was *Elizabeth*; it was a *Quare* in *Dyer 105*, if this was amendable, but since adjudged, that it may. *Blackmore's Case, 1 Rep. 156*.

4. Husband and Wife levy a Fine to *B. G.* who grants and renders to them, and to the Heirs of the Husband, and then renders Part to the Wife in Tail, the Remainder over; and on a Writ of Error brought by the Heirs of the Husband, for this Variance, the Whole being rendered to them, and afterwards part to the Wife in Tail; it was adjudged no Error, for in a Render on a Fine, is but a Grant on Record, and doth not require a precise Form, so it shall be construed as a Grant by Deed. 5 *Rep. 38. Tey's Case*.

5. Error to reverse a Common Recovery in a Writ of Entry in the *Post*, which was had *de uno annali redditu five pensione quatuor marcarum*; it was insisted, that every *Præcipe* ought to be very certain, which this was not, because it was in the Disjunctive, *de redditu five pensione*; but adjudged no Error, because 'tis only a Demand of one Thing by two Names, for *Rent and Pension* are Words synonymous; but this being a common Assurance, and by mutual Consent of the Parties *consensus tollit errorem*, if it was Error. 5 *Rep. 40. Dormer's Case*.

6. Where a Mistake was in the Year of the King in making the Proclamations, (*viz.*) the fifth and last being entered in *Hill. 6 Jac.* when it should be *Hill. 5 Jac.* this was Error. 2 *Brownl. 300*.

7. The Writ was *Præcipe B. G. quod jusse, &c. ten', &c. Con. de octo Messuagiis, duobus rostris, decem Gardinis, &c.* and it was certified *de octo Messuagiis decem Gardinis*, omitting the Words

Duobus Toftis, and in a Writ of Error brought to reverse this Fine, it was held no Error. 2 Cro. 77. *Earl of Bedford versus Foster*.

8. In a *Formedon*, the Tenant pleaded a Fine with Proclamations, the Demandant replied *Nul tiel Record*, the Record which remained with the Chirographer did warrant the Plea, but the Record of the Fine which remained with the *Custos Brevium* did not; adjudged, that which was with the Chirographer was the principal Record, and the other was amended by it. *Godb.* 103.

9. Error to reverse a Fine, for that the *Dedimus potestatem* was directed to *Sir Roger Manwood Knight*, and *Roger Manwood*, who took the Fine, was not then a Knight; adjudged, this cannot be assigned for Error, because 'tis directly against the Record. *Yelv.* 33. *Arundell versus Arundell. Antea* (F) 27. S. P.

10. On a Writ of Error to reverse a Common Recovery suffered in the County Palatine of *Lancaster*, by Husband and Wife, the Error assigned was, that the Wife was under Age, and entered into Warranty as Vouchee *per Attornatum*, when it should be *in propria Persona*, or *per Attornatum*, if she should be suffered to appear at all; but as this Case was, 'tis certainly Error, and so it was adjudged. 2 *Roll. Rep.* 85. *The Lady Darcy's Case*.

11. Error to reverse a Fine brought by the Heir after an Estate-tail spent; the Defendant confessed the Settlement in Tail, and the Death of the Tenant in Tail without Issue, and the Fine levied, &c. but pleads, that the last Proclamation was made 17 *Car.* 2. and that this Fine was to the Use of the Tenant in Tail, and *his Heirs*, whose Estate the Defendant hath, and for fifteen Years last past had, that the Tenant in Tail died without Issue, *Anno* 10 *Car.* 2. and that he (the Defendant) had continued in Seisin by the Space of five Years after the Death of the Tenant in Tail, without Issue, and before this Writ of Error brought, and demands Judgment, if the Writ ought to be maintained against this Fine and Proclamations; and upon a general Demurrer, the Error assigned was, that the Cognisor died after the Caption by *Dedimus*, and before the Return of the Writ of Covenant, which being true in Fact, was certainly erroneous; but then the Defendant insisted on his Plea, that this Writ of Error would not lie five Years after the Fine levied; for he who hath a Right to bring a Writ of Error, and will suffer five Years to pass before he brings it, shall be barred by the Fine and Nonclaim: *Sed Curia contra*, and this Fine was reversed. *T. Jones* 181. *Cockman versus Farrer*.

12. Error to reverse a Fine levied by four Cognisors, and the Error assigned was, that one of them died before the King's Silver was paid; and the Question was, whether it should be wholly reversed, or only as to him who was dead; and the better Opinion was, that it should be wholly reversed, because by the Death of one the Writ abated, and so 'tis a Fine without an Original. 2 *Lev.* 127. *Biddulph versus Harrison*.

13. Writ of Error to reverse a Common Recovery in *Wales*, the Errors assigned was, that there was no good Warrant of Attorney, because the *Dedimus* to take it issued before the *Summons ad Warrantizandum*, for which see the Case of *Arundell and Arundell*, so that the Caption of the Warrant of Attorney is naught, because before the *Dedimus*, and this shall not be supplied by an Indentment that there is another *Dedimus*; to which it was answered, that here was a good Record of a Common Recovery, and those Errors assigned, are only in the Proceedings to it, and shall not be now assigned for Errors, because repugnant to the Record; now a *Dedimus* is no Part of the Recovery; but if it was, yet 'tis not a substantial Part; and if so, then 'tis helped by the Statute 29 *Eliz.* cap. 9. and to prove it no substantial Part, it was argued, that at Common Law a *Fine or Recovery* could not be levied by *Dedimus*, that is given by the Statute of *Carlisle*, 15 *Ed.* 2. which Statute is directory, as in *Tey's Case*; afterwards adjudged, that a Caption of a Warrant of Attorney, before the Time that it ought to be taken, is well enough, as in *Champernoon's Case*. *Hutt.* 135, and so the Judgment was affirmed; thereupon it was moved for Costs, according to the Statute 3 *H.* 7. cap. 10. and so is *Penruddock's Case*, and *Cro. Eliz.* *Grow's Case*; 'tis true, the Words of the Statute are, *where there has been any Delay of the Execution*, and here was no Delay, because no Execution is to be had; but the Court would not allow any Costs for that Reason, and said, that at Common Law there was no Costs upon a Writ of Error. *Raym.* 70, 96, 134. *Winne versus Lloyd*.

14. In a special Writ of Error to reverse a Fine levied by Tenant in Tail in *Easter-Term*, 17 *Car.* 2. the Plaintiff in the Writ of Error, assigns for Error, that the Cognisor, after the Fine acknowledged before the Commissioners, and before the Return of the Writ of Covenant, died, it was thus: The Writ of Covenant was dated 17 *Feb.* 16 *Car.* 1. the *Dedimus* was dated 18 *Feb.* the Caption was 18 *Martii*, and on *April* 6, before the Return of the Writ of Covenant, the Cognisor died, and the King's Writ was entered in *Easter-Term*, so that 'tis plain here was Error; thereupon the Plaintiff prayed a *Scire facias* to the Cognisees and their Heirs, and to the Tertenants of the Land; and the Sheriff returned a *Scire feci* upon *T. T.* one of the Cognisees, and upon *W. B.* Cousin and Heir of *W. B.* the other Cognisee, who was dead; and upon *W. F.* and several other Tertenants, of which only *W. F.* appeared and pleaded this very Fine, (now endeavoured to be reversed) and five Years Nonclaim, in Bar of the Writ of Error; and upon Demurrer to this Plea, the Plaintiff had Judgment, and the Fine was reversed, because *non potest adduci exceptio ejusdem rei cujus petitur dissolutio*. *Raym.* 461. *Cockman versus Farrer*. 1 *And.* 172, and 74. S. P.

See Cro.
Eliz. 468.
Owen 25.
Wright v.
Wick-
ham.

Sid. 213.
3 Lev. 72.
130, 146.

(N)

In Parliament. See *Act of Parliament.* (E) per totum.

1. Judgment in Affise, and a Writ of Error brought in *B. R.* to reverse it, and there it was affirmed, and a Writ of Error brought in Parliament; the Chief Justice mult bring the Record and Transcript into Parliament, and after the Errors are examined it must be remanded, but the Transcript of the Record remains in Parliament. *Dyer* 385. *Whalley's Case.*

2. The Method of bringing a Writ of Error in Parliament, upon a Judgment affirmed in *B. R.* is to petition the King, which being referred to the Attorney-General, he writes on the Petition, *This is to be granted of Course, without Prejudice to your Majesty*; which being brought back to the King, he writes upon the Top of the Petition, *Fiat justitia*; the Question was, if Judgment be given in the Common Pleas, and that Judgment affirmed in *B. R.* upon a Writ of Error brought, whether upon the Affirmance of that Judgment a Writ of Error will lie in Parliament? the Better Opinion was, that it would not, because if the Parliament should reverse the Judgment in Error given in *B. R.* that would not reverse the first Judgment given in the Common Pleas; therefore Execution might be taken upon that Judgment since, because 'tis double, and there was but one reversed. *Moor* 834. *Heydon versus Sheppard.* 2 *Bulst.* 162. *S. C.* See *Superfedeas.* (C) 3.

3. In the aforesaid Case of *Gofton* and *Sedgwick*, it was held by *Hale*, Ch. Just. that a Writ of Error in Parliament must be returnable *ad proximum Parliamentum* on such a Day; for 'tis ill if a particular Day be not set forth; and if that Day is two or three Terms distant, then the Writ will be no *Superfedeas*, because it appears to be for Delay; 'tis true, in the Register there is a *Scire facias*, *ad prox' Parliamentum*, without naming a Day; but no Writ of Error without it. 1 *Mod.* 106.

4. Writ of Error returnable in Parliament upon a Judgment in *B. R.* and the Transcript of the Record was certified, and Errors assigned; but before they were argued the Parliament was dissolved; and upon a Motion in *B. R.* to have Execution on the Judgment, it was granted, because the Record it self was never out of the Court, but only a Transcript thereof carried up to the House of Lords by the Ch. Justice, and left there; and if the Judgment of *B. R.* is reversed, the Transcript is returned, and the Record in *B. R.* made up according to that Transcript. *Raym.* 5. *Dethick versus Bradbourn.*

5. Error in Parliament to reverse a Judgment in Dower given in *B. R.* the Writ was discontinued by the Prorogation of the Parliament; then another Writ was brought, *Teste* the last Day of the Sessions, returnable 19 November, being the Day to which the Parliament was prorogued; adjudged, that because of the Length of Time on which this Writ was returnable, it shall be no *Superfedeas*. 1 *Vent.* 31. *Wortley versus Holt.*

6. The Reason why 'tis no *Superfedeas*, is because the Writ of Error is brought in the same Court; but if 'tis brought in the Exchequer-Chamber, and discontinued, and another Writ of Error is brought in Parliament, that is a *Superfedeas*. 1 *Vent.* 100. 1 *Mod.* 285. *S. P.* 2 *Cro.* 241. *S. P.*

7. A Rule was made by the House of Lords, that all Causes *there depending* should not be discontinued by the intervening of a Prorogation; after this Rule was made, a Writ of Error was brought in Parliament on a Judgment in Ejectment, *Teste* 30 Novemb. returnable 13 April following, that being the Day to which the Parliament was prorogued; adjudged, that the Rule made by the Lords did not extend to this Case, because the Cause would not be depending in the House of Lords till the the Return of the Writ; but here being a whole Term, (*viz.*) *Hillary-Term*, intervening between the *Teste* and Return, the Plaintiff in the Action moved the Court for their Opinion, whether he might take out Execution; but no Rule was made. 2 *Lev.* 120. *Lord Eure versus Turton.*

8. *Nota*, it was declared by the Lords, and the Law is now taken to be, that a Writ of Error in Parliament doth not determine by a Prorogation. 2 *Lev.* 93. *Gofton versus Sedgwick.*

9. Debt on a Bond in *C. B.* and after a Judgment for the Plaintiff, a Writ of Error was brought in *B. R.* and Bail put according to the Statute, and the Judgment affirmed; thereupon a Writ of Error was brought in Parliament, but the Clerk of the Errors refused to allow the Writ, unless the Party would give a new Recognizance of Bail; and upon Motion it was insisted, that this was not required by the Statute 3 *Jac.* 1. *cap.* 8. but adjudged, that the first Recognizance doth not include Payment of Costs to be assessed in the House of Peers, which Costs ought to be paid; therefore a new Recognizance ought to be given within the Intent of that Statute. 1 *Salk.* 97. *Tilly versus Richardson.*

10. Judgment in Ejectment in *B. R.* was given for the Defendant, and upon a Writ of Error in Parliament that Judgment was reversed; whereupon the Plaintiff applied to *B. R.* to enter up the Judgment given by the House of Lords; it was objected, that it could not be done there, because the Lords have only the Transcript of the Record before them; adjudged, that where Judgment is given for the Plaintiff, and that is reversed in Error, the Defendant is in *statu quo*, &c. and no new Judgment is necessary; but if 'tis given for the Defendant, (as in the Principal Case) and reversed, a new Judgment must be given to put the Plaintiff in Possession of that which he demands, which the Court of *B. R.* could not do for the Plaintiff; because when they have given Judgment upon the Original, they have executed their Authority wholly; and tho' 'tis true, that the Lords

* (*Viz.*) have only the Transcript of the Record, yet in Judgment of Law, they have the very Record it self; for the Writ of Error mentions *Recordum & processum*, and not *Transcriptum*; whereupon the Lords entered the * new Judgment. 1 *Salk.* 403. *Phillips versus Berry.* *Antea* Error. (A) Terminu' S. C. præd'.

(O)

In Sheriffs in executing Writs.

1. **W**Here the Sheriff is either Plaintiff or Defendant, the Writ must be directed to the Coroner, and therefore where one of the Cognisees in a Fine was Sheriff, the Writ of Covenant was directed to the Coroner. *Cro. Car.* 300, 415. *Dene versus Smithier.* *W. Jones* 352. S. C. reported in another Manner; and *W. Jones* 373.

(P)

Where the Record is not well removed.

1. **W**rit of Error to remove a Record out of *Durham* was directed to the Bishop and eight more, and the Record was certified by those eight, without the Bishop, and it was held not to be well removed; for it doth not appear, that the Bishop was dead or removed. 2 *Cro.* 254. *Odell versus Moreton.*
2. Judgment was given *quod computet, &c.* and before the final Judgment was given a Writ of Error was brought; adjudged, that the Record was not well removed, because until final Judgment is given, the Chief Justice of the Common Pleas hath no Authority to send it, and that Court may proceed, tho' the Record be marked *Mittitur.* 11 *Rep.* 38 *Metcalf's Case.*
3. The Plaintiff had a Verdict in a *Quare Impedit, &c.* the Defendant brought a Writ of Error in the King's Bench, *Quia in recordo & processu & in redditione judicii loquela quæ fuit Coram nobis*; it should have been *coram vobis.* *Dyer.* 76.

(Q)

Of Bail in a Writ of Error. See antea *Bail.* (E) per totum.

1. **J**udgment against an Executrix, who brought a Writ of Error; adjudged, she shall not find Bail upon the Statute 3 *Fac. cap.* 8. for tho' the Words of the Statute are general, yet 'tis intended where a Writ of Error is brought upon a Judgment given against the Party himself, and not where 'tis Special, as in this Case 'tis, (*viz.*) *de bonis Testatoris*, and Damages only *de bonis propriis*; and therefore it would be unreasonable for the Executor to find Bail to pay the entire Condemnation with his own Goods, as he must do if he put in Bail by Virtue of this Statute wherefore a *Superfedcas* was awarded. 2 *Cro.* 352. *Goldsmith versus Platt.*
2. Judgment in Debt upon an *in simul computasset*, the Defendant brought a Writ of Error in *B. R.* and the Plaintiff in the Action moved, that he might put in Bail according to the Statute 3 *Fac.* but adjudged he should not, for this Case is not within the Statute, because the Debt which was recovered did not arise upon any Contract, or other certain Duty, but merely upon an Account between the Parties, which is altogether incertain; and this is the true Reason why Bail shall not be given upon a Writ of Error, on a Judgment on a Bond of Award; for tho' when the Arbitrators have awarded, that the Controversies shall be ended by the Payment of a Sum of Money, the same is then a Debt; but 'tis not such a Debt which arises by a Contract, or which was a Duty certain before, and therefore not a Debt intended by the Statute. *Telv.* 227. *Girling's Case.*

I

Escape.

Escape.

Escape on mesne Proceſs, and what ſhall be an Escape. (A)	Where Debt lies, and where not, for an Escape, and where an Action on the Caſe lies. (F)
Of Escapes on Executions. (B)	
Escapes after <i>Habeas Corpora</i> by Priſoners in Execution. (C)	Of Actions by and againſt Executors and Adminiſtrators for Escapes. (H)
Escapes and Freſh purſuit. (D)	Pleading in Actions for Escapes not good. (I)
Escapes of Felons, &c. where the Hundred or Town is liable. (E)	Pleadings therein good. (K)

(A)

On mesne Proceſs, and what ſhall be an Escape.

1. **C**ASE, &c. lies againſt the Sheriff, for ſuffering an Escape upon mesne Proceſs, becauſe the Plaintiff is prejudiced in his Suit againſt the Party. *Cro. Eliz.* 623, 625. *Bennion verſus Watſon*, and 652. *Bonner verſus Stokeley*, S. P.

2. If the Defendant is arreſted on mesne Proceſs, and reſcued before he is brought to Gaol, the Sheriff is not chargeable. 2 *Cro.* 419. *May verſus Sheriffs of Middleſex.* S. P. *March contra.* *Moor* 852. *Poſtea pl.* 4. S. C.

3. The Defendant was arreſted by the old Sheriff, and afterwards the new Sheriff ſuffered him to eſcape; adjudged, that he is chargeable in an Action on the Caſe for this Escape. 2 *Cro.* *Sir Euſebie Andrew's Caſe.*

4. The Defendant was arreſted upon a Bill of *Middleſex*, and afterwards eſcaped; upon which an Action was brought againſt the Sheriff for an Escape, who pleaded, that the Perſon was reſcued from them; adjudged no good Plea. *Moor* 852. *May verſus Sheriffs of London.* *Antea pl.* 2.

5. There is a Difference in declaring againſt the Sheriff upon mesne Proceſs, and an Escape on Execution; for in the firſt Caſe, the Plaintiff muſt declare, that the Perſon who eſcaped *non comperuit ad diem*, but that the Sheriff *ad largum ire permiſit*; but if 'tis on an Execution, then *ad largum ire permiſit* is ſufficient. *Noy* 72. *Sheriff of Nottingham's Caſe.*

6. Where a Sheriff removes a Priſoner out of the County, or from one Place to another, in the County, if it was for the Eaſe and Delight of the Priſoner, 'tis an Escape; and ſo it was adjudged where the Gaoler went with his Priſoner to a Bear-baiting in the ſame County; or if he ſuffer him to go at Large to work for the Benefit of the Gaoler. *Hetl.* 34.

7. Several Informations were exhibited againſt Sir Miles Hobart and William Stroud, for their ſeveral Escapes, in which the Caſe was thus: (*viz.*) They were by the King's Command committed for a Miſdemeanor alledged againſt them in the Houſe of Commons in the laſt Parliament, and both of them by a Rule of Court in *B. R.* were removed to the *Gatehouſe*; the Keeper whereof received Sir Miles Hobart into his Houſe adjoining to the Priſon, but it was no Part thereof; Mr. Stroud being ſick could not be removed to the *Gatehouſe*, but was ſuffered by the Keeper to continue in his Lodgings in *Fleetſtreet*; afterwards the Plague encreasing in *London*, the Keeper gave them Leave to retire to their reſpective Houſes in the Country for the Space of ſix Weeks; they having never been in the old Priſon, unleſs when they withdrew to a Cloſe-ſtool which ſtood near the Parlour, and was in the old Priſon; and all this Matter appearing upon Evidence to the Jury, it was a Queſtion, whether they were ever actually in Priſon, ſo as to maintain this Information for an Escape; and adjudged, that their voluntary Retirement to the Cloſe-ſtool made them Priſoners, and that tho' a Priſoner departs out of the Priſon with Leave of the Keeper, 'tis an Offence as well in him as the Keeper; and laſtly, it was reſolved, that the Priſon of the King's Bench is not a local Priſon confined only to one Place, but that any Place is a Priſon, where a Man is reſtrained of his Liberty. *Cro. Car.* 152. *Sir Miles Hobart and William Stroud.* *Hill. Car.* 6.

8. In an Action of Debt for an Escape, upon *Nil debet* pleaded, the Sheriff may give a freſh Purſuit in Evidence; this Cauſe being tried at Bar, the Evidence was, (*viz.*) upon an *Habeas Corpus ad teſtificandum*, the Priſoner went into the Country a long Time before the Aſſiſes, and ſtaid long after, and went threeſcore Miles beyond *Wells*, where the Aſſiſes were held; adjudged, this was an Escape; for tho' the Sheriff need not bring the Priſoner the direct Way, for fear of a Reſcous, he muſt not carry him too far round about, if he doth, 'tis an Escape; but in this Caſe he went threeſcore Miles beyond the Place where the Aſſiſes were kept, which is an Escape; ſo the Plaintiff had a Verdict. 1 *Mod.* 116. *Mofedell's Caſe.*

9. *Scire facias* by Executors, to have Execution of a Judgment obtained by their Teſtator *unde Executio reſtat faciend'*; the Defendant confeſſed the Judgment was had againſt him, but that a

Ca. fa. issued on it, and that he was taken and committed to the *Fleet*, and that he paid the Sum mentioned in the Condemnation to the Warden of the *Fleet*, who thereupon suffered him to go at Large; and upon a Demurrer this was adjudged no Plea, because this was a voluntary Escape in the Warden. 1 *Mod.* 194. *Compton versus Ireland.*

10. A *Committitur* was entered on the Roll, and a Motion was made to vacate it, which was granted, that the Plaintiff might take out what Execution he would; for the Entry of the *Committitur* shall not charge the Marshal with an Escape; but if after the *Committitur* entered the Party be in Prison, and escapes, the Marshal shall be charged. *Sid.* 220. *Cony versus Jacob.*

11. Case, &c. for an Escape against a Serjeant of the *Compter* in *London*, the Defendant pleaded, that the Sheriff of *London* commanded him (the Defendant) to deliver the Prisoner to him, which he did, and traversed, that he was guilty *aliter vel alio modo*; and upon a Demurrer to this Plea, it was held good, if it had not been for the Traverse; for the Serjeant is the Sheriffs Officer; and 'tis usual to plead, that the Prisoner is in the Custody of the Sheriff, who in *London* may make his House the Prison; but if he be taken upon a *Plaint*, he is properly in Custody of the Serjeant, and if he escapes an Action lies against the Serjeant. *Sid.* 318. *Husband versus Cole.*

12. Case, &c. upon an Escape in *mesne Process*, the Action was brought in *Excester* against the Sheriff of *Devon*, in which the Plaintiff declared, that *W. R.* was arrested at *Toppsam*, which is in *Devonshire*, and that the Defendant suffered him to escape at *Excester*, which is a City and County of itself; so he declared of the Taking in one County, and of the Escape in another County; and this was moved in Arrest of Judgment, but it being a Verdict, the Court held, that it shall be intended, that the Defendant had the Custody of the Prisoner at *Excester*, either upon an *Habeas Corpus*, or upon fresh Pursuit; tho' in *Nottingham*, which is a City and a County, the Judge sits in the City, and tries Causes for the County at Large. *Sid.* 364. *Hopping versus Holmy.*

13. Debt against the Sheriff, for suffering a Prisoner in Execution voluntarily to escape; the Defendant *protestando* that he did not suffer him voluntarily to escape, pleads, that he took him again upon fresh Pursuit; and upon Demurrer to this Plea it was objected, that the Defendant did not traverse the voluntary Escape; but adjudged, that he need not, because it was impertinent for the Plaintiff to alledge it in his Declaration; it would come properly to his Replication, but not there. 1 *Vent.* 217. *Sir Ralph Bovey's Case.* See (B) *pl.* 12. and *Lutch Harvey versus Sir Geo. Reynolds, S. P.*

14. Escape, &c. in which the Plaintiff declared, that he brought an Action of Debt against *T. S.* in the Court at *Ely*, upon a Bond made *infra jurisdictionem Curiae*, upon which *T. S.* was taken, and the Defendant suffered him to escape: Upon *non est factum* pleaded, the Jury found all the said Matter, but the Bond was not made *infra jurisdictionem Curiae*, and the Question was, whether an Action of escape would lie? because, since the Bond was not made within the Jurisdiction of the Court, all the Proceedings were *coram non Judice*; and *per Curiam*, this is no Escape, for the Party by pleading *Non est factum* could not give the Court any Jurisdiction, where originally it had none. 2 *Mod.* 29. *Squibb versus Hale.*

15. In a Special Verdict in an Action of Escape, the Question was, whether *Sir Jeremy Witchcote*, Warden of the *Fleet*, was liable to the Escapes suffered by *Duckenfield* his Lessee, he being insufficient; the Verdict found, that *Duckenfield* was insufficient when put in, and at the Time of the Escapes, but it was not found, that he was insufficient at the Time of the Action brought; and for that Reason the whole Court were of Opinion, that they could not give Judgment upon this Verdict; whereas, if that Matter had been found, they all agreed, that the Warden had been liable; therefore the Plaintiff was permitted to take a *Venire facias de novo*, but his Counsel advised rather to have a *Nil capiat per Billam* entered, and so bring a Writ of Error, because they were of Opinion, that in a Special Verdict it shall be intended, that *Duckenfield* was insufficient at the Time of the Action brought, especially since 'twas so alledged in the Declaration. 1 *Vint.* 314. *Plomer versus Witchcote.* 1 *Lev.* 158. *Jones* 60. *S. C.* 2 *Mod.* 119. *S. C.*

16. Case against the Sheriff of *Nottingham*, for an Escape, who pleaded, that he received a Writ of Privilege from the Duke of *Newcastle*, reciting, that he was a Justice of Peace, and *Custos Rotulorum* of that County, and that the Prisoner was convened before the Justices at their Sessions, and by the Law ought not to be molested *eundo & redeundo*, during the Time he had any Cause there depending, and so demanded the Sheriff to dismise him, which he did accordingly; and upon Demurrer this was adjudged an ill Plea, for the Justices cannot discharge a Person arrested; because, if they should, then an Inferior Court might controul the Process of *B. R.* Mr. *Siderfin* says, the Defendant offered to waive his Plea, and to plead Not guilty. *Raym.* 100. *Clerke versus Molineux.*

17. In Escape against the Sheriffs of *London*, the Plaintiff declared, that he levied a *Plaint* against *W. R.* being then in the *Counter*, upon a former *Plaint* levied against by *L. R.* and that he being so in Custody, did escape; and upon Demurrer to the Declaration, it was insisted, that there ought to be a Precept issued out on the last *Plaint*, on which the Sheriff might have returned *Copi*; but adjudged, that on Entering a *Plaint* in the *Counter*, there never is any Precept awarded, but the Serjeant at Mace arrests the Party by his general Authority, and that by entering the *Plaint*, and charging him in the *Counter*, he is in actual Custody of the Sheriff. 1 *Salk.* 273. *Jackson versus Humfries.*

18. Debt upon Bond conditioned to pay 100 *l.* the Defendant was committed to the Marshal for want of Bail; but upon Application to the Justices of Peace he was discharged by the Act for Relief

Sid. 269.
1 *Lev.*
159.

lief of Insolvent Debtors; afterwards the Plaintiff retook him upon an Escape-Warrant, and upon a Motion to be discharged it was adjudged an Escape, for being in Prison, and charged with 100*l.* and more, for Debt and Damages; the Justices had no Authority, and therefore the Discharge by them was illegal. 1 *Salk.* 273.

19. Indictment against the Keeper of *Newgate*, for that one *Birkenhead* was committed to *Newgate*, in Custody of the Sheriff of *Middlesex*, and being in Custody of *Fell*, &c. *oneratus* with High Treason, he suffer'd him negligently to escape; after a Verdict for the King, it was moved in Arrest of Judgment, that this Indictment was ill, because the Warrant of Commitment of *Birkenhead* was not set forth; adjudged, that 'tis not enough to say, that he was *Oneratus*, but it must appear he was committed for High Treason; the Judgment was arrested. 1 *Salk.* 272. *The King versus Fell.*

20. Debt upon an Escape against the Marshal, who pleaded *Nil debet*, and at the Trial the Evidence was, that the Prisoner being upon Bail, surrendered himself, by entering *Reddidit se* in the Judge's Book, which the Plaintiff's Attorney accepted, and filed a *Committitur* with the proper Officer; there was a Verdict for the Plaintiff upon this Evidence, and upon a Motion for a new Trial, it was adjudged, that the *Reddidit se* is an immediate Discharge of the Bail, but that he is not in Custody till the *Committitur* was entered, nor then, so as to charge the Marshal with an Escape, unless the *Committitur* is entered in the Office as well as with the proper Officer, or the Marshal served with a Rule; but this ought to be insisted on at the Trial, 'tis now too late after a Verdict. 1 *Salk.* 272. *Watson versus Sutton.*

21. By the Statute 1 *Annæ*, cap. 6. 'tis enacted, that if any Person in Prison, upon mesne Process or Execution, shall escape, then upon Oath made in Writing before a Judge, or before a * Commissioner, the same Thing being duly filed, such Judge may make a Warrant (reciting the * 5 *Annæ*, Action, Execution, or Contempt, for which the Person escaping stood charged) directed to all cap. 5. Sheriffs, Mayors, &c. to retake and commit such Person to the common Gaol where taken, there to remain without Bail or Removal, till the Debt be satisfied * or discharged by due Course of Law: The Defendant being in Custody upon mesne Process, escaped, and was † retaken upon an Escape-Warrant; and *B. R.* was moved, that upon bringing the Money into Court, he might be discharged, but it was denied. *Mod. Cases* 21. *Hotherhall versus Bowes.*

* If the Plaintiff doth not proceed in two

Terms, he shall be discharged upon common Bail. † He may be retaken on a Sunday. See Parker v. Sir William Moor.

22. A Prisoner in the *Fleet* escaped, and was retaken upon an Escape-Warrant, and committed to *Newgate*, and upon *Affidavit* made, that nothing was due to him, (he being Plaintiff in an Action of Debt against the Defendant) and having disabled himself by this Escape from coming before a Judge to shew his Cause of Action, the Court ordered common Bail. *Mod. Cases* 63. *Cotton versus Martin.*

23. A Prisoner in the King's Bench escaped, and was retaken upon an Escape-Warrant, by Persons who had no Authority to take him, and was brought by them to the Sheriff, together with the Warrant, who, upon a Motion made against him to return the Warrant, thus returned it, (*viz.*) that *W. R.* was brought to him in Custody of *L. L.* and others to him unknown, by Virtue of a Warrant, &c. and that he detained him in Custody *juxta exigentiam Warranti prædicti*; now, tho' this new Act being in Aid of the Execution of Justice, and for that Reason ought to be favourably extended; yet the Party being brought to the Sheriff by a Warrant illegally executed, 'tis as if there had been no Warrant at all, and therefore he cannot detain him, especially since it doth not appear that any of the Persons who brought him was a Constable, or other Officer of the Peace, or affirmed himself to be so, for 'tis from such only that the Sheriff is to receive him, and from no other. *Mod. Cases* 154. *Rich versus Doughy.*

(B)

On Executions. See Sheriff. (H) 4.

1. **T**HE Defendant was in Prison upon an Execution, at the Suit of the Plaintiff, who died Intestate; the *Gaoler* suffered him to go with a Keeper into another County, this was adjudged an Escape, and since the Power of the Sheriff extended no farther than his own County, the Person thus in Execution might bring an Action of False Imprisonment for detaining him in another County. *Plow. Com.* 36. *Platt versus Sheriffs of London.* *Dyer* 166. *S. P.* *Hob.* 212. *Balden versus Temple.* *S. P.*

2. Where the Defendant is taken in Execution, and *rescued* before he is brought to Gaol, the Sheriff shall be liable for the whole Debt, and he shall have his Remedy against Rescuer by an Action on the Case. *Dyer* 241. *March* 1. *S. P.*

3. Debt against the Sheriffs of *London*, upon an Escape, setting forth, that *B. G.* was in Execution in *Ludgate*, *sub Custodia* of the former Sheriffs, in the first Year of the King, and so continued *sub custodia* of the next Sheriffs, in the second Year, and of the next Sheriffs, in the third Year of the King, and they suffered him to escape; they pleaded, that before the Escape on the Day and Year mentioned in the Declaration, *I. S.* and *R. B. adunc Vicecomites*, suffered him to escape; this was no good Plea, for when the Defendants are to discharge themselves by a former

Escape,

Escape, they must alledge it in Fact, and precisely, which was done here. *Serjeant Minor's Case.* *Dyer* 66.

4. The Marshal suffered one in Execution to go at large, the Plaintiff consenting, and the Chief Justice directing; afterwards the Defendant returned to the Prison, and was in Execution again, if the Marshal then suffer him to escape, he is not liable. *Dyer* 275, 279. *S. P.*

5. The *Deputy Marshal* suffered one who was in Execution to go into *Norfolk* with a *Keeper*; it was adjudged in an Action of Debt brought against him, that this was an Escape. *Dyer* 278. *Gawdy's Case.*

6. The Duke of *Norfolk* being Marshal of *England*, made one *Gawdy* his Deputy, *per nomen Mariscalli* of the *King's Bench*; afterwards he suffered a Person in Execution to go into the Country with a *Keeper* for a certain Time, and he returned on the Day to Prison; the Judgment-Creditor brought an Action of Debt against *Gawdy*, by the Name of Under-marshal and Keeper of the Prison of the *Marshalsea*, alledging, that he suffered the Prisoner to Escape; the Defendant pleaded, that he did not suffer him to escape; upon which being at Issue, all the Matter aforesaid appeared upon the Evidence; and the Question was, if the Defendant should be charged with the Debt, because he was not *Marshal*, but Under-marshal only, and adjudged he should be charged, and that in *Middlesex*, where the Escape was supposed to be, and not in *Surrey*, where the Prison is. *Dyer* 278. *Gawdy's Case.*

7. In Debt, &c. the Plaintiff had Judgment, and after the Year he brought a *Ca. sa.* upon which the Defendant was arrested, and the Sheriff suffered him to escape; now, tho' the *Ca. sa.* was erroneous, being sued out after the Year, yet it was a sufficient Authority for the Sheriff to take the Defendant, and he might have justified under it, if False Imprisonment had been brought against him; therefore he shall be charged if he let him go at large. *Cro. Eliz.* 188. *Buj's Case*, and 576, *Conier's Case.* *S. P.*

8. In False Imprisonment, the Defendant pleaded, that a *Ca. sa.* issued to the Sheriff at the Suit of *B. G.* against the now Plaintiff, and that the Sheriff made his Warrant directed to the Defendant to arrest him, by Virtue whereof he did take him, &c. the Plaintiff replied, that after the *Ca. sa.* and before the Taking, he paid the Money to the Sheriff, who thereupon made a Warrant in the Nature of a *Superfedeas* directed to all his Bailiffs, to cease making Execution on the Plaintiff; and that the Defendant having arrested him, the said Plaintiff, he presently after the Arrest, shewed the Defendant this Discharge; but notwithstanding he detained him in Prison, &c. adjudged, that because this was a Writ of Execution, to have the Money in Court, and it being paid to the Sheriff, and he having given a Discharge, the Plaintiff ought not to have been taken and detained. *Cro. Eliz.* 404. *Stranger versus Stanlake.*

9. Upon a *Capias Utlegatum*, after Judgment, the Sheriff suffered *B. G.* to escape; an Action was now brought against him *tam quam*, &c. in which the Plaintiff had Judgment; and upon a Writ of Error brought, it was first assigned for Error, that the Action ought not to have been *tam quam*, &c. but it should be brought by the Plaintiff only; this was over-ruled, because 'tis a Contempt to the Crown to suffer him to escape after an Outlary; the second Error was, that the Action for the Escape was brought against the Sheriff of *Berks*, and laid in *R.* in which Action the Plaintiff declared, that he had obtained a Judgment against *B. S.* of *R.* in the County of *Bucks*; and that upon a Warrant of a *Capias Utlegatum*, he was arrested at *R. aforesaid*, which must be at *R.* in the County of *Bucks*, and then the Arrest was tortious, because it was made by the Sheriff of *Berks* in the County of *Bucks*; and upon such an Arrest there can be no escape, and so it was adjudged. *Cro. Eliz.* 877. *Eaton versus Lloyd.* See *Dyer* 60.

10. The Defendant being in Execution, the Sheriff voluntarily let him go at large; the Prisoner returned to the Gaol, and there remained till another Sheriff was made, and then he escaped; adjudged, that neither the Sheriff or Gaoler are chargeable, because by the Prisoner's going at large, the Execution was discharged, and he could not be taken again, tho' the Party yield himself, and the Creditor consents. *Hob.* 202. *Sheriff of Essex's Case.* 3 *Rep.* 43. *Boyton's Case.* *S. P.* This Case is not Law. See *Postea*, pl. 25.

11. The Defendant was in Execution at the Suit of the Plaintiff, and at the Suit of *Dighton*; the old Sheriffs delivered his Body to the new Sheriffs by Indenture, wherein the Execution at the Suit of *Dighton* was mentioned, but that at the Suit of the Plaintiff was omitted; now, tho' he was actually in Prison at the Suit of *Dighton*, yet as to the Plaintiff this was adjudged an Escape, and the old Sheriffs are liable, for in Law the Prisoner is still in their Custody. 3 *Rep.* 71. *Wylly's Case's Moor* 688. *S. C.* 2 *Leon.* 54. *Smalman versus Lane.*

12. Judgment against Husband and Wife, and she was taken in Execution and escaped, for which an Action of Debt was brought against the Marshal; it was insisted for him, that the Plaintiff was not wholly deprived of the Debt, because her Husband was liable to the Execution; but adjudged, that the Action did lie against the Marshal. 2 *Cro.* 657. *Whiting versus Sir Geo. Reynell.* * 3 *Bull.* 150. *Wood versus Dr. Sutcliffe.* 2 *Bull.* 320. *S. C.* *Sutcliffe versus Sir Geo. Reynell.* * 2 *Roll.* *Antea Audita Querela.* (B) 19. *S. C.* Baron and Feme. (I) 13. *S. C.*

13. The Defendant was taken in Execution by the old Sheriffs, who *in exitu ab officio*, did by Indenture debito modo consecr, deliver him to the new Sheriffs, *virtute cujus* he was in Execution under them; and upon an *Habeas Corpus* brought, was delivered to the Marshal, who suffered him to escape, against whom an Action was brought; and upon Demurrer to this Declaration it was objected, that the Prisoner was still in Custody of the old Sheriffs, because it was

not alledged, that he was delivered to the new Sheriffs, *with the Cause of his Imprisonment*, but only *per Indenturam debito modo confectam*, he was delivered, &c. which may be true, and for other Causes, the Court was divided. 2 Cro. 587. *Dorndswell* versus *Sir Geo. Reynells*.

14. Debt upon an Escape, where the Party was taken upon an *Outlary*; after Judgment, upon *Outlary*, Demurrer, the Objection was, that the Action was not brought *tam pro Domino Rege quam pro seipso*; but adjudged, that the Plaintiff might bring Debt for what he had lost. 2 Cro. 619. *Moor* versus *Sir Geo. Reynells*. (B) 6, 8. Bridg. 6. Latch 200.

15. The Prisoner was taken in Execution by a *Ca. sa.* by an Under-Sheriff, who suffered him to go at large; the Sheriff died, a new Sheriff was made, and the same Person continued Under-Sheriff, and procured the Plaintiff to take out a new *Ca. sa.* which was done, and the Person retaken, and escaped, the new Sheriff is not liable, because the Retaking in Execution was not lawful, for by the first Escape the Execution was discharged. *Hob.* 202, not Law. See 1 *Leon.* 78. 2 *Leon.* 96. S. C. not Law. *Postea* pl. 25.

16. Debt against the Sheriff, for suffering *B. G.* against whom the Plaintiff had recovered as *Executor* of *W. S.* to escape; and in reciting the first Action, 'tis alledged that he recovered against him as *Administrator*, which cannot be. 2 Cro. 394. *Slingsby Mil.* versus *Lambert*. 1 Roll. Rep. 276.

17. A Man was in Custody of the Officer of the Sheriff by mesne Process, and being outlawed after Judgment, at the Suit of another; the Judgment-Creditor brought a Warrant upon a *Capias Utlegatum*, and delivered it to the Sheriff's Officer, in whose Custody he was, who refused to execute it, and afterwards the Prisoner escaped; adjudged, that an Action of the Case did lie against the Sheriff, wherein the Plaintiff might declare, that he did arrest the Party by Virtue of the Warrant, and suffered him to escape, because upon the Delivery of the Warrant to the Officer, he is immediately in Custody at the Suit of the Plaintiff, by Judgment of Law, without an actual Arrest, and the Writ is not only *quod capias*, but also *quod salvo Custodias*. 5 Rep. 89. *Frost's Case*.

18. *Sci. sa.* on a Recognizance, and after two *Nibils* returned, the Judgment was, that the Plaintiff *recuperet debitum*, and a *Lewari facias* to the Sheriff, who returned *Nulla Boni*, and afterwards the Defendant was taken upon a *Ca. sa.* and escaped; and upon an Action brought against the Sheriff, it was objected, that a *Ca. sa.* did not lie upon a Recognizance in Chancery; but adjudged, that after 'tis acknowledged, 'tis a Judgment on Record, and if so, the Party may have a *Ca. sa.* by Virtue of the Statute 25 Ed. 3. but if the *Capias* had been misawarded, the Execution is lawful, and the Sheriff is chargeable with the Escape. 2 Cro. 1. *Weaver* versus *Chifford*. 2 *Bull.* 65. S. C. 2 Cro. 288, 289. S. P. *Telv.* 42. S. C.

19. Upon a *Ca. sa.* against the Defendant, and *Non est inventus* returned, and a *Testatum*, that he concealed himself in *Lancashire*, a Writ was awarded to the Chancellor of the County Palatine, to command the Sheriff to take him, &c. so as the Chancellor should have him such a Day, &c. and the Chancellor commanded the Sheriff to take him, so as the Sheriff should have him such a Day, &c. and in an Action on the Case brought against the Sheriff for an Escape, and Judgment against him, and a Writ of Error brought, this Variance was assigned for Error, and that the Plaintiff ought to have brought Debt, and not an Action on the Case; but adjudged, it was at the Plaintiff's Election to bring either Action; and tho' there was a Variance, yet that being only Error in Process, the Sheriff shall not take Advantage of it. 2 Cro. 288. *Burton* versus *Eyre*.

20. Debt against the Sheriff of *Devon*, wherein the Plaintiff declared, that he recovered against *B. G.* and that he was taken in Execution by the Sheriff at *R.* in the County of *Devon*, and that he suffered him to escape in the Parish of *B. in London*: The Defendant pleaded in Bar, that *B. G.* was in his Custody, in Execution, until he broke the Prison at *R.* against the Will of the Defendant, and escaped; upon which he made *fresh Pursuit*, and retook him at *R.* the Plaintiff by Protestation that the Defendant did not make fresh Pursuit, pleaded, that after the Escape, and before he retook him, he suffered him to be a whole Day and Night out of his View at *London*; and upon Demurrer it was adjudged, first, that the Plea in Bar was not good, for the Plaintiff had declared of an Escape in *London*, and the Defendant justified the Retaking at *R.* so the Escape at *London* was not answered; and therefore if the Plaintiff had demurred upon the Bar, he should have Judgment; but he not denying the fresh Pursuit, but by Protestation, relying only upon this Matter, (*viz.*) That the Prisoner was out of the Sight of the Defendant, it was adjudged, that tho' he is out of Sight, yet if he is retaken upon a fresh Pursuit, he shall be in Execution at the Suit of the Plaintiff; and that if he fly into another County, the Sheriff may retake him there upon a fresh Pursuit, because the Escape was of his own Wrong, of which he shall never take Advantage. 3 Rep. 52. *Rigeway's Case*.

21. The Body and Goods of the Conusor were taken in Execution upon a Statute-Merchant; afterwards the Conussee agreed, that he should go at large; it was a Question, whether this was a Discharge of the whole Execution, or of the Imprisonment only. *Hetley* 79. *Wiggons* versus *Dray*, but in *Linacre* and *Rhodes*, 1 *And.* 266. 1 *Leon.* 231. 2 *Leon.* 96, it was adjudged a Discharge of the whole Execution, and that the Conusor shall have his Lands again immediately; but if the Sheriff had suffered him to escape, the Execution on the Land is not thereby discharged.

22. Case against the Marshal of *B. R.* wherein the Plaintiff declared that he had Judgment against *T. S.* in Debt, and that he was taken in Execution, and committed to the Defendant, who suffered him to escape at *D.* in the County of *H.* the Defendant confessed the Judgment, and that *T. S.* was committed in Execution at *Southwark*, &c. and that afterwards he escaped at *Southwark*

out of the Defendant's Custody, and contrary to his Will, and that he made fresh Pursuit after him, and that upon that fresh Pursuit, *scilicet ante diem exhibitionis Billa præd'*, (*viz.*) 9 die Novemb. Anno, &c. he retook him, &c. and that he is in Custody and demands Judgment; the Plaintiff demurred, and it was adjudged, that tho' the Plaintiff had set forth the Escape to be at *D.* in the County of *H.* and he confessed it to be at *S.* in *Southwark*, that this was good, without a Traverse of the Escape at *D.* for where a Man is at large, 'tis an Escape in any County; adjudged likewise, where the Escape is involuntary, and the Party is taken upon a fresh Pursuit, before any Action brought against the Gaoler, he shall be excused, and not punished by any Action; but if the Action against him is commenced before the Retaking, then 'tis otherwise. *W. Jones* 144. *Harvey* versus *Sir Geo. Reynolds*.

23. Debt against the Sheriff, for suffering a Man to escape who was in Execution upon a *Capias Utlegatum* on a Judgment of 60 *l.* recovered against him; the Defendant pleaded *Nul tiel Record* of the Recovery; and upon Demurrer to this Plea it was objected, that he ought not to plead *Nul tiel Record*, but *Nil debet*; but adjudged, that in an Action of Debt, as this was, the Defendant might plead *Nul tiel Record*. *Hob.* 209. *Maddox* versus *Young*. *Mich.* 15 *Jac.* 1 *Brownl.* 51. *S. C.*

24. Debt against the Sheriff of *Denbigh*, wherein the Plaintiff declared, that he recovered against *R. O.* and had Judgment for 40 *l.* Debt, upon which the said *R. O.* was afterwards outlawed; and that the Plaintiff delivered a *Capias Utlegatum* against the said *R. O.* to the Defendant, then Sheriff, and that he having been in his Presence, the Defendant would not arrest him, tho' required to do it, but returned *Non est inventus*; upon *Nil debet* pleaded, it was found for the Plaintiff, but it was moved in Arrest of Judgment, that this Action was brought in *Middlesex*, when it should be brought in *Denbighshire*, because the Fault was there in not arresting the Party; but adjudged, that the Action was well brought in *Middlesex*, because the false Return to the Court which sits in *Middlesex*, is likewise a Wrong done to the Plaintiff; and therefore he hath his Election to bring his Action in either County. *Mich.* 15 *Jac.* *Hob.* 209. *Packhurst* versus *Powell*.

25. Adjudged, that where a Man is in Execution, and escapes by the Negligence of the Gaoler, he may be retaken, either by the Sheriff, or by the Party at whose Suit he was in Execution; but if it was a wilful Escape, by the Consent of the Sheriff or Gaoler, they shall never retake him, but the Party may; because otherwise by the Contrivance or Insufficiency of the Gaoler, he may be without Remedy; and another Reason is, because the Party hath an Interest in the Body till the Debt is satisfied; or he may bring a *Scire facias* against him, to shew Cause why executionem habere non debet; for it would be a very great Mischief, that the Gaoler might at his Pleasure suffer a Prisoner in Execution to escape, and put the Plaintiff to an Action against him, who might not be able to pay the Debt; 'tis true, the Law was formerly otherwise. *Sid.* 330. *Allanson* versus *Butcher*. 1 *Lev.* 132, 211. *S. C.* 1 *Mod.* 194. See *Scire facias*. (H) 11. 1 *Vent.* 4, and 269. *James* versus *Peirce*. *S. P.* 2 *Lev.* 132. *S. C.* See Execution. (K) 7. See *pl.* 22. *S. P.*

26. Debt against the Son, who was Marshal of the *King's Bench*, for the Escape of one in Execution in the Time of his Father, who was likewise Marshal; upon the Trial, the Case upon the Evidence was, the Father suffered a Prisoner in Execution voluntarily to escape, who afterwards returned to the Prison, and was actually in Custody at the Death of the Father, and so continued when the Son was Marshal, who likewise suffered him voluntarily to escape, and whether he should be chargeable was the Question; it was insisted, that he should not, because after the voluntary Escape suffered by the Father, he could not take him again in Execution, tho' the Creditor might, and tho' he returned to the Prison, yet neither the Father or Son could detain him; but adjudged, that even where there is a voluntary Escape in the Time of the Predecessor, and another in the Time of the Successor, he shall be chargeable. 2 *Lev.* 109. *Lenthall* versus *Lenthall*.

27. In an Action for an Escape, the Question was, whether the Plaintiff may take out a *Ca. fa.* or *Fi. fa.* against the Defendant, after a voluntary Escape permitted by the Gaoler: *Et per Curiam*, 'tis at his Election to do either, which Judgment was affirmed upon a Writ of Error in the Exchequer-Chamber. 2 *Mod.* 136. *Basset* versus *Salter*.

28. An Action was laid in the County of *Somerset*, in which Judgment was obtained by *T. S.* who soon after died Intestate: The Plaintiff *Gold* took out Administration in the Court of the Bishop of *Bath and Wells*, and brought a *Scire facias* upon the Judgment against the Defendant in the Action, to shew Cause *quare executionem non haberet*, and had likewise Judgment upon the *Scire facias*, and was taken in Execution, and escaped, and the Plaintiff Administrator brought an Action against the Sheriff and had a Verdict; it was objected in Arrest of Judgment, that this Administration was void, because the Judgment obtained by the Intestate being entered on Record in the County of *Middlesex*, where the Records are kept, he had *Bona notabilia* in two Counties, and therefore ought to have a prerogative Administration, and not in the inferior Diocese; and the Administration being void, the *Scire facias* which depends on it must be likewise void: *Sed per Curiam*, admitting the Plaintiff recovered in the *Scire facias* without a Title, yet the *Ca. fa.* was a sufficient Authority to the Defendant to take the Body, tho' grounded on an erroneous Judgment, and the Execution good till avoided by a Writ of Error. 3 *Mod.* 324. *Gold* versus *Sirode*.

T. Jones
27.
Allen v.
Vintner.
S. P.

1 Vent. 4.
269. S. C.
T. Jones
21. S. C.

29. The Defendant was in Execution upon a *Ca. Sa.* returnable a Term after the *Teste*, so that there was a whole Term intervening between the *Teste* and *Return*; and in an Action of Debt for an Escape brought against the Sheriff, the Plaintiff had a Verdict; it was insisted in Arrest of Judgment, that this *Ca. sa.* was void, and if so, then Escape did not lie against the Sheriff; but adjudged, that there is a Difference between a *Capias on mesne Process*, and a *Capias ad satisfaciendum*; for in the first Case, if a *Term* is omitted, the Writ is void in all Personal Actions, for the Cause is discontinued and out of Court by such Omission; but in Executions the Omission of a Term doth not make the Writ void, because the Defendant hath no Day in Court, his Cause is ended, and he must be in Prison; whether the Writ is returnable or not; nor is it necessary, that it should be returned; yet if a Writ of Execution bear *Teste out of Term*, the Sheriff shall not be liable to an Escape. 2 Salk. 700. *Shirley versus Wright*. Furr. 29. S. C.

30. The Sheriff had the Defendant in Execution upon a *Ca. sa.* which issued after a Day and Year without a *Sci. fa.* and suffered him to escape; and in an Action of Escape brought against him, the Question was, whether he could take Advantage of this Error? and adjudged, that he could not. 1 Salk. 273. *Sherley versus Wright*. Far. 29. S. C. Moor 274. Dyer 175. Poph. 100. S. P.

203. 3 Cro. 271, 893. 1 Leon. 30. 8 Rep. 121. 2 Saund.

31. In a *Scire facias quare executionem non*, &c. the Defendant pleaded, that he was formerly taken in Execution upon a *Ca. sa.* upon the same Judgment, and the Sheriff suffered him to escape, to which the Plaintiff then and there consented; and upon Demurrer to this Plea, it was adjudged ill, because the subsequent Consent will not make it an *Escape with the Consent* of Plaintiff; and therefore he may retake the Party, or bring his Action against the Sheriff. 1 Salk. 271. *Scott v. Peacock*.

(C)

After Habeas Corpora brought by Men in Execution.

1. **H**abeas Corpus is an antient and legal Writ; but under Colour thereof the Sheriff is not to suffer a Prisoner to escape, and if he doth, he is liable to the Debt.

2. Judgment was had against the Defendant in *B. R.* and another Judgment against him in the Common Pleas, upon which he was taken in Execution, and committed to the Fleet, he brought an *Habeas Corpus cum causa*, and was removed into the King's Bench; if the Marshal suffer him to escape, he is liable to both Debts. Dyer 152, 307. S. P.

3. Where the Defendant is in Execution, and upon an *Habeas Corpus* brought to have his Body in Court on a Day certain, the Sheriff brings him to an Inn on the Road, and the Prisoner escapes into another County, but returns next Day to the Sheriff, who brought him in at the Return of the Writ; this is no Escape. Cro. Eliz. *Charnock's Case*. 3 Rep. *Boyton's Case*, S. P.

4. If upon an *Habeas Corpus* brought to have the Prisoner in Court, who is in Execution, the Gaoler suffers him to go at Large any longer Time than is convenient for his bringing him into Court, 'tis an Escape. Cro. Car. 9. 335. S. P. Hob. 202. *Balden versus Temple*, S. P.

5. A Suit being commenced against the Defendant in an Inferior Court, he brought a *Habeas Corpus cum causa*, and put in Bail before the Chief Justice, which not being filed, a *Procedendo* was awarded, and thereupon they proceeded, and had Judgment in the Court below, and afterwards the Defendant escaped; and upon an Action of Debt brought against him for this Escape, it was adjudged, that when Bail was put in upon the *Habeas Corpus*, tho' 'tis not filed, yet the Prisoner and his Sureties below, are discharged. 2 Cro. 203. *Farnely versus Bussell*.

6. In *Audita querela* against *Richard Halsey*, and others, supposing that he the Plaintiff being taken in Execution at their Suit by the Sheriff of Bedford, that he suffered him (the Plaintiff) to go at Large in Surrey, &c. in Southwark. &c. the Defendants pleaded, that they did not suffer the Plaintiff to go at Large; the Jury found, that the Plaintiff was taken in Execution, and by a *Habeas Corpus* was brought by the Gaoler to Smithfield, and there about eight of the Clock at Night the Prisoner escaped out of the Custody of the Gaoler, and went into Southwark, and lay there that Night, but the next Morning he returned to Smithfield to the Gaoler, who brought him to the Chamber of the Chief Justice, and returned his Writ, and that the Chief Justice committed him to the Marshalsea; and this was adjudged no Escape. Moor 257. *Bennett versus Halsey*.

7. *Audita querela* by the Plaintiff against the Defendants, suggesting, that he was taken in Execution at their Suit by a Warrant upon a *Ca. sa.* directed to the Sheriff of Suffolk, and that the Bailiffs let him go at Large at Lambeth: Upon *non permisissent ire ad largum* pleaded, a Special Verdict was found, that the Plaintiff was taken in Execution by a *Ca. sa.* and before the Return of the Writ he was brought to Westminster, and at his own Request was carried by the Bailiffs to Lambeth, where he remained in their Custody till the Day on which the Writ was returnable, and which Day they brought him to Westminster, and then delivered him to the Court according to the Writ; they likewise found, that Lambeth is a Vill near Westminster, but that 'tis not in the Road from Suffolk to Westminster, nor between the County of Suffolk and Westminster; and upon arguing this Special Verdict, it was adjudged no Escape, let it be in any County

whatsoever, whether in the Road, or out of it, where the Sheriff hath the Prisoner in Custody, if 'tis before the Return of the Writ, *Moor* 299. *Burton* versus *Andrews*. *Mich.* 32 *Eliz.*

(D)

Concerning fresh Pursuit. *Postea* (F) 2

1. IF one in Execution escape into another County, and the Sheriff on fresh Pursuit retakes him before any Action brought against him, this is no Escape, and the Prisoner shall never have an *Audita querela*, because his Escape was wilful, and he shall not take Advantage of his own Wrong. 3 *Rep.* 43. *Boyton's Case*. *Goldf.* 180. *S. P.* 3 *Rep.* 52. *Rigewale's Case*. *Poph.* 41. *S. C.*

2. Judgment against Husband and Wife, and she was taken in Execution, and because the Marshal suffered her to go at Large, an Action of Debt was brought against him, who pleaded, that she broke the Prison, and he took her in fresh Pursuit, and now hath her in Execution; adjudged no good Plea, because the Plaintiff had alledged, that the Defendant voluntarily suffered her to go at Large, which was not answered or traversed; and if so, then his re-taking her on fresh Pursuit is to no Purpose. 2 *Cro.* 657. *Whiting* versus *Sir Geo. Reynell*.

3. The Defendant being in Execution, brought his *Habeas Corpus* to come before a Judge at the Lent-Assises, and escaped to London, and in Easter-Term following was re-taken, and thereupon he brought an Action of False Imprisonment against the Bailiff; but adjudged, that the Re-taking on a fresh Pursuit was good, tho' it was at the End of the Year. *Godb. pa.* 177. *Stone's Case*.

(E)

Of felons, where the Hundred or Town are liable.

1. ONE was killed in the Evening, the Murderer escaped; by the Common Law the Town shall be amerced, for the Evening is Parcel of the Day, and not of the Night. 7 *Rep.* 6. *Sendill's Case*.

(F)

Where Debt lies for an Escape, and where not, or an Action on the Case. See *Sheriff*. (H) 4.

1. DEBT doth not lie against the Heir of a Gaoler upon an Escape; for the Heir shall not be charged in Debt, neither by the Common Law, nor by any Statute but where he is named, tho' it be recovered in the Life-time of his Ancestor. *Dyer* 271.

Cro. Eliz.
311. *S. C.*

2. Debt against the Sheriff, wherein the Plaintiff declared, that he had obtained a Judgment against *W. R.* and that his Body was taken in Execution by the Defendant, Sheriff of the County of *D.* and that he suffered him to escape in *Wurda de Cheap London*; the Defendant pleaded, that *W. R.* was taken in Execution 20 *Aprilis* 33 *Eliz.* and that he continued in Execution till the 8th of *December* following, on which Day he broke Prison, & a *Custodia ipsius R. & contra voluntatem ipsius R. evasit*, and that he retook him in *recenti infecutione*; the Plaintiff by Protestation, replied, that the Defendant did not make fresh Pursuit, and for Plea said, that before the said *W. R.* was taken, he was one whole Day and Night at London, in the Parish and Ward aforesaid, out of the View of the Defendant; and upon Demurrer to the Replication it was adjudged, that if a Prisoner escapes, and is out of the View of the Sheriff, yet, if fresh Suit is made, and he is re-taken upon such Suit, he shall be in Execution again, tho' he is taken in another County; and in such Case an Action will not lie against the Sheriff, but he may have an Action against the Prisoner for this Escape; but 'tis otherwise, if he escapes with the Consent of the Gaoler. *Pasch.* 36 *Eliz.* *Ridgway's Case*. 3 *Rep.* 522. *Moor* 660. *S. C.* By the Name of *Grills* versus *Ridgway*.

3. Action brought for Escapes always ought to pursue the first Action; therefore if the Escape be of one in Execution, Debt lies against the Sheriff; but if 'tis upon mesne Process, then an Action on the Case is the proper Remedy; but Debt will likewise lie. 2 *Cro.* 288. *Burton* versus *Eyre*.

4. Where the Sheriff himself is Plaintiff, he may neither bring an Action of Debt, or an Action on the Case for an Escape of the Prisoner; and where the Prisoner pleaded, that the Gaoler walked with him out of the Limits of the Gaol, &c. & ipsum ibidem ad largum ire permisit, but did not say *voluntarie*, and that afterwards he came of his own Accord to the Gaol, and then *evasit & exivit prout ei bene licuit*; this was held ill, because a negligent Escape is no Escape between the Sheriff and his Prisoner, but a voluntary Escape is; 'tis true, a negligent Escape is an Escape between the Sheriff and the Party at whose Suit the Prisoner was in Execution. *Moor* 577. *Savage* versus *Becham*.

5. Case, &c. wherein the Plaintiff declared, that he had brought an Action against *W. R.* for 30 *l.* and he not appearing, was outlawed, and was afterwards taken by the Defendant, being Sheriff, &c. upon a *Capias utlagatum*, who returned *Cepi*, but suffered him to escape; adjudged, that the Action would lie, and that the Jury ought to give the Plaintiff the Value of his Debt in Damages. *Moor* 641. *Evans* versus *Williams*.

6. In a Special Verdict in an Action of Debt against a Gaoler, the Case was, the Sheriff took a Man in Execution for a Debt, and committed him to the Gaoler of the County at *H.* when the Common Gaol was at *F.* and afterwards the Gaoler suffered him to escape; the Prisoner never having been in his Custody in the Common Gaol; the Question was, whether an Action of Debt lay upon this Escape, against the Gaoler, or whether it ought to be brought against the Sheriff? it was argued, that the Gaoler is liable; 'tis true, an Action of Debt did not lie against him at Common, but only an Action on the Case, which always supposes a Wrong; but by the Statutes 13 Ed. 1. *De mercatoribus*, and *Westm'* 2. cap. 11. Provision is made to secure the Party's Debt in Case of an Escape, (*viz.*) that he who actually suffers the Escape, shall be liable; and if he is not able, then *Respondent superior*; 'tis true, a Gaoler is a Servant to the Sheriff, and an Under-Officer, yet he is an Officer known to the Court, and fixt in his Office; because an *Habeas Corpus* may be directed to him, and the Duke of *Norfolk's* Case in *Dyer* 278, proves, that an Action of Debt lies against the Deputy-Marshall; then as to his Receiving the Prisoner in another Place, and not in the County-Gaol, that makes no Alteration; for 'tis not the Walls of the Gaol, but the being in the Custody of the Gaoler that makes the Prison; 'tis true, this Action hath been rarely brought against a Gaoler; the Reason may be, because they are indigent Persons: It was argued for the Defendant, that the Action lies against the Sheriff, and not the Gaoler; for 'tis the Sheriff's Gaol, and the Gaoler is but his Servant, and when the Prisoner is out of the Gaol, tho' in the Custody of the Gaoler, he acts but as the Sheriff's Bailiff or Servant; 'tis true, an Action of Debt for an Escape hath been brought against the Deputy Marshall, but the Reason may be, because he is a Person admitted by the Court to execute that Office, which other Gaolers are not; 'tis true an *Habeas Corpus* may be directed to them, but that doth not prove, that they are Officers known to the Court, because such Writs may be directed to any other Person, who hath the Custody of the Body; this is no Process of Charge or Discharge, there is no Record to charge him. The Case was not adjudged. *Hardr.* 29. *Wainwright* versus *Griffith*.

7. Debt against the Defendant as Superior, for the Escape of one in Execution, and in a Special Verdict the Case was, Sir *Jeremy Whitcomb* (the Defendant) was seised in Fee of the Office of *Warden of the Fleet-Prison*, who granted the same to *Duckenfield* for three Lives, reserving the Rent of 1000 *l. per Ann.* and took Security to save himself harmless from Escapes; the Grantee was admitted by the Court of *C. B.* and afterwards suffered several Prisoners in Execution for Great Debts, to escape, and went himself beyond Sea with one of them, and whether the Warden should be charged as Superior, was the Question; it was insisted for him, that he ought not, because at Common Law no Gaoler was answerable for Escapes; the Remedy was given by the Statute *W. 2. cap. 9.* which extends only to Arrears in Account, and the Warden cannot properly be said to be Superior to *Duckenfield*, during his Estate for three Lives, for he is the present Warden, and the other but in Reversion; but for the Plaintiff it was argued, that Debt did not lie at Common Law for an Escape, but an Action on the Case; and tho' the Statute *W. 2.* mentions Account, yet it extends to other Cases; after which Statute, and before the Statute *1 R. 2. cap. 12.* which is the first Statute concerning Escapes, Actions of Debt were brought for Escapes in other Cases besides Account; adjudged, that the Warden, at his Peril is to put in a Person sufficient to answer all Escapes, otherwise he himself must answer. *2 Lev.* 158. *Plummer* versus *Whitcomb*.

1 Vent.
314.
2 Mod.
119.
T. Jones
60.

(H)

Of Actions by and against Executors and Administrators for Escapes.

1. **I**T hath been held, that an Action of Debt would not lie against the Executor of a Sheriff, for suffering a Prisoner, tho' in Execution, to escape, unless the Plaintiff had recovered a Judgment against the Sheriff himself, before he died; and the Reason is, because the Escape was a Wrong which arises *ex maleficio*, and not *ex contractu*, and therefore 'tis no more than a Trespass, which dies with the Person. *Dyer* 322, 271. *a.*

2. But since that Time the better Opinion seems to be to the contrary, that an Action of Debt would lie, because the suffering one in Execution to escape, is not merely a Trespass, or Personal Wrong, for 'tis mixed with an Interest, because the Creditor hath an Interest in the Body of his Debtor in Execution, which ought to remain there as a Pledge for his Debt. *Goldf.* 90. *1 Vent.* 31. *S. P.*

3. It was never yet doubted, but that an Administrator might have an Action of Debt against the Sheriff himself, for suffering a Prisoner in Execution to escape in the Life-time of the Intestate; but where the Escape hath been upon *misfe Proceſs*, it hath been a Question, whether an Administrator might have an Action on the Case against the Sheriff; 'tis true, such an Action was brought, and upon Demurrer to the Declaration, two Judges were of Opinion, that the Action did lie; if not at Common Law, yet by the Equity of the Statute 4 Ed. 3. cap. 19. *De bonis aspectatis in vita Testatoris*,

flatoris, which is a Law that ought to have a favourable Construction for the Advancement of Justice, for certainly it must be reasonable, that since the Testator himself had an Injury done by such an Escape, that his Executor should not be deprived of a proper Remedy. *Style 32. Boomer versus Paite. 1 Vent. 31 S. P.*

But two other Judges held, that the Action on the Case did not lie, neither at Common Law, nor by the Equity of that Statute; 'tis plain, that the Action doth not lie at Common Law, because it was not grounded on a Contract, as Debt, Covenant, or the like; for at Common Law an Executor could have no other Action; he could not maintain any Action which did arise *ex maleficio*, as an Action of Trespass, Assault, Battery, or the like; neither could he maintain all Actions which were grounded even upon Contracts, for he could not have an Action of Account before the Statute of *W. 2.*

Now if he could not have this Action on the Case at Common Law, he can never maintain it upon the Equity of the Statute 4 *Ed. 3.* for that only gives him an Action of Trespass against him who carried away the Goods and Chattels of his Testator whilst he was living, which Action he could not have before this Statute was made; it doth not provide a Remedy for any other Sort of Trespass whatsoever; and it can never be said, that the suffering the Defendant to escape upon mesne Process, in the Life-time of the Testator, was an Injury done to his Goods or Chattels; 'tis true, this Statute may be extended by Equity to other Actions which concern his Goods and Chattels, and therefore it hath been adjudged, that an Executor may maintain an Action of Trover for Goods taken away and converted in the Life-time of the Testator, but no other Action of Trespass than what concerns such Goods. *Poph. 189. Mason versus Dixon. Jones 173. S. C. Latch 167. S. C.*

Hob. 264. 4. But where the Executor himself had recovered a Judgment against the Debtor of his Testator, and had him in Execution, and then the Sheriff suffered him to escape, it was held very clear, that he might maintain an Action of Debt against the Sheriff; but whether it ought to be in the Debt & Detinet, was the Question; and adjudged, that it ought to be in the Detinet only; for tho' the Judgment was obtained by the Executor himself, yet it was not for a Debt due to him; as Executor, but for a Debt due to his Testator, and therefore it must be brought in the Detinet for if 'tis brought in the Debt and Detinet, 'tis not only wrong, but no Statute of Jeofails will help it. 2 *Cro. 545. Reynell v. Lancastle. Antea Debt. (C) 2. S. C. Shore 57. Brooks versus Cook. S. P. Antea (B) 16. Slingsby versus Lambert, S. P.*

(I)

Pleadings therein not good.

1. **D**E B T against the Sheriffs of London, for an Escape of B. setting forth, that he was in Execution in Ludgate, in the Time of the former Sheriffs, and delivered over to the present Sheriffs, who on the 15th of December, Anno 3 *Ed. 6.* suffered him to escape, &c. the Defendants pleaded, that before the said 15 December, viz. 23 September 3 *Ed. 6.* the said B. being then in Custody of the former Sheriffs in London, they at Lambeth in the County of Surrey suffered him to go at Large, &c. and upon Demurrer to this Plea, it was adjudged ill, because he might escape before the 23d of September 3 *Ed. 6.* and yet after the then Sheriffs were out of their Office; besides, 'tis repugnant to say, that he was in their Custody in London, and that they suffered him to go at large in Lambeth; for he ought to have alledged certainly, that he was in their Custody at Lambeth, otherwise 'tis no Escape. *Mich. 3 Ed. 6. Dyer 66, 67.*

2. Debt upon an Escape, in which the Plaintiff declared, that whereas he had obtained a Judgment against W. R. in London, and a *Capias ad satisfaciend'* against him, which was returned *Non est inventus*, and thereupon one of his Bail was arrested and committed to Prison, and therein detained in Execution *secundum cons' Civitatis præd'*, and afterwards escaped; upon Demurrer to this Declaration, it was objected, that the Plaintiff did not alledge the Custom expressly, but only *secundum consuetudinem*, and that if the Custom had been expressly alledged, 'tis not good, because the Plaintiff ought to have a *Sci' fa.* against the Bail; for 'tis unreasonable to take him in Execution, without giving him Opportunity to answer, because he might plead a Release of the Principal, or other Matter, to discharge himself; and so it was adjudged. *Trin. 32 Eliz. Cro. Eliz. 185. Dewred versus Ratcliff.*

3. In Debt for an Escape of one in Execution, in which the Plaintiff declared on the Writ and the Escape, but omitted the Judgment; and this was held an incurable Fault. 1 *Lev. 191. Jones versus Pope.*

(K)

Pleadings therein, good.

1. CASE against the Sheriff of *Bristol* for an Escape, in which the Plaintiff declared, that a Commission of Bankruptcy was taken out against *T. S.* who escaped, and the Commissioners offered to examine him upon Interrogatories, which he refused to answer, and thereupon they committed him, and the Defendant suffered him to escape; it was objected, that this Declaration was ill, because the Plaintiff had alledged, that the Defendant suffered the Bankrupt to escape, but did not set forth, that the Debt was not satisfied: But *per Curiam*, it shall be intended, that it was not satisfied, and 'tis the Escape which is the Tort. 1 *Roll. Rep.* 47. *Barnes versus Carey.*
2. Debt upon an Escape against the Sheriff, who pleaded, that the Plaintiff *dedit consensum* to him the Defendant, that the Prisoner should go at large, whereby he did so; it was objected upon a Demurrer to this Plea, that the Defendant should have pleaded *dedit licentiam*, and not *consensum*, as he had done; but adjudged a good Plea, for the Plaintiff might have taken Issue upon it. *Goldf.* 81. *Cumming versus Harrington.*
3. Case against the Sheriff for an Escape upon mesne Process; the Defendant pleaded the Statute 23 *H. 6. cap.* 10. and that he let the Person out upon Bail, according to the said Statute, and that he had taken reasonable Securities, viz. *A.* and *B.* having * *sufficient within the County*; the Plaintiff in his Replication traversed, that the Defendant took Bail of Persons having *sufficient within the County*; and upon Demurrer it was insisted for the Defendant, that he is compellable to take Bail; if he take those who are insufficient, the Course is, for the Court to amerce the Sheriff, and not for the Party to bring an Action; adjudged, that if he take no Bail, then an Action lies against him, but the Sufficiency of the Bail is not material, for 'tis only for the Sheriff's Security; Judgment for the Defendant. 1 *Mod.* 227. *Ellis versus Yarbrough.*
4. Debt for an Escape, in which the Plaintiff declared *Quod cum recuperasset versus W. R. &c.* prout patet per Recordum, and thereupon a *Capias* issued against him, and afterwards he was taken by the Defendant, and escaped; adjudged, that this Declaration was ill, it being too general; for it doth not appear that any Judgment was had against *W. R.* but only, that the Plaintiff *recuperasset*; and if there was no Judgment, then he could not be taken in Execution. *Sid.* 306, in *Jones and Pope's Case.*
5. In Debt for an Escape against the Warden of the *Fleet*, the Plaintiff declared, that one *Lenthall* was committed to him in Execution upon three several Judgments, (but did not say prout patet per Recordum of the Commitment) and that the Defendant permitted him to escape; the Defendant pleads he permitted him to escape by License of the Plaintiff, who replied, that he permitted him to escape *de injuria sua propria*, and not by License of the Plaintiff; and upon Demurrer it was insisted for the Defendant, that the Declaration was ill, because he did not alledge prout patet per Recordum of the Commitment, which is a Matter triable by Record, &c. this is very true, but 'tis cured by the Plea by which an Issue is tendered upon another Matter, and by that the Commitment is admitted, so that 'tis not the Commitment, but the License, and nothing else, which is now to be tried. 3 *Lev.* 393. *Norden versus Fox.* See Stat. 4 & 5 *Annæ*, cap. 16. See *Knighton versus Moreton.*
6. Case, &c. against the Defendant for an Escape, wherein the Plaintiff declared, that the Defendant (the Sheriff) did arrest *W. R.* by Virtue *cujusdam Brevis de Latitat de Curia Domini Regis apud Westm'*, and afterwards suffered him to escape; there was a Verdict for the Plaintiff, but it was objected in Arrest of Judgment, that the Declaration was ill, because the Arrest was laid to be by Virtue *cujusdam Brevis de Latitat*, and doth not say out of what Court that Writ issued; besides, there is no such Writ as *De Latitat*, it should be *cujusdam Brevis vocat. Latitat*, &c. 'tis true, a Sheriff shall not take Advantage of an erroneous Process, but he shall of a void Process, and this Writ is void, for it doth not appear out of what Court it issued; it might issue out of the Common Pleas, and if returnable here, 'tis void; but the better Opinion was, that a *Latitat* issues out of no Court but *B. R.* that if *Curia Domini Regis* had been left out, and it had been only, that *W. R.* was arrested *Virtute Brevis vocat. Latitat*, it had been well enough. 5 *Mod.* 413. *Odes versus Clerke.*

Escheat.

(A)

1. **W** Here the King pardons a Felon *before Conviction*, the Lord shall not have his Lands by Escheat, because he hath no Title before the Attainder. *Owen 87. Smith's Case.*

2. Husband and Wife, Tenants in *special Tail*; the Husband is attainted in Treason, and executed, leaving Issue; the Wife died, the Lands shall escheat, because the Issue in Tail ought to make his Conveyance by Father and Mother, and from the Father he could not, by Reason of the Attainder. *Dyer 332. See Beaumont's Case. 9 Rep. 138.*

3. If Tenant in Fee simple is attainted of Treason and executed, immediately upon his Death the Fee is vested in the King without Office found, yet he must bring a *Sci. fa.* against the Tertenants, but it shall never escheat to the Lord of whom the Lands are holden, until Office found. *3 Rep. 10. Dowry's Case.*

4. Where a Man is attainted of Felony, his Heirs born after the Attainder shall not inherit, but the Land shall escheat. *3 Rep. 40, in Ratcliffe's Case.*

5. The principal Felon fled, and was outlawed, the Accessary was convicted and executed, the Lord entered on his Land as escheated, afterwards the Principal reversed the Outlary, and upon his Trial was acquitted; adjudged, that the Heir of the Accessary shall recover the Lands, for by the Acquittal of the Principal he also was acquitted. *9 Rep. 119, in Lord Sancher's Case.*

6. An Abbot, &c. was seised of an Acre of Land in Fee, held of the Manor of R. he and all the Monks died, by Reason whereof the Land escheated; the Manor descended to the Heir at Law, who conveyed the same to B. G. in Fee, of which the Acre was Parcel; it was a Question, whether this Acre should escheat to the Lord of whom it was holden, or revert to the Heirs of the Donor; and it was adjudged, that it should escheat unto the Lord of whom it was held. *Winch 37. Johnson versus Norway.*

Escrow. See Debt. (F) 4.

Estate for Life.

By Deed, good. (A)

| Estate for Life by Devise, and Estate
for the Life of another. (B)

(A)

By Deed, good.

1. **L** ANDS were assured to one, to the Use of a Man and his Wife, for the Term of their Lives, and the longer Liver of them, Remainder to the Use of another Man and his Wife in Tail; and for Want of such Issue, to the Use of the Husband to whom the Estate for Life was limited, and his Heirs for ever: Provided, that if the said Tenant for Life should have *Issue of his Body*, or *any Wife* which he should have at the Time of his Decease, should be with Child by him, then after the Birth of such Issue, the Use of the said Lands should, after the Decease of him and his Wife, be to the said Issue; and in Default of such Issue, to the right Heirs of the Husband; the Wife died, and the Husband married again; adjudged, that before Issue had by his second Wife, he had only an Estate for Life, as he had before. *Trin. 14 Eliz. Dyer 314. See Lisle versus Grey.*

2. Feoffment to the Use of G. and D. and of the Heirs Males of the Bodies of the said G. and D. lawfully to be begotten, and for Default of such Issue Male of both the Bodies of the said G. and D. or either of them lawfully to be begotten, then to the Use of, &c. adjudged, this was a Gift to a Man and his Issue, for 'tis but to both of them for Life; and an *Implication* can never be intended by Deed, unless there are apt Words for it; 'tis otherwise in Wills. *Mich. 15 Jac. 1 Brownl. 153. Nevill versus Nevill.*

3. The Husband, in Consideration of Marriage, covenanted to make a Feoffment to *W. R.* in Fee, to the Use of the Husband for Life, and *after his Decease*, to the Use of *Anne* (whom he intended to marry) *until one of the Sons of the said Husband, on the Body of the said Anne to be begotten, shall be of the Age of twenty-one Years, &c.* the Marriage took Effect, and the Husband died without Issue; adjudged, that *Anne* had an Estate for Life before any Issue born, or in Case there was no Issue at all between them, and this by the first Words of the Will, (*viz.*) after the Decease of the Husband to the Use of *Anne*. *Moor* 15. *Cockett versus Sheldon*.

4. Lease to *A.* during his own Life, and the Lives of *B.* and *C.* the Question was, whether this Limitation, during the Lives of *B.* and *C.* was good, or not, because an Estate for a *Man's own Life*, being of an higher Nature than an Estate for the Life of another, therefore both those Estates cannot stand together, but one must drown in the other; but adjudged, that it was one entire Estate of Freehold, and should continue during the three Lives, and the Survivor of them; and tho' the Lessee could have it no longer than his own Life, yet his Assignee shall have the Benefit of it so long as the other Two are living. 5 *Rep.* 13. *Ross's Case*. *Moor*, pl. 32. *S. P.*

5. Debt upon Bond, conditioned, that if the Obligor, his Heirs, &c. do yearly, and every Year, pay so much, &c. to *Thomas and Dorothy his Wife*, during their two Lives, that then, &c. The Husband died, the Question was, whether the Payment should continue to the Wife, and adjudged, it should not; 'tis true, where an Interest is secured for Lives, it must be for the longer Liver of them; but here is no Interest, for that is in the Obligee, and 'tis a collateral Limitation to the Husband and Wife, and even an Interest will not survive in some Cases, as where an Office is granted to Two, and one dies, the Office is extinct, unless there are Words of Survivorship. 1 *Mod.* 187. *Slater versus Carew*. See *Brudnell's Case*.

(B)

What shall be an Estate for Life by Devise.

1. **W**Here there are no Words of Inheritance, the Devisee hath only an Estate for Life; 'tis true, the Word *Heir* is generally a Word of Inheritance, but even where that Word is in a Will, an Estate for Life only passes, as for Instance, the Testator devised Lands to *W. R.* and other Lands to *W. N.* but did not limit for what Estate; and farther he devised, that if either of them die, then the Survivor should be *Heir* to the other, but without saying to what Land; adjudged, that the Survivor shall have only an Estate for Life, because the Person to whom he is made *Heir* had no greater Estate. See *Postea*, pl. 3, 4, 11.

2. The Father was Tenant for Life, Remainder in Fee to his Son, who devised to his Wife all the Lands which he might have in Reversion after the Death of his Father, paying to the right Heirs of the Father 40 *l.* yearly; afterwards the Son died, and the Father survived; adjudged, that the Son's Wife had only an Estate for Life, and that she should not pay the Annuity of 40 *l.* till after the Death of the Father, because his right Heir could have no Title during the Father's Life. *Dyer* 371. b.

3. There was a Grant of a Rent to *W. R.* during the Life of the Wife of the Grantor, and that if it was in arrear, that then it should be lawful for the said *W. R.* and his Heirs, to distrain for it; afterwards the said *W. R.* devised this Rent to another, and died; adjudged, that the Devisee shall have it, because this Clause of Distress made the Grantee have a Freehold in the Rent, determinable upon the Death of the Wife of the Grantor. 9 *Eliz.* *Dyer* 251. *Cassandra's Case*.

4. The Testator being seised of Lands in Fee, devised that his Wife should take the Profits till his Daughter *Mary* should be of the Age of sixteen Years; and if she died, &c. then *W. R.* should be his Heir; the better Opinion was, that she had an Estate for Life. 4 *Leon.* 37, 213. *Comie's Case*. See *Antea* pl. 1.

5. So where the Testator had three Sons, and three Houses, and he devised an House to each of his Sons in Tail; and if any of them died without Issue, then the Survivors should have all his Part, equally to be divided amongst them; one of them died without Issue; adjudged, that the Survivors shall have only an Estate for their Lives in his Part, because there are no Words to shew, that he intended a greater Estate for them; for those Words, *All his Part*, extend only to the whole House devised to him, and not to the whole Estate which the Testator had in it; therefore it shall descend to his Heir at Law. 1 *And.* 180. *Pettinwood versus Cook*. 3 *Leon.* 180. *S. C.* *Litch* 40. *S. C.* *Cro. Eliz.* 52. *S. C.* 2 *Leon.* 129, 193. *S. C.* Jointenants. (A) 7. *S. C.*

6. Devise to *W. R.* and to his eldest Issue Male, he had no Son then living; adjudged, that the Father had an Estate only for Life, because of the Word *Eldest*. *Sir Francis Moor*, who reports this Case, tells us, that the Lands devised were *Gavelkind*, and that the Devise was to the Father, and his eldest Issue Male, and so from Heir Male to Heir Male for ever; and that this was an Estate for Life only in the Heirs Males, who were then born, and not to such who should be afterwards born, because such a Limitation tends to a *Perpetuity*, and for that Reason would be void. *Cro. Eliz.* 40. *Lovelace versus Lovelace*.

7. So a Devise to *R. Archer* for Life, and after to his next Heir Male, and to the Heirs Males of his Body; *R.* had issue *John*; adjudged, this is only an Estate for Life in *R. Archer*, and that *John*, the right Heir, shall take by Purchase, and not by Descent. *Cro. Eliz.* 453. *Baldwin versus Smith.* 1 Rep. 66. b. S. C. 2 And. 37. S. C.

8. The Husband devised all his Lands to his Wife for Life, and after her Decease he devised three Parcels to his three Sons respectively, but did not limit what Estate they should have in those Parcels; and that if any of his Sons marry and have Issue Male of his Body, and die before he enter on the Lands, then his Issue should have that Part; the Youngest married, had Issue, and entered on his Part, and afterwards died; adjudged, that he had only an Estate for Life in his Part; and for that Reason his Issue could not have it after his Death, for the Father being the youngest Son of the Testator, the Fee-simple, after his Death, must descend to the eldest Son; 'tis true, where a Devise is to one, and if he die without Issue, Remainder over, this makes an Estate-tail in the Devisee; but 'tis otherwise where the Dying without Issue is limited to be within a certain Time; as for Instance, if he die without Issue before he is twenty-four Years old, or before he enter on the Lands, as in the principal Case. *Cro. Eliz.* 497. *Bacon versus Hill.* Moor 464. S. C. Fee-simple in Wills. (B) 2. S. C.

9. Devise of the Fee-simple of his House to the Mother, and after her Decease to her Son; adjudged, that the Mother had only an Estate for Life, and the Son had an Estate in Fee in Remainder. 1 And. 51. *Baker versus Raymond.*

10. The Father devised all his Lands and Goods, after his Debts paid, to *R.* and *B.* his Children, equally to be divided betwixt them; adjudged, that his Children had only an Estate for Life in the Lands; for the Goods and Lands being joined together in one Sentence, and there being no Words of Inheritance to pass the Lands, an Estate for Life only passes; for the Words *Equally to be divided*, as they relate to the Lands, extend only to the several and distinct Occupations of them by his Children, and not to the Continuance of the Estate for ever; but as they relate to the Goods, it makes them Tenants in Common thereof, and 'tis a Devise of those Goods for ever. *Cro. Eliz.* 330. *Dickens versus Marshall.* Jointenants. (A) 15. S. C. See pl. 14.

11. The Lord of a Manor devised to *W. R.* his Steward, a yearly Rent of 10 *l.* issuing out of all his Lands, and payable quarterly, with Power to distrain for the same, and to hold Courts of all his Manors for Life; adjudged, this was a Devise of the yearly Rent of 10 *l.* for Life, because that Rent was a Recompence for the Keeping his Courts, which was granted to the Steward for Life. 8 Rep. 85. *Sir Rich. Pexall's Case.*

12. The Testator had three Sons, and Lands also in three Villages, and he devised his Lands in one Vill to his eldest Son, and his Lands in another Vill to his second Son, and his Lands in the third Vill to his youngest Son, but did not limit what Estate either of them should have in their Lands; but farther devised, That if any of them died, that the Survivor, &c. should be his Heir; the eldest Son had Issue, and afterwards he died, adjudged, that such Issue shall have his Father's Part, exclusive of his Uncle's, who survived, because, tho' the Father had only an Estate for Life, by the Will, yet he being the eldest Son of the Testator, the Reversion in Fee descended on him, by which Descent his Estate for Life was drowned; and if so, then his Death cannot revive, and vest the Remainder in his surviving Brothers. 1 Bullst. 61. *Wood versus Ingersole.* 2 Cro. 260. See pl. 7.

13. The Husband devised Lands to *Rose*, for Life, and that if she married after his Decease, and had any Heirs of her Body lawfully begotten, then that Heir should have it after her Decease, and the Heirs of the Body of such Heir; and if she died without Issue, then he devised the Remainder over; adjudged, that *Rose* had only an Estate for Life, because the Limitation to the Heirs of the Body of such Heir, was grafted on the precedent Word Heir, which Word was used only as a Designation of the Person, and not as a Limitation of the Estate; Justice Crook, who reports this Case, tells us, that it was adjourned, but that two Judges against the Opinion of the Chief Justice Popham, held, that *Rose* had only an Estate for Life, for the Reason before-mentioned. Moor 593. *Clerke versus D. y.* Cro. Eliz. 313. S. C. Owen 148. *Lilly versus Tayler.* S. P. Postea Purchase. (B) pl. 1. S. C.

14. The Testator devised his Manor of *Dale* to his second Son, but did not limit for what Estate, so that he could have no more than an Estate for Life in it: Item, I give my Manor of *Sale* to my said Son and his Heirs; here the Word Item shall not be taken as a Copulative to join the Sentences, and make the Son have a Fee-simple in the Manor of *Dale*, but it shall be taken as a new Grant of the Manor of *Sale*. Moor 52. 1 Roll. Abr. 834, 844. S. P.

15. The Father devised one House to his eldest Son in Tail, another House to his second Son in Tail, and a third House to his youngest Son in Tail; and that if any of them die without Issue, then the Remainder to the other Two equally; this shall make only an Estate for Life in the two Survivors, because those Words, (viz.) to the other Two equally, do not extend to the Quantity of Estate, but to the Quantity of the Land. 2 Brownl. 74. *Pitt versus Brown.* See pl. 9.

16. In a Special Verdict, the Case was, that the Testator was seised in Fee of a Messuage and certain Lands, always used with the House, and being so seised, he made a Lease of Part of the Lands to *W. R.* for Years, and afterwards he devised the Messuage to his Wife, with all the Lands in the Occupation of the Lessee, and after the Decease of his Wife, that it, and all the Rest of his Lands, should remain to his Younger Son; adjudged, that the Wife shall not have an Estate for Life in all the Lands, by Implication, because it was expressly devised, that she should have

the Lands in Lease, which shews, that the Testator did not intend she should have all the Rest; and because the youngest Son could not take by this Devise, till after the Death of the Wife, therefore during her Life, the Heir at Law shall have it. *Moor* 123.

17. The Testator devised his Lands to *A. for Life*, Remainder to *B. and the Heirs of his Body*; Remainder to *Wild and his Wife*, and after their Decease, to *their Children*; adjudged, this was only an Estate *for Life* in the Husband and Wife, because there being a Remainder in Tail limited expressly to *B.* if the Testator had meant to dispose the like Estate to *Wild*, 'tis very probable he would have used the same Words; besides, the Limitation to the Children stopt there; for if it had been to the Children of their Bodies, that would have lookt like an Estate Tail; but the Chief Reason was, because *Wild* and his Wife had Children then born. 6 Rep. 16. *Wild's Case*. See *Clerke versus Day*, S. P.

18. 'Tis likewise true, that the Word *Paying* generally makes an Estate of Inheritance, but not where the Payment is to be made out of the Profits of the Lands, &c. as where the Father devised his Freehold Lands to his Sons, *Henry and Michael*, upon Condition, that if they sell the same to any, but to his Son *Matthew*, then he shall enter, and that all his Sons shall pay to their Mother 40 *l. per Annum*, during her Life, for Dower out of all his Lands, &c. adjudged, that *Henry and Michael* had but an Estate for Life; and that the subsequent Condition did not enlarge their Estate, because it was such a Condition as is more proper to be annexed to an Estate for Life, than to create a Fee-simple; for if it should be construed to make a Fee-simple, then the Sons could not be restrained from selling to any Body; and as to the Payment of 40 *l. per Annum* to the Mother, for her Dower, 'tis not a Payment of a Sum in Gross, so as to make a Charge on the Persons of the Devisees; but 'tis a Charge out of all his Lands, in the Nature of an yearly Rent out of the Profits; for where the Payment is to be made out of the Profits, or where the Charge is upon the Land, there the Devisee cannot be a Loser, as he may, where the Payment is to be made of a Sum in Gross, because he may be compelled to pay the Money, and may die before he can satisfy himself out of the Profits. *Bridgm* 132. *Muschamp versus Bluett*. *Jones* 211. S. C. *Cro. Car.* 112. S. C. by the Name of *Anley versus Chapman*.

19. The Testator was seised of Lands in Fee, and had other Lands mortgaged to him in Fee, which Mortgage was forfeited, (but *Seijeunt Rolle* tells us, it was not) and having his own Lands, he gave his Wife all the rest of his Goods, Chattels, Leases, Estates and Mortgages, whereof he was possessed; adjudged, that neither an Estate in Fee, or for Life, passed by those Words, *Estates and Mortgages*, because they were coupled with Personal Things, of which the Testator was possessed, and that at the most he could have no more than an Estate for Life. *Cro. Car.* 447. *Wilkinson versus Merriland*. *Jones* 380. S. C. 1 Roll. Abr. 834. S. C.

20. The Father devised Lands to his two eldest Sons respectively, in Tail, and other Lands to *Henry* his youngest Son, and his Heirs: *Item*, I give unto the said *Henry* my Pasture Lands, called *Southfields*, and my Meadows, called *Warbay*; but did not limit for what Estate. Also I will, that all Bargains which I have from *Nicholas Webb*, my Son *Henry* shall enjoy, and his Heirs for ever, and for lack of Heirs of his Body, Remainder over; adjudged, that *Southfields and Warbay* being not the Bargains of *Webb*, therefore *Henry* had but an Estate for Life in those two Places; for the Testator having devised several Lands to several of his Sons in Tail, and some to *Henry* in Fee, and then giving more to *Henry*, not mentioning what Estate he should have in them, the Law will construe, that he intended them only for his Life; for the Word *Item* shall not couple the Sentences, and import, that *Henry* shall have the same Estate in the *Southfields and Warbay*, as he had in those Lands which were devised to him and his Heirs, but shall extend only to that Clause which follows it; and that the Words, *Heirs of his Body*, which are in the subsequent Clause shall extend only to the Bargains of *Webb*. *Cro. Car.* 368. *Spirit versus Bence*.

21. The Father made a Settlement upon his Son for Life, Remainder in Tail Male; afterwards he made a Will, and devised, that, for want of Issue Male of his Son, the Lands should remain to his Son by any other Wife, but did not limit for what Estate; and in Case of Failure of Issue Male by such Son, then all his Lands should remain to his Grand-Children, and their Heirs; adjudged, that there being *no express Estate devised to this Son, the Words which seem to create an Estate-Tail in him, will not do it, (*viz.*) in case of Failure of Issue Male; and so he had but an Estate for Life. 4 Mod. 316. *Moor versus Parker*.

They would have it an Estate-Milford.

Tail, by Tacking the Estate by the Will to the Estate for Life in the Settlement. See Smith versus

22. The Husband devised Lands to his Wife for Life, and after to be disposed by her to such of his Children as she should think fit; this makes a Fee-simple in the Wife; but if it had been, I devise my Lands at the Dispose of my Wife to such of my Children as she shall think fit; there the Children take expressly by the Gift or Device of their Father, and the Words, at the Dispose of my Wife, relate only to the Children, and not to the Estate. *Carter* 235.

To his Wife for Life, and she to give it to whom she pleased; she had an

express Estate for Life, and a Power to grant the Reversion, and the Grantee will be in by the Will. 4

Leon. 41.

23. In an Action of Debt for Rent, the Case upon the Pleadings was, *Crafford Gibbons* was seised in Tail of the Reversion of the Manor of *Bawds*, expectant upon the Determination of an Estate for Life then in Being, and being so seised, he made a Lease of a Messuage, Mill, and four Acres of Land, Parcel of the said Manor, to one *Lesson* for twenty-one Years, to commence

after the Death of the Tenant for Life, reserving 10 *l.* per Ann. Rent ; afterwards *Letton* assigned the said Term, and his Interest therein, to *Glascock* the Defendant ; and after that the aforesaid *Crafford Gibbens* bargained and sold the Reversion of the Premises to one *Kinder* in Fee, who devised it to *Took* the Plaintiff, and died ; then *Crafford Gibbens* levied a Fine *come ceo, &c.* of the whole Manor to *T. P.* and both he and the Tenant for Life died, and then the Defendant *Glascock*, by Vertue of the said Lease and Assignment thereof made to him, entered, and *Took* supposing, that she had the Reversion by the Will of *Kinder*, brought an Action of Debt for Rent against the Defendant ; but adjudged, that she had no Title to the Rent, because by the Bargain and Sale made by *Crafford Gibbens*, who was seised of the Reversion in Tail, to *Kinder*, nothing passed to him but a descendable Fee, *i. e.* only a descendable Estate for the Life of the said *Crafford Gibbens*, which could not be devised by *Kinder*, either by the 32 *H. 8. cap. 1.* or by 34 & 35 *H. 8. cap. 5.* of Wills ; and notwithstanding the Devise to the Plaintiff *Took*, the Estate descended to the Heir at Law of the Testator, as a special Occupant, and tho' by the Fine levied by *Crafford Gibbens*, after the Death of *Kinder* the Testator, the Estate-Tail as to the Cognisor, was barred and extinguished, yet that Fine signified nothing to *Took* the Devisee, so as to make the Way good by way of Relation, but only to corroborate the Estate of the Heir of *Kinder* the Testator, to whom it was descended before the levying the Fine, and to make it a base Fee in him, who had an Estate in Fee only for Life, descendable before ; that an Estate *per auter vie* is not devisable, See *Margery Calley's Case.* and in 10 *Rep. 96 & 98.* *Seymour's Case.* and *Cro. Eliz. 804.* and *Dyer 253.* 1 *Saund. 260.* *Took versus Glascock* : This Case denied to be Law *per Holt Ch. Just. Pasch. 12 Will. in Machill and Clerk's Case.*

24. In a Special Verdict in Ejectment, the Case was, the Testator being seised in Fee, devised to his Wife for Life, and then to be at her Disposal to any of her Children, who shall be then living ; adjudged, that the Wife had only an Estate for Life, and that the Power of disposing was a separate and distinct Gift ; for the Estate given to her is very express and certain for her Life, and the Power to dispose is *additional* ; 'tis not like those Cases which are General and Indefinite, (*viz.*) A Devise to *W. R.* that he shall sell, or to sell, &c. for in these Cases *W. R.* hath a Power to convey a Fee, therefore he is construed to have a Fee ; but here the Power is separate and distinguished from the Estate for Life. 1 *Salk. 239.* *Thomlinson versus Dighton.* See *Moor 57.* *Latch 9. 34.* *Jones 137.* 1 *Mod. 189.* 2 *Lev. 104.* 3 *Lev. 71.*

Estate for Years.

By Deed, good. (A)

Estate for Years by Devise, good, and |

where the Term shall vest in the Executor. (B)

(A)

By Deed, good.

1. **I**N Covenant, the Case was, Tenant for three Lives, his own being one, made a Lease to *W. R.* for six Years, and the Lessee for Years made a Lease to another at Will ; the Tenant for three Lives died, the Tenant at Will being then in Possession of the Lands, then the Lessee for six Years, in Consideration of 400 *l.* paid to him by the Plaintiff, sells all his Estate to him, reciting in the Conveyance, that the Tenant at Will did claim only at Will, and to his Use, reciting also, that the Tenant for three Lives was dead, and that by Virtue thereof he was seised of the Freehold, as Occupant during the other two Lives, and that he being so seised, did assign, bargain and sell to the Plaintiff, all his Estate, Right, Title and Interest in the Lands, to hold to him, for and during the two Lives then in Being, and covenanted, that he had such an Estate in Law, and that he would warrant the Sale so to him made ; and upon this Covenant the Action was brought ; the Question was, whether upon the Death of the Tenant for three Lives, this Lessee for Years had a greater Estate than only for the Remainder for the six Years ; and adjudged, that he had not. *Trin. 10 Jac. 2 Bull. 11.* *Chamberlaine versus Ewers.* For the Tenant at Will was Occupant.

2 *Lev. 35.*

2. In a Special Verdict, the Case was, the Father settled his Lands upon himself for Life, and afterwards to his Son, and the Heirs Males of his Body, Remainder over ; and if he die without Heirs Males of his Body, then his Daughters to have the Lands for one Hundred Years ; Proviso, that if his Heir Male pay 1500 *l.* to each of his Daughters, within two Years after his Decease, that then this Limitation of the Estate for Years shall cease and be void ; the Money was not paid, the Daughters entered after the Death of the Issue Male ; adjudged, this was a good Lease by

Way of Future Interest, and that it shall commence after the Death of the Heir Male of the Body 3 Cro. of the Father; but that such a Term might be barred by a Common Recovery suffered by the 293^d Tenant in Tail. *Sid. 102. Goodier versus Clarke.*

(B)

By last Will, good, and where the Term shall best in the Executor.
See *Executory Devise. (A) (B) per totum.*

1. **T**HE Father devised Lands to his Daughter, and her Heirs, when she should come to her Age of eighteen Years, and that *his Wife should take the Profits to her Use without any Account* to be made, until his Daughter came to that Age, and that she should pay the old Rent, and find her Daughter Necessaries until she could write and read *English*, and made his Wife Executrix, and died; she proved the Will, and married again, and died; the Husband assigned the Term to the Lessor, who brought an Action of Debt for Rent upon a Lease for a Year, and so from Year to Year, &c. and it was found, that all the Conditions in the Will were performed, and that the Daughter was under the Age of 18 Years; adjudged, this being a Will is a good Lease, and not a Trust only in the Wife, so long as she should educate the Daughter, and by Consequence, that the Husband should have the Term; and therefore the Action by the Assignee is well brought. 17 *Jac. Hutt. 36. Blackburn's Case.*

2. The Testator being possessed of a Close for a Term of Years, devised the said Close to his Grandson *William*, after he should attain his Age of 22 Years, paying to his younger Brother *Thomas* so much, &c. and if *William* should die before 22, then he devised the said Close to *Thomas* after he should attain his Age of 22 Years, and made *W. R.* his Executor, and died; *William* attained his Age of 22 Years, and entered by the Assent of the Executor, and died without paying any Thing to *Thomas*, but he first made a Will, and appointed *R. C.* Executor thereof; afterwards *Thomas* died before he attained the Age of 22, having also made a Will, and the aforesaid *R. C.* Executor thereof, who was the now Defendant; then *W. R.* the Executor of the first Testator entered, and being turned out by the Defendant, brought this Ejectment; and all this Matter being found Specially, the Question was, who should have the Residue of the Term, and it was insisted, that *W. R.* the Executor of the first Testator should have it; that the Executor of the Grandson *William* could not have it; for if he should, that would be against the Intention of the Testator, that never intended that *William* should have the Term, because 'tis expressly devised over to *Thomas*, and the Executor of *Thomas* can have no Title, because it was devised to him upon a Contingency, which never happened; and if so, then the Law will carry the Residue of the Term to the Executor of the first Testator; but adjudged, that the Devise of the Close to *William*, without mentioning * for what Estate the whole Term passed, and after he entered by the Assent of the Executor, 'tis impossible that any Interest should remain to that Executor; and as to *Thomas* the second Devisee, 'tis devised to him by express Limitation upon a Contingency, and he dying before such Contingency happened, his Executor can have no Title; and if so, then the Executor of *William* must have it. 2 *Sid. 135, 151. Fynmore versus Crockford.* * *Dyer 307. b.*

3. In a Special Verdict in Ejectment, the Case was, the Testator being possessed of Lands for a Term of Years, devised them to *W. R.* and to the Heirs of his Body; and if the said *W. R.* die, without Issue, *living B. B.* then to the said *B. B.* adjudged, this was a good Limitation to *B. B.* because the Contingency was to arise within the Compass of a Life, and in this Case the Court denied *Child and Bailie's Case* to be Law; which see *Executory Devise. (B) 14. 1 Salk. 225. Lamb versus Archer. See Sid. 451. 1 Cro. 230.*

4. The Testator being possessed of a Term for 99 Years, devised it to *A.* for Life, and so to *B.* for Life, and likewise to five more successively for Life? they all died, and the Question was, who should have the Residue of the Term; adjudged, that all Remainders in this Case were good, and that the first Devisee, and so every other Devisee in his Turn, had the whole Term vested in him, and the next had but a Possibility of a Remainder, and the Executor of the Testator had but a Possibility of Reverter: Now here the Testator gave but a limited Estate, and what he did not give away must remain in him, and by Consequence must go to his Executor. 1 *Salk. 231. Eyre versus Falkland.*

Estate at Will.

(A)

1. **T**HE Lessor made a Lease to three Persons at Will; one of them died; the Question was, whether the Death of that one did determine the Estate at Will, because such an Estate cannot survive; it was not resolved in *Hill. 10 Eliz. Dyer 269.* but afterwards, in another Case, it was adjudged, that the Estate at Will was not determined.

5 *Rep. 10. Hensted's Case.*

2. In Ejectment, the Case was, the Lessor being seised in Fee, made a Lease to *W. R.* at Will, who being disseised by *B. B.* re-entered and took a Lease of the Disseissor; adjudged, that by the taking this new Estate, his Will was determined by his own Contract. *Style 363. Locky versus Dumilow. See Dinsdale versus Isles.*

3. Lease of Lands for one Year, rendring Rent, and afterwards for nine or twelve Years, as *W. R.* a third Person should agree; but no Agreement was made, yet the Lessee continued in Possession after the Year; adjudged, that he was Tenant at Will; but they doubted, whether an Action of Debt would lie for Rent after the Year. 2 *Sid. 153. Bedford versus Johnson.*

4. Adjudged, that where Lands are leased at Will, rendring Rent, the Lessee cannot determine his Will before or after the Day, for the Payment of the Rent, but it must be done on that very Day, and not two or three Days before; for the Law will not allow, that the Lessee shall determine his Will to the Prejudice of the Lessor, nor will it allow, that the Lessor shall determine his Will to the Prejudice of the Lessee, after the Land is sowed with Corn; for as one shall have the Corn, so the other shall have the Rent. *Sid. 339. Lev. 109. See Kelw. 56, 65.*

5. Case, &c. by Tenant at Will for destroying his Common of Pasture, with Conies, and for building a House thereon; upon a Demurrer, it was objected, that the Declaration was ill, because the Plaintiff being only Tenant at Will, could not maintain this Action; *Sed per Curiam*, the Plaintiff had Judgment. *T. Jones 5. Timberly versus How.*

Estate at Sufferance.

(A)

1. **W**. R. was Tenant in Fee of a Manor holden in *Capite*, lying on the *North-side* of the River *S.* and *M. M.* was Lord of another Manor held in *Knights Service*, and lying on the *South-side* of the said River, which run very crooked between those Manors; thereupon they agreed to cut a Course for the River to run in a straight Line, which was accordingly done, and each of them enjoyed those Nooks of Land which lay on their respective Sides of the River; but some of those Nooks which lay on the *North-side* of the River before it was cut, did now lie on the *South-side*, and the Lord of the Manor of the *South-side* died, his Heir of full Age; the Question was, whether he should be seised of those Nooks which were formerly on the *North-side*, but now on the *South-side* of the River, and which were held in *Capite* so as his Heir must sue Livery? and adjudged, that he was not, for he was only Tenant at Sufferance, and there was no Descent of the Nooks so exchanged. *Hill. 16. 1 Leon. 6. Green versus Lapworth.*

Estoppel.

(A)

What shall be an Estoppel.

1. **L**Ease of Lands for Years, to commence after the Expiration of the Lease then in Being, and formerly made to one *B. G.* in which second Lease, the first made to the said *B. G.* was recited; and in an Action of Covenant brought against the Lessor, by the second Lessee, he pleaded, that there was no such Person as *B. G.* adjudged, that the Lessor having sealed a second Lease, in which the first Lease made to *B. G.* is recited, tho' 'tis a common Opinion, that a *Recital* shall not operate to make an Estoppel; yet where a *Recital* is material, as in this Case, it shall estop the Lessor to say, that there was no such *B. G.* *in verum natura.* 2 *Leon.* 11.

2. In Ejectment, upon Not guilty pleaded, the Jury found specially, that the Lessor had not any Thing in the Land at the Time of the Lease made; two Judges were Opinion, that this was a Lease by Estoppel, for the Defendant is estopped to say, that the Plaintiff *Non demist*, especially having pleaded the general Issue, Not guilty; but *Windham* was of Opinion, that the Defendant ought to have demurred on the Evidence; and if the Plaintiff would not join in the Demurrer, the Court would have adjudged, that a Man cannot make a Lease of Lands to which he hath no Manner of Title. *Mich.* 31 *Eliz.* 1 *Leon.* 206. *Sutton versus Dickens.*

3. *Trespass, &c.* for Chasing his Cattle in such a Close; the Defendant justified, for that they were *Damage-feasant* in his Freehold; the Plaintiff replied, that the Defendant had made a Grant to him of Common in the Place where, &c. and had afterwards erected a great Stack of Corn there, and that the Plaintiff put in his Cattle to use the Common, and the Defendant chased them out; adjudged, that the Driving out the Cattle was not justifiable, for if it was, it would tend to the Diminution of the Defendant's own Grant, and therefore he shall be estopped to say, that the Cattle were *Damage-feasant* in his Freehold, when the Grantee might use the whole Place for his Common. *Telv.* 201. *Farmer versus Hughes.*

4. Debt upon Bond, conditioned to give to *W. R.* all the Goods which were devised to him by his Father; adjudged, that in this Case the Defendant was estopped to plead, that the Father made no Will; he might plead, that he had not any Goods devised to him by his Father, but he is concluded by the Condition of the Bond to plead, that the Father made no Will. *Mich.* 8 *Jac.* *Godb.* 177. *Cullingworth's Case.* *Moor* 420. S. C. by the Name of *Paramour versus During.*

(B)

What shall not be an Estoppel.

1. **I**N Estoppels, both Parties must be estopped; therefore where an Infant or Feme Covert make a Lease, they are not estopped to say, that 'tis not their Deed, because they are not bound by it, for as to them 'tis void. *Cro. Eliz.* 36. *James versus Lander.*

Estovers.

(A)

1. **I**N *Trespass*, the Case was, the Bargainor, by Deed, bargained and sold all her Woods, Under-woods, and Hedge-Rows, which have been usually felled, and which were standing and growing on the Lands demised, to hold from *Michaelmas* last past, during the Life of the * Bargainee, who covenanted with the Bargainor to pay the yearly Rent of 10*l.* during the Term; the Bargainee entered and cut down all the Trees, Woods, and Under-woods, which were standing or growing on the Lands at the Time of the Demise; afterwards, when the Woods and Under-woods were renewed in their Growth, the Bargainor cut them down, for which the Bargainee brought an Action of *Trespass*; but it was adjudged against him, for after he had once cut them down, he shall never afterwards fell in the same Place by Virtue of this Demise, notwithstanding the Payment of the yearly Rent, and tho' he was to hold the Lands during Life. *Trin.* 4 *Eliz.* 3 *Leon.* 7. *Andrews versus Glover.*

So where a Lease was made of all the Profits of a Wood, the Lessee cannot fell Timber-Trees. 4 *Leon.* 8. 2. A

2. A Man having Estovers to his House, either by Grant or Prescription, altho' he alters the Rooms, without making new Chimnies, the Prescription still holds; and if he build new Chimnies, the Prescription is not destroyed, but he must not spend any of the Estovers in them. 4 Rep. 87. *Lutterell's Case*. 4 Leon. 241. *Brown's Case*. S. P.

3. Under the Name of Estovers are comprehended, House, Plough, Fire, Cart, and Hedge-boots; and if a Man hath reasonable Estovers in the Wood, another to be taken by View and Delivery of the Bailly of the Manor, if he take them without, he is a Trespasser; if they are demanded, and denied, he may have an Assize 5 Rep. 25. in *Sir Tho. Palmer's Case*.

4. At Common Law an Assize did not lie for a *Disseisin de libero Estoverio*, but now by the Words in the *Stat. Westm. 2. cap. 25. de proficuo in certo loco capiendo*, he may. 8 Rep. 48, in *Jehu Webb's Case*.

3 Cro.
217.

5. If Estovers are granted to be burnt in such an House, they shall go to him who hath the House, by whatsoever Title he holdeth it; and therefore if a Man is seised of an House in the Right of his Wife, and a Grant is made to the Husband and his Heirs, to have sufficient Estovers to be burnt in that House, in such Case the Estovers are appurtenant to the House, and shall descend to the Issue of the Husband and Wife. 8 Rep. 52, 54. *Simms's Case* Postea pl. 13. S. C. This Case is questioned by *Vaughan Ch. Just.* in 1 Mod. 182.

6. If a Man hath Common of Estovers in Fee, and the Owner grubs up the Wood, he shall have an Assize; but if he hath it but for a Term of Years, he shall have an Action on the Case. 9 Rep. 112, in *Rob. Mary's Case*. Hob. 43. *Cowper versus Andrews*. S. P.

7. A Prescription to have Estovers for repairing the old Houses, and for Building new Houses on the Copyhold Lands, is good. Cro. 33. *Arundel versus Steers*.

8. In Trespass for Taking away the Boughs of Trees felled, the Defendant justifies by Virtue of a Custom of the Manor, that when the Lord felled any Timber-Trees, the poor Tenants had the Boughs for necessary Estovers, to be burnt *in focali in terris & ten'tis*, &c. adjudged, that the Custom was not well alledged, to burn Estovers *in Terris*. Godb. 234. *Bishop of Chichester versus Strodwick*.

9. Trespass, &c. for cutting down Trees, &c. the Defendant pleaded, that he was seised in Fee of an antient House and Lands, &c. and so prescribed to have Estovers for repairing the House, or for the Building a new House on those Lands; and upon Demurrer it was objected against this Prescription, for that it ought to be reasonable and usual, which is to repair antient Houses, but not to build new ones; but adjudged, that the Prescription is good, because such Estovers may be granted, even at this Time, and by the same Reason there may be a Prescription for them. 2 Cro. 25, *Countess of Arundel versus Steer*.

10. Adjudged, that if Tenant for Life or Years cut down Timber-Trees, or pull down any Buildings, the Lessor shall have the Timber, because the Lessee hath it only as Things annexed to the Land, and therefore when 'tis severed from thence, the Lessor hath a general Property in it, for 'tis his Inheritance, and the Lessee never had but a special Property in it; so where an House or Trees are blown down by Tempest in the Time of Lessee for Life, or Years, in Dower, the particular Tenants have a special Property in the Timber to rebuild their Houses, but not to sell, because the general Property is in the Lessor. 11 Rep. 79. *Lewis Bowles's Case*.

11. Lease of Lands for Life, excepting Trees of twenty-one Years Growth, if not decayed; adjudged, that the Trees remained as Parcel of the Inheritance, and are not Chattels, but shall descend to the Heir of the Lessor; and if there had been no Exception, the general Property and Interest of them had been in the Lessor, and the Lessee had only a particular Interest, and therefore the Lessor might sell them without the Assent of the Lessee; but in such Case the Sale must take Effect after the Lease is determined. 11 Rep. 46. *Lyford Richard's Case*. 4 Rep. 62. *Harlakenden's Case*. S. P. Dyer 91. *Martyn's Case*. S. P.

12. Prescription for eight Loads of Wood to be cut and taken every Year, as appertaining to his Messuage, is not good, for it ought to be for Estovers, to be employed in repairing the House, or to be spent in it; for to prescribe to cut down and take my Wood, not saying for what, is as much as I who have the Freehold can do. Mich. 9 Jac. 1 Brownl. 35. Postea pl. 18.

13. Where a Man hath a Grant of Estovers to be burnt in such a House, they shall go to him who hath that House, by whatsoever Title he hath it, because one is inseparably Incident to the other; and if the Owner of the House cut them down, and another carries them away, he may have an Action of Trespass against him, tho' he who took them away had Common of Estovers in the same Place. 1 Brownl. 44. *Spilman's Case*. Antea pl. 5. S. C.

14. The Countess of Cumberland exhibited a Bill in Chancery against the Earl of Cumberland, that he might be decreed to permit her to have and take old Birch-Trees of above 200 Years Growth on her Lands, which she held in Jointure in *Yorkshire*, which she alledged belonged to her, as Tenant for Life, to take; the Defendant, by his Answer, shewed, that those Birches in that County are used for Timber to build Sheep-Houses and Cottages, which being proved by Witnesses, Baron Altham, who was called to the Assistance of the Chancellor, and having conferred with all the Judges, they resolved, that Birches in that County were Timber, and belonged to the Inheritance, and therefore could not be taken by the Jointress, and that the Case was the same of Windfalls, which had any Timber in them, belonged to him in Reversion; and so it was decreed. Moor 812. *Countess of Cumberland's Case*. Estrepeement. (A) 4. S. C.

15. Trover for 200 Load of Timber and Stockwood, the Cafe was, *Tenant for Life*, without Impeachment of Waste, excepting voluntary Waste, he in Reversion sold the Timber-Trees growing on the Land to the Plaintiff, and the *Tenant for Life* cut them down and sold them to the Defendant; the Question was, whether he to whom the Reversioner sold the Trees could maintain an Action of Trover against him to whom the Tenant for Life sold them; and adjudged he could not; for tho' the Reversioner had a general Property in them during the Life of the Tenant for Life, yet he had no Authority to sell them, because the Tenant for Life had a particular Interest in them, therefore his Sale being void, the Person to whom they were sold cannot have this Action. *Cro. Car. 199. Waller versus Sands.*

16. Lease for Years, excepting all Trees growing, or to grow on the Lands, and in this Lease the Lessor covenanted, &c. to find sufficient *Housebote*; the Lessee made his Executor, and died; the Executor assigned Part of the Term to another, and the House being in Decay, the Assignee cut down Timber to repair it; the Question was, what Interest the Lessee himself had in the Trees, and whether he ought to require the Lessor to set out what Trees he should have to repair, and if upon such Request and Denial he may have an Action of Covenant against the Lessor, or cut down what Trees he will; all this was debated upon an Action of Trespass brought against the Assignee, and whether the Action would lie against him; but these Points were not resolved, for Judgment was given upon a Default in the Pleading. *Latch 98. Lisle versus Martin.*

17. Lease for Years, and that the Lessee shall have convenient Fuel, not cutting down or selling any Trees; the Lessee cut down Trees for Fuel, and the Lessor brought an Action of Covenant; and adjudged, that the Action was well brought, for this was a Covenant on the Part of the Lessee, because the Law allows him reasonable Estovers, and by this Covenant he had abridged himself of that Privilege. *Pasch. 15 Car. March 9.*

18. In Trespass *Vi & Armis*, for Entering into his Land and digging it; the Defendant pleaded, ^{1 Lev.} that he was seised of an antient Messuage, and so prescribes to have fourteen Days to dig Turf in ^{231.} the Place where, &c. *tantum ad messuagium præd' pertinen'*; and upon a Demurrer to this Plea, it was adjudged ill, because he said the Turfs were appertaining to his Messuage, but did not say they were to be burnt or used therein. *Sid. 354. Heyward versus Cannington.* See *Antea pl. 12. S. P.* See Prescription. (B) 13.

Estray, Waif, and Wreck.

(A)

1. **A** Thief having stolen Sheep, and being pursued, waived them in the Manor of *B. G.* and they strayed into the Manor of *W. S.* where they were seised by the Bailiff as Estrays; it was the Opinion of one Judge, that if the King was entituled to Estrays, the Property was in him by his Prerogative, without Seizure; but if the Lord of the Manor was entituled, then he had no Right till Seizure. *Dyer 338.*

2. A Swan may be an Estray, and so cannot any other Fowl. *7 Rep. 17, in the Case of Swans.*

3. In Trover, &c. the Defendant justified as Servant to the Sheriff of *Middlesex*, for that the Plaintiff had stolen the Goods and brought them to *R.* in the County of *Middlesex*, at which Place the Defendant took them *ut Bona waviata*; and upon Demurrer the Plea was held ill, for he ought to alledge in Fact, that a Felony was committed, &c. and that the Goods were waived by the Felon, &c. *Cro. Eliz. 611. Dury's Cafe.*

4. If the Owner of an Estray doth not claim the same within a Year and a Day, Proclamations being duly made in that Time, the Goods are forfeited; so 'tis in Cafe of a Wreck at Sea, but there the Year and Day shall be accounted from the Seizure; for tho' the Property of it is vested in the Lord before Seizure, yet till then, and till he takes it in his actual Possession, the Owner cannot tell of whom he may claim the Goods. *5 Rep. 107. Sir H. Constable's Cafe.*

5. In a Justification for an Estray, the Defendant must alledge, that *it came into the Manor* as an Estray; adjudged, that he cannot justify the Fettering it to another Horse; and that if another taketh it away, the Owner cannot have an Action against him from whom it was taken, because by its coming as an Estray, and being seised as such, the Property is devested out of the Owner; and if after such Seizure it strayeth into another Manor before the End of the Year, he who enters there to take it, is a Trespasser. *1 Brownl. 236. Harvey versus Blacklock. Winch 124. Pledwell versus Gosmore. Hutt. 67. S. C.*

6. The Using an Estray within the Year, is an Abuser, for it ought not to be done, or put to Noy in any Manner of Use. *Godh. 150. Tayler versus Jones. 2 Cro. 147. Bagshaw versus Goddard. S. P. S. C. Telv. 96. S. C. Distress. (B) 5. S. C.*

Moor 572. Cro. Eliz. 693. S. C. 7. The Reason why *Bona waviata* are forfeited to the King or Lord of the Manor, and that the Owner shall lose his Property in them, is, because it shall be intended, that he was negligent in making fresh Pursuit to apprehend the Felon, and therefore the Law hath imposed this Penalty on him, that he shall lose all the Goods which the Felon leaves behind, but Goods stolen and hid by the Felon are not *Waif*, and the Owner may take them where-ever he finds them. 5 Rep. 109. *Foxley's Case*.

8. In Trespass for his Horse, the Defendant pleaded, that one *T. P.* was Owner of the Horse, and that he estrayed out of his Possession, and came to the Hands of the Plaintiff, and that the Defendant, by the Command of *T. P.* demanded the Horse within a Year, &c. *proferendo satisfactionem* to the Plaintiff, who refused to deliver the Horse, and thereupon the Defendant took him, &c. there was a frivolous Replication; and upon Demurrer it was adjudged, that the Owner may seize an Estray where he finds it, without telling the Marks or proving the Property, (which may be done at the Trial, if the other thinks it proper to contend it) that the Participle *Proferendo satisfactionem* is a direct Affirmation of the Tender of Amends, like *Warrantizando vendidit*, that a Tender of Amends generally was good in this Case, without shewing the particular Sum, because the Owner of the Estray is no Wrong-doer, and 'tis impossible for him to know how long his Horse had been in the Possession of the Plaintiff, or how much would make Satisfaction; but 'tis otherwise in Trespass, for there a Sum certain must be tendered, because the Defendant is a Wrong-doer, and for that Reason the Law puts this Difficulty upon him. 2 Salk. 686. *Henley versus Walsh*. See *Co. Ent.* 40, 170. *B. Rast. Ent.* 680.

Estreats. See **Amerciaments.**

Estrepeement.

(A)

1. **T**HIS is an original Writ, which lies to prohibit Waste pending a real Action, and 'tis properly before Judgment, but in some Cases it may be as well *after as before Judgment*; 'tis directed to the Sheriff, commanding him *quod ad messuagium personaliter accedens totaliter ordinari faciat quod vasium seu Estrepeementum de eodem messuagio contra formam statuti non fiat pendente placito indiscusso*; by Virtue of this Writ the Sheriff may resist them who make Waste, and he may also commit them, and for that Purpose may raise the *Posse Comitatus*. 5 Rep. *Foliam's Case* 115. *Hetley* 79. S. C.

2. Pending a Writ of Partition between Coparceners, the Tenant committed Waste, the Court would not grant this Writ, because in this Case there was equal Interest between the Parties, and the Writ will not lie, but where the Interest of the Tenant is to be disproved. *Goldf.* 50. 33 H. 8. *Bendlos* 18. S. P.

3. A Writ of Intrusion was brought in the *Per* against the Heir of the Intruder; and because it was brought in the *Per*, the Court held, that pending that Writ an Estrepeement would lie against the Tenant. *Godb.* 112.

4. A Writ of Estrepeement was granted against the Countess Dowager of *Cumberland*; and upon a Motion that her Servants might be committed, because they had done Waste after the Writ delivered, the Court denied it, because it was not directed to her and *her Servants*, for then it had been a Contempt of the Court. *Hob.* 85. *Cumberland Earl, &c.*

2 And.
93.

5. *Brownlow*, one of the Pronotaries, informed the Court, that there was no Precedent of a Writ of Estrepeement awarded to Servants, but only to the Tenant, because Damages are to be recovered against him; the Court answered, that the Damages might be more than the Tenant was able to satisfy, and therefore it shall be awarded against him and his Servants. *Cro. Eliz.* 393. *Arden versus Darcy*, and 484. *Perry's Case*. S. P.

6. Error to reverse a Common Recovery, and whilst that Writ was depending, an Estrepeement was awarded to the Tenant; adjudged well brought. *Cro. Eliz.* 114. *Holland versus Dauntsy*.

7. A Writ of Estrepeement was brought against Husband and Wife, *after they had Judgment in a Quid juris clamat*, and before Execution was awarded, and held good. 15 Eliz. *Dyer* 325. *Bold versus Newport*.

8. Estrepeement, &c. in which the Plaintiff counted, that he had brought a *Formedon in Descender* against the Defendant, &c. and a Writ of Estrepeement, which he delivered to him, (the Defendant) and that afterwards he had committed Waste contrary to the Prohibition, and in Contempt thereof; the Defendant pleaded, that he had done no Waste, upon which they were at Issue; and it was found for the Plaintiff, and thereupon he had Judgment for his Damages and Costs. *Moor* 100. *Playflow versus Bachelor*.

9. Writ of Error to reverse a Recovery, and a *Scire facias* against the Tertenants, pending which Writ an Estrepement was awarded against them ; and adjudged the Writ was maintainable. *Moor* 622. *Holland & al' versus Jackson and Ogden.*

Evidence to maintain Issues.

Between Executors and Administrators.

(A)
Upon Specialties. (B)
In Ejectment, Dower, and Waste, and
other Actions. (C)

What shall be Evidence, what not ; and
what Statutes, Deeds and Writings
may be given in Evidence, and what
not ; and what Persons and Things are
allowed to be Evidence, and what not.
pl. 34. (D)

(A)

Between Executors and Administrators. See Title *Witness*.

1. **I**N Debt against Executors upon *Plene Administravit* pleaded, they gave in Evidence, that they redeemed Part of the Testator's Goods with their own Money, which he had pawned for the full Value, and that they had paid the full Value of the Residue to discharge his Debts ; and this was held a good Evidence. *Mich. 6 H. 8. Dyer.* But if the Action had been on a Debt upon the Testator's Bond, there Payment of his Debts upon Contracts had not been good Evidence to maintain such Plea, because Debt upon Bond is of a higher Nature than Debt on a Contract. *Dyer 32.*

2. In Debt against Executors, the Issue was upon *Assets* in their Hands on the Day of the Action brought, and the Evidence was, that they received 100 *l.* on that very Day by a Decree of the Prerogative Court, which they paid on the same Day to a Creditor of the Testator, by the Order of the said Court ; adjudged no good Evidence to maintain this Issue ; it should have been pleaded Specially, and then it would not be *Assets*. *Dyer 208.*

3. Debt against an Executor, and upon *Plene Administravit*, the Plaintiff replied *Assets* at *Excester*, and being at Issue, he gave in Evidence *Assets* at *Excester*, and the Jury found, that the Testator died in *Ireland*, and that the Defendant took his Goods there ; resolved, that the Jury might find *Assets* in another County, and having found the Substance of the Issue, (*viz.*) *Assets*, the Finding, that they were beyond Sea, is but *Surplusage*. 6 *Rep.* 46. *Dowdale's Case.* *Dyer 30. S. P. Earl of Oxford versus Waterhouse. Postea Fines.* (B) 13. *S. C.*

4. Debt against an Executor upon *Plene Administravit* pleaded, the Plaintiff replied *Assets*, and gave Evidence, that the Defendant had intermeddled with the Testator's Estate, and afterwards refused the Executorship in open Court ; whereupon Administration *cum Testamento annex'* was granted to another, and that the Testator's Goods amounted to 1000 *l.* The Defendant gave Evidence, that he had paid several Debts due and owing by the Testator, and that several Persons had recoverd Debts against the Administrator, amounting to 1000 *l.* & *ultra* ; adjudged, this was no Evidence to prove *Plene Administravit* by himself. *Leon. 154. Hawkins versus Laws. Postea Refusal.* (A) 1. *S. C.*

(B)

Upon Specialties.

1. **D**EBT against an Heir upon the Bond of his Ancestor, he pleaded *Reins per descent*, upon which they were at Issue, and the Plaintiff gave Evidence of a Fraudulent Conveyance made by the Defendant before the Action brought, on purpose to deceive him, adjudged ; that the Evidence was good, and that the Statute 13 *Eliz.* of *Fraudulent Conveyances*, need not be pleaded, because this Conveyance was made void by the Statute. 5 *Rep.* 60. *Gooch's Case.* *Hob. 72. Humberton versus Howgill. S. P.*

2. Debt upon Bond, the Defendant pleaded Payment according to the Condition, upon which they were at Issue, and the Defendant gave Evidence, that he had paid the Money before the Day, and that the Plaintiff had accepted it, adjudged ; that Payment before the Day is a sufficient Discharge of the Bond. *Mich. 24 Eliz. Godb. 10.*

3. Adjudged, that tho' the Deed of Purchase expresses a Consideration of so much Money paid by the Purchaser, yet upon a Trial, that shall not be good Evidence to prove the Money paid ; but it must be proved by Witnesses. *Style 462. Thorn versus Maddison.*

5 D 2

(C) In

(C)

In Ejectment, Dower and Waste, and other Things. See *Estoppel*.
(A) 2.

1. **T**HE Declaration was on a Demise of a Manor & *terras dominicales*, and upon Not guilty pleaded, the Plaintiff gave in Evidence a Demise of the Manor & *omnes terras dominicales*, except two Clofes; it was objected, that by the Words *terras dominicales* in the Declaration, all the Demefne Lands were comprehended, and the Evidence being, that two Clofes were excepted, did not maintain that Point; but adjudged the Evidence was good; for *terras dominicales* shall not be intended all the Demefne Lands; and if so, then the Lands not excepted are *terras dominicales*, and that will maintain the Declaration. 1 Leon. 139. *Atkyns versus Hales*.

In Trespass, the Defendant pleaded, that one *Tindal* was seised in Fee, and died seised, and that the Land descended to the Defendant; the Plaintiff replied, and traversed the *Seisin in Fee*, upon which they were at Issue, and the Evidence to prove the *Seisin in Fee*, was, that *Tindal* was so seised a long Time before he died, and that he aliened, and was not seised after; adjudged, that this Evidence did not maintain the Issue; for the *Seisin* upon which the Issue was taken must be intended a *Seisin* continuing to the Death of *Tindall*, and not a general *Seisin* at any Time during his Life. 4 Leon. 97. *Paston versus Townsend*.

2. Waste was assigned in cutting and felling Oakes, the Defendant pleaded no Waste done; adjudged, that upon such Plea he might give in Evidence, that he only lopt the Oakes. *Dyer* 92.

3. Waste was assigned for digging a Trench in a Meadow; upon no Waste pleaded, the Evidence was, that a Trench was made, &c. by which the Meadow was improved; it was a Question, whether this might be given in Evidence, or whether it ought to be pleaded. *Dyer* 361.

4. If one commit Waste, and afterwards repair before the Action brought, he cannot plead no Waste done, and give in Evidence, that he repaired before the Action brought; but must plead it. 5 Rep. 119. in *Whelpdale's Case*. *Dyer* 276. *S. P.*

5. In Trover for a Lease, upon Not guilty pleaded, the Plaintiff gave Evidence, that the Lease was made to him and to *B. G.* and that it was left with *B. G.* who died, so that the Plaintiff was now the sole Owner of the Lease; the Defendant gave Evidence, that *B. G.* sold his Interest in the Lease, and also the Lease it self, to him the said Defendant; so as now he was Tenant in Common with the Plaintiff; this was held good Evidence, without pleading it. 2 Leon. 222.

6. There was a Covenant between the Parties to levy a Fine of Lands to the Use of *B. G.* upon Condition, that if he did not pay so much Money by such a Day, that it should be to the Use of *R. L.* and his Heirs; the Fine was levied, and before the Day of Payment of the Money, *R. L.* released to *B. G.* all his Right, &c. in the Land, thereupon the Money was not paid; but afterwards *R. L.* supposing, that the Release he made before the Condition broken, was not a sufficient Discharge of the future Use, he brought an Ejectment, and at the Trial a Copy of this Release was produced in Evidence; and adjudged, that it was good, it being to defend the Possession. *Cro. Eliz.* 863. *Broom versus Carr*.

7. In Ejectment, the Plaintiff declared on a Demise of 100 Acres, and that the Defendant ejected him out of 100 Acres, and shewed his Lease in Evidence, which was only forty Acres; it was objected, that this could not be the Lease on which he declared; but adjudged, that the Declaration was good for as much as is comprised in the Lease, and that the Jury might acquit him of the Rest. *Cro. Eliz.* 13. *Guy versus Rand*.

8. In Debt for Rent against the Lessee for Years, the Issue was, whether the Rent was paid or not; the Defendant gave Evidence, that the Plaintiff was bound by his Covenant to repair the House, which he neglected, and thereupon he employed Part of the Rent in repairing it; and as to the Residue, he paid it by Order of the Lessor to discharge a Rent-Charge with which the Lands were charged; adjudged, that the Lessee may employ the Rent to repair, but then he must plead it, and not give it in Evidence; but he may give in Evidence, that he paid it by Order of the Lessor. *Cro. Eliz.* 222. *Taylor versus Beale*.

9. The Statute of *Usury* mentions *Loans*, *Bargains* and *Chevisance*; an Information was brought upon the Statute for an usurious Loan of Money, and the Informer gave Evidence an Usurious Contract upon a Bargain for Wares; adjudged, that this did maintain the Issue; but if the Information had been General, upon an *Usurious Agreement*, in such Case it had been good Evidence, because every Loan is an Agreement. 1 Leon. 96. *Sir Wolstan Dixey's Case*.

10. Adjudged, that if the Plaintiff in Ejectment, or in any other Action gives any Writing, Record, or Sentence in the Ecclesiastical Court, in Evidence, and the Defendant offers to demur upon it, the Plaintiff ought either to join in Demurrer, or waive that Evidence, because the Defendant shall not be compelled to put a Matter of Difficulty to the Jury; but if either Party offer to demur upon any Evidence given by Witnesses *viva voce*, the other shall not be compelled to join, because the Credit of the Evidence is to be left to the Jury, and not to the Court. *Pasch.* 42 *Eliz.* *Cro. Eliz.* 751. *Middleton versus Baker*.

11. Where an Information contains some particular Offences, as *Extortion, &c.* and afterwards there are general Words, which may include Offences of the same Nature; as *Oppression, &c.* if the Plaintiff proves the particular Offence, he may give Evidence of the other Offences included in the general Words, and this he may do in Aggravation of the Damages; but if he doth not prove the particular Offence, then 'tis otherwise. 2 *Brownl.* 151. *Doctor Manning's Case.*

12. Trespafs for an Assault and Battery, in which the Plaintiff supposed it to be done 1 *Maii* 8 *Jac.* the Defendant pleaded, that on the same Day the Plaintiff would have assaulted him, and that he in his own Defence, *molliter manus imposuit* on the Plaintiff, *quæ est eadem transgressio*; the Plaintiff replied *son assault demesne*, upon which they were at Issue, and at the Trial the Defendant produced Witnesses, who proved, that the Plaintiff assaulted him a long Time before the Day laid in the Declaration, and that on that Day the Defendant assaulted the Plaintiff in his own Defence; upon this Evidence the Plaintiff demurred, because the Defendant by his Plea had confessed, that the Plaintiff had assaulted him on that very Day which was laid in the Declaration; and now he justifies for an Assault made on him another Day long before that Time; adjudged, that if he had pleaded the general Issue, Not guilty, he might have given Evidence of an Assault made on him by the Plaintiff, before the Day contained in the Declaration; for in such Case the Day had not been material, but throughout the whole Pleadings, the Parties had agreed on the Day, and therefore they cannot vary from it upon the Evidence. *Trin.* 10 *Jac.* 2 *Brownl.* 183. *Downes versus Skrimshaw.*

13. In Replevin, the Defendant made Conusance, for that *W. R.* was seised of six Acres of Land, &c. in Fee, and granted a Rent out of it to the Plaintiff, and for the Rent arrear, he avowed the Taking the Cattle, &c. the Issue upon the Pleadings was, that the Rent did not pass by this Grant; adjudged, that the Avowant ought to prove, that the Grantor was seised of six Acres, or rather more, but not less, if he would maintain this Issue. *Trin.* 19 *Jac.* *Winch* 15. *Bennett's Case.*

14. *Iudebitatus assumpsit*, upon *Non Assumpsit* pleaded, the Plaintiff shall not give any Specialty in Evidence to prove his Debt, as a Bond, Indenture, &c. because he may bring an Action of Debt upon that Specialty. *Moor* 340.

15. Trover and Conversion brought by an Executor, the Defendant pleaded *ne unques Executor*, 1 *Lev.* upon which they were at Issue, and at the Trial in *London*, the Probate under the Seal of the Court was produced, which the Defendant did not deny, but offered to give Evidence, that the Original Will was forged, which was opposed, because the Validity of the Will was properly determinable in the Spiritual Court; therefore least they should demur on the Evidence, the Court ruled, that if this Evidence was allowed, they would grant a new Trial; and they held that nothing should be given in Evidence against what had been already done in the Spiritual Court, and therefore the Defendant might give Evidence, that the Probate was not under the Seal of the Ordinary, or a forged Probate, or admitting it to be his Seal, yet the Defendant might give Evidence that the Will was revoked. *Sid.* 359. *Noell versus Wells.* The Remedy is by Appeal. 235.1 Raym. 405.

16. Ruled, that where an Action is brought upon a * *Promise in Law*, Payment before the Action brought may be given in Evidence, tho' *Holt Ch. Just.* held, there was no such Thing as a * *Promise in Law*; but where the Action is grounded on a Special Promise, there Payment, or any other legal Discharge, must be pleaded. 1 *Mod.* 210. *Fitts versus Freestone.* *6 Mod. 131.

(D)

What shall be Evidence, what not; and what Statutes, Deeds and Writings may be given in Evidence, and what not; and what Persons and Things are allowed to be Evidence, what not.

1. **A**fter the Jury were gone from the Bar, a Witness, who was sworn for the Defendant, was called by the Jury, before whom he recited the Evidence given in Court, and afterwards the Defendant had a Verdict; upon Complaint of this Misdemeanor the Judge of Assize examined the Jury, and they confessed the Matter; whereupon it was returned on the *Postea*, and the Verdict set aside. *Cro. Eliz.* 159. *Metcalf versus Dean.*

2. In Trespafs, and the Parties were at Issue, and a Church-Book was given in Evidence to prove the Nonage of the Plaintiff at the Time he made a Lease; and after the Jury were gone from the Bar, the Plaintiff delivered to them the Church-Book, and had a Verdict; this Matter was returned upon the *Postea*, to set aside the Verdict; but adjudged, it should not, and that it differed from *Metcalf's Case*, where the Witness was examined *Viva voce* after the Jury were gone from the Bar; 'tis true, the Court might have refused the Verdict in the principal Case, but the Church-Book having been given in Evidence, and the Court having directed the Jury as to the Validity of such Evidence, the Book remains the same, tho' it was given to the Jury without the Consent of the Court, and after they were gone from the Bar. *Cro. Eliz.* 411. *Vicary versus Farthing.* *Moor* 451. *S. C.*

3. An Answer in Chancery may be given in Evidence to a Jury against the Defendant himself. *Godb. 326, 439. Huet versus Overie.*

4. A Copy of a Deed shall not be given in Evidence, unless the * *Deed is burnt*, or some such Inconvenience; but a Copy of a Record is good Evidence. 10 *Rep. 92. 2 Resol. in Dr. Leyfield's Case.* * 1 *Mod. 4. Medlicot versus Joyner.*

5. In Attaint, the Plaintiff shall not give more Evidence, nor produce more Witnesses, than he gave to the Petty Jury; but the Defendant may, because 'tis in Affirmance of the first Judgment. *Dyer 53, and 212. in Paramour's Case.*

6. A Church-Book was given in Evidence, and held good. 1 *Brownl. 207. Hall versus White. Cro. Eliz. 411. Vicary versus Farthing, S. P.*

7. If the Plaintiff produce any Writing or Record, or Sentence in the Ecclesiastical Court in Evidence, upon which any Matter in Law ariseth, and the Defendant will demur upon the same, the Plaintiff is bound to join in Demurrer, or waive the Evidence; and the Reason is, because Matter of Law should not be tried by a Jury. 5 *Rep. 105. Baker's Case.*

8. Depositions taken in Chancery may be read in Evidence to a Jury between the same Parties, upon Oath made, that the Witnesses cannot be found to give Evidence *Viva voce.* *Godb. 439. Huet versus Overie.*

9. The King, under his Sign Manual, certified a Promise made to him in Behalf of another; and this Certificate was allowed good Evidence. *Hob. 213. Lord Abigny versus Lord Clifton. Godb. 199. Lea versus Lea, S. P.*

10. In Hilary-Term, 22 *Jac.* a Commission issued to examine Witnesses returnable in Easter-Term following, the Commissioners began to examine on Monday the 28th of March 1625. which was the Day after the Death of the King, and continued examining till Friday following, and then, and not before, they had Notice of the Demise of the King; yet it was adjudged, that the Depositions should stand; especially, it being in a Court of Equity, where the Proceedings are *De jure naturali*, and not by the strict Course of Law. *Cro. Car. 69. Crew versus Vernon.*

11. A Bill in Equity was exhibited against two Defendants, one of them in his Answer claimed a Title, but the other did not, but set forth several Things in his Answer to make out the Title of the other Defendant, and in an Action between other Parties, concerning the same Title, it was moved, that this Answer might be given in Evidence, but it was denied; 'tis true, his Answer might be given in Evidence against himself. 2 *Roll Rep. 311. Berisford versus Phillips.*

12. Trover and Conversion brought by the Citizens of Colchester against the Citizens of London, for taking their Goods; upon Not guilty pleaded, there was a Trial at Bar by a *Hartfordshire* Jury, where the Defendants confessed the Taking the Goods; but that it was for Non-payment of Toll, which the Defendants claimed by Custom, which they proved by several Records and Entries in their Books, that the Plaintiffs had paid; but they insisted upon their Charter granted by King *Richard* to be discharged; it was objected against the Defendants Evidence, that it was not good upon the General Issue, but that they ought to have pleaded the Matter Specially; 'tis true, if it had been an Action of *Trespass*, they ought to have pleaded the Custom Specially; but in Trover any Thing may be given in Evidence which may prove the Conversion to be lawful, and that upon the General Issue. *W. Jones 240. Colchester versus London.*

13. If a Record be given in Evidence the Jury may find it, tho' 'tis not *sub pede figilli.* *White versus Pinder, Style 22.*

14. If a Jury will give Evidence of any Thing which is of his own Knowledge, he must give it in Court, and not to his Fellows. *Style 233. Denmet versus Hundred of Hartford.*

15. Two Commoners, in Behalf of themselves, and all the Commoners within *H.* preferred a Bill in the Dutchy-Court, against the Owner of the Land, in which they claimed Common, &c. and upon hearing the Cause, the Common was decreed for them; the Dutchy-Court was put down, and the now Defendant having purchased Lands within *H.* the Plaintiff, who was a Commoner when the Decree was made, but not a Plaintiff in that Cause, exhibited his Bill against the now Defendant, to have the Use of the * Depositions taken in the Cause in the Dutchy-Court, at a Trial to be had at the Assises, and the Defendant demurred to the Bill, because neither of them were * Parties to the former Cause, tho' it was the same upon which the Action at Law was now brought; and the Demurrer was held good. *Hardr. 472. Stanley versus Pegg.*

Antea 8. Countess of Pembroke, & al'. S. P.

* Hardr.
472.
Rush-
worth o.
Countess

16. The Plaintiff exhibited his Bill in the Exchequer, for Tithes of Houses in the Parish of *St. Helen's* in London, according to the Statute 37 *H. 8.* the Defendants in their Answer set forth a Customary Payment in Lieu of all Tithers, and thereupon a Trial was directed at Law; and now the Plaintiff exhibited another Bill against the Parishioners, that the Leiger-Book in their Custody might be produced in Evidence at the Trial, which Book concerned him as well as the Parish; and upon a Demurrer to this Bill, because it was only to provide himself of Supplemental Evidence, after the hearing the Cause, it was decreed, that the Demurrer was ill, because the Bill was not to have Supplemental Evidence in the same Cause, and in the same Way of Proceeding, but collateral to it, (*viz.*) at a Trial at Law; besides, these are Common Evidences for both Parties, they are like Court-Rolls, which belong as well to the * Tenants as to

* 5 *Mod.*
395, 396.

the Lord of the Manor, and therefore they may bring a Bill to have the Use of them. *Hardres* 180. *Langham versus Lawrence*.

17. Upon a Bill in the Exchequer to preserve the Testimony of Witnesses, one *T. S.* being a Witness, and sick, was, upon Hearing of Counsel on both Sides, and by Order of Court, examined *de Bene esse* on the Part of the Defendant; afterwards the Answer came in on the 28th of November, and the Witnesses died on the 18th of December following; and by the Opinion of all the Judges, it was held, that this Examination could not be read in Evidence in a Trial at Law in Ejectment, because it was taken before Issue joined in the Cause, and he might have been examined after the Answer came in. *Hardres* 315. *Brown's Case*.

18. In Ejectment for the Rectory of *Burghfield* in *Berks*, at a Trial at Bar, the Case was, that the *Earl of Shrewsbury* being a Popish Recusant convicted, presented the Lessor of the Plaintiff, who was thereupon instituted and inducted; but the Record of this Conviction being burnt in the Fire in the *Inner Temple*, the Defendant offered to prove it by the Estreat thereof into the Exchequer; and by an Inquisition found and returned into that Court, of Recusants Lands; and adjudged by *Hale Chief Baron*, and the Court, that in such Case a Record may be proved by Evidence, because the Conviction is not the direct Matter in Issue, but an Inducement to it; as if an Appropriation was in Issue, the King's Licence is the Foundation of it; but yet if such Licence cannot be found on Record, it may be proved in Evidence; so where in Trover the Proof depended on a *Fieri facias & venditioni exponas*, and the *Fieri facias* could not be found on Record; it was allowed to be proved in Evidence, but then the Evidence must be very strong, which it was not in the Principal Case, because by the Estreat of the Conviction into the Exchequer, it appeared to be at the same Assizes at which the Party was presented to be a Recusant, which is not allowed, either by the Statute 23 or 29 *Eliz.* But by these Statutes a Proclamation is directed to be made at the same Assizes, &c. that the Offender shall render himself to the Sheriff of the County before the * next Assizes, and therefore it was held, that the Conviction was not well proved in this Case. *Hardres* 323. *Knight versus Danler*.

* See Recusancy. (A) pl. 22.

19. Trial at Bar, upon an Issue out of Chancery, and the Evidence to prove a Settlement made 9 Car. was a Witness, who said, that he being to purchase an Estate from the Plaintiff's Father, one Mr. *Nicholls*, who was the Father's Counsel, gave him a Copy of such a Deed of Settlement, to shew what Title the Father had, but that he never saw the Original; this was ruled no Evidence of the Deed it self. 1 *Mod.* 94. *Lord Peterborough versus Lord Mordant*.

20. At a Trial at Bar, the Question was, whether a Will, or not, it being only a Deed, and indented, made between the Father and Son; but there being Words in Form of a Will, (*viz.*) that he was sick in Body, but of sound Mind, and it being proved, that he intended it for his Will, it was held this was a good Proof that it was his Will; then the Defendant set up an Entail, but the Plaintiff produced an Exemplification of a Recovery in the *Marquess of Winchester's Court in antient Demesne*, which being an antient Copy, and the Record being burnt in the Civil Wars, the Court held it good Evidence, and would not put the Plaintiff to prove it was a true Copy, like the Case of a *Quare Impedit*, where the Defendant pleaded an Appropriation, and because it was antient, the Court would intend that there was a Licence of Appropriation where the Licence it self did not appear. 1 *Mod.* 117. *Green versus Proud*.

21. In Ejectment for Lands in the County of *Brecknock*, the Plaintiff claimed by Descent, but the Defendant claimed under a *Quod deforceat* in the Grand Sessions of *Wales*; upon which a Common Recovery was had, and offered to produce it * under the Seal of the Great Sessions; and upon a Demurrer it was adjudged, that a Recovery suffered in *Wales* might be given in Evidence at a Trial in the next County, under the Great Seal of *Brecknock*, that no Writing can be delivered in Evidence to a Jury, but such as is of Record, or under Seal, unless by the Consent of Parties, that a Chirograph of a Fine may be given in Evidence, but not delivered in Evidence; but that a Recovery may be delivered in Evidence, and so may a Copy of it. 2 *Sid.* 145. *Ollive versus Gwynn*. See *Wales*. (A) 11. See 27 *Eliz.* cap. 9.

Hardres 118.

* *Dyer* 276. 2.

22. Error of a Judgment in the Palace-Court in *Assumpsit*, in which Action the Plaintiff was to prove an Arrest as a Consideration of the Promise, and not producing the Writ; the Defendant demurred on the Evidence, but yet the Plaintiff had Judgment; and now the Error assigned was, that he ought to produce the Writ, for the King's Writs are Records, and to be proved only by themselves, which is very true; but here the Defendant had demurred upon the Evidence, and by that Means had confessed the Writ, and the Arrest is Matter of Fact, tho' 'tis to be proved by Matter of Record, and the Jury might know that there was a Writ; if so, then by the Demurrer to the Evidence, all Matters of Fact are Confidence, which the Jury might know of their own Knowledge. 1 *Lev.* 87. *Fitzharris versus Bojourn*. See *Dyer* 239. See Error. (G) 50. S. C.

Sid. 105. S. C.

23. *Hawkins* having a great personal Estate, and being a Prisoner in *Newgate*, and a little disturbed in his Mind, made his Will, attested by Witnesses; and upon hearing the Cause in the Prerogative-Court, Sentence was given against the Will; and upon an Appeal to the Delegates, two Records were produced to avoid the Testimony of two Witnesses to the Will, by which it appeared, that one of them was convicted for a Libel, and the other for Singing a Ballad against the Government, and both of them adjudged to the Pillory, but no Proof that they stood in it; after these Witnesses were examined in the Spiritual Court, and before Sentence given there came a general Pardon, by which they were pardoned; and the Question now was, whether

* 5 Mod.
15.

ther their Depositions taken in the Spiritual Court shall be admitted for Evidence: It was agreed, that if their Testimony was not good at the Time when it was taken, the subsequent Pardon would not make it good, and that the *Judgment of Pillory* makes the *Infamy*, tho' never executed; but the chief Question was, whether that Judgment for *these Crimes* should make them infamous, because (as it was objected) 'tis not from the Judgment, but from the * *Nature of the Crimes* for which the Offenders are convicted, that the Infamy arises, as where they are Deceits, Frauds, Cheats, &c. Besides, the Judgment of the Pillory, tho' it infers Infamy at the Common Law, yet it imports no such Thing, either by the Canon or Civil Law, unless the Cause for which 'tis inflicted is infamous, and 'tis by those Laws that this Case (being concerning a Will) is to be determined, therefore the Matter for which these Witnesses were convicted, being not infamous, either by the Canon or Civil Law, tho' they had Judgment for the Pillory, their Depositions were admitted for Evidence, and the Sentence in the Prerogative-Court reversed, and the Will decreed to be good. 3 Lev. 426. *Chater versus Hawkins*, &c.

24. Depositions in Chancery, in one Cause, may be read in Evidence in another Cause, tho' not between the same Parties; and when an Answer is read in Evidence, the Party may have any Part of it read, but the other Side may insist on the Whole. 5 Mod. 9. *Earl of Bath versus Batefsea*.

25. In Ejectment at a Trial at Bar, the Plaintiff's Title was as Heir at Law, and the Defendant claimed under a Common Recovery suffered by the Plaintiff's Brother; but it happened, that Part of the Lands comprised in the Recovery, were at that Time in *Jointure* to *F. D.* for Life, and not conveyed to him who was *Tenant to the Præcipe*, but the Jointure-Deed could not be produced; whereupon they proved, that in the Year 1661, the Jointress levied a *Fine sur concessit* of the Lands, and demised the same to *W.* for ninety-nine Years, if *she* so long lived, and this was Securing the Payment of 400 *l.* with Interest, and both of them joined in a Lease to him (who suffered this Recovery) for sixty Years, if the said *F. D.* lived so long, rendring the yearly Rent of 200 *l.* and this they proved by Depositions in Chancery, which they insisted might be read, tho' the Bill and Answer were taken off the File and lost; but they proved by the Six Clerks Book, that these were once filed, and they produced an Enrollment of the decretal Order, wherein both the Bill and Answer were mentioned, and this was held a sufficient Proof of the Jointure; for where it was impossible to produce the Deed it self, the Proof thereof might be supplied by these Memorials. 5 Mod. 210. *Haines Barley's Case*.

26. In Ejectment, the Plaintiff claimed a Title under a Settlement of his Mother's Ancestor, but could not produce the original Settlement, of which he gave this Evidence; he proved, that it was in the Possession of the Lady *Baltinglass*, who having committed a Forfeiture, by suffering a Common Recovery, brought the Deed to Mr. *Grange*, to advise with him about it; he proved likewise, that it was produced before a Master in Chancery, that a Copy of it was made, that this Copy was produced at a Trial at Law, in which there was a Special Verdict found, and the Settlement was set forth *in hæc verba*, the Record of which Verdict was now produced; he proved, that a Bill in Equity was exhibited against my Lady *Baltinglass*, to avoid a Lease made by her, and that the Settlement was set forth in this Bill, and admitted by the Lady in her Answer; so the Plaintiff had a Verdict upon this Evidence. 5 Mod. 384. *Matthews versus Thompson*.

27. Adjudged, that an Order of the Court of Chancery shall not be given in Evidence, without producing a Copy of the Bill on which it was made, that where there was a Commission in Chancery to abut and bound certain Lands, and returned; that shall not be given in Evidence, unless acquiesced under, and enjoyed according to such Boundaries for some Time. *Mod. Cases* 149. *Turner versus Nurse*.

28. A Difference arising between an Impropiator and the *Parishioners*, concerning the Right of an House, he brought an Ejectment, and moved, that the Church-wardens might shew him the Parish-Books, and give him Copies of what concerns his Title, that they might be produced as Evidence at the Trial, but it was denied, because this was not a parochial Right, but a Title in Question; 'tis true, Rules have been for the Steward of a Manor to give Copies, and that the Court-Rolls might be produced in Evidence at Trials; the Reason is, because all the Tenants of the Manor have an Interest in the Court-Rolls; but in the principal Case, the Impropiator hath a distinct Interest from the Parishioners. 5 Mod. 395. *Cox versus Copping*.

29. In Ejectment at a Trial at Bar, a Herald's Book, being antient, was admitted as Evidence to prove a Pedegree; and an Inquisition, *post Mortem*, is likewise Evidence, but not concluding Evidence. *T. Jones* 224. *Earl of Thanet versus Foster*.

30. Upon a Trial at Bar, in Ejectment, it was resolved *per Curiam*, that where the Plaintiff hath a Title to several Lands, and brings an Ejectment against several Defendants, and recovers against one, he shall not give that Verdict in Evidence against the rest, because the Party might be relieved against it, if erroneous, but the rest cannot, tho' they claim under the same Title, and all make the same Defence.

So if two Persons will defend a Title in Ejectment, and a Verdict should be against one of them, it shall not be read against the other, without a Rule of Court for that Purpose, but if the Ancestor hath a Verdict, the Heir may give it in Evidence, because he is privy to it; for he who produceth a Verdict must be either Party or Privy to it, and it shall never be read against different Persons, unless it appear they were united in Interest. 3 Mod. 141. *Lock versus Norborne*.

31. Ruled, that a *Counterpart* of an antient Deed may be given in Evidence, and this was done when *Hale* was Chief Justice, in which * *Cafe* a Special Verdict was found, (*viz.*) of the original Deed, and concluded *prout*, as by the Counterpart it appeared, and this was done to preserve the Precedent; and so it hath been held since, that a Counterpart of an old Deed is Evidence, but not of it self, without some other Circumstances; but if 'tis a Counterpart of a Deed leading the Uses of a Fine, 'tis Evidence of it self. *Mod. Cafes* 225. * *In the Cafe of Mayor v. Comb.*

32. At a Trial at Bar in Ejectment, the Question was, upon a Commencement of a Lease, which was to be upon the Determination of a Lease to Queen *Elizabeth*, then in Being, of certain Lands belonging to the Church; and an antient Book was produced to prove this *Lease to the Queen*, in which Book Entries were made of Leases of these Lands ever since the Reign of *H. 7.* and this was found amongst the Evidences of the Bishops of *Worcester*; but this was opposed, and not admitted by the Court to be Evidence, because the Lease being made to the Queen, it must be enrolled, and then a Copy of the Enrolment had been Evidence, for without an Enrolment the Queen could not take, and 'tis better Evidence of a Lease in Fact as well as in Law, than the Book can be. *Mod. Cafes* 248. *Stillingfleet* versus *Parker*.

What Statutes, Deeds and Writings may be given in Evidence, what not.

33. Adjudged, that where an Action of Debt is brought for Rent, upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence, because the Statute had made it no Debt at the Time of the Plea pleaded. 1 *Salk.* 278.

34. Bill in Chancery to perpetuate the Testimony of Witnesses; the Defendant, who was Heir at Law, would not Answer, but stood in Contempt; the Plaintiff took out a Commission, and examined Witnesses *de Bene esse*, and the Defendant joined in Commission and cross-examined them, and before the Answer came in, some of the Witnesses died; it was admitted on all Sides, that if an Answer had been put in, these Depositions might have been given in Evidence; and it was the better Opinion, that they might be given in Evidence without an Answer. 1 *Salk.* 278. 4 *Mod.* 146. *Godb.* 326. *Hob.* 1128. 1 *Cro.* 352. *Hardr.* 232. *Howard* versus *Tremaine*.

35. Depositions had been taken in Chancery *in perpetuam rei memoriam*, and afterwards the Inheritance of the same Lands descended to that very Person who was sworn as a Witness in Chancery; and at a Trial at Bar in Ejectment, wherein he was a Party, the Question was, whether these Depositions might be read as Evidence; and adjudged, that they could not, because such Depositions cannot be Evidence so long as the Parties are living. 1 *Salk.* 286. *Tilley's Cafe*.

36. In my Lord *Hale's* Time, a Counterpart of an old Deed was admitted as Evidence of the Deed it self, and the Special Verdict was drawn up with a *Prout patet* by the Counterpart; but *Mich. 3 Annae*, the Court would not allow a Counterpart of a Deed, without other Circumstances, to be Evidence, unless in Case of a Fine. 1 *Salk.* 287.

37. In Trover, the Plaintiff proved the Goods to be in his Possession, and to be taken away by the Defendant; the Evidence for the Defendant was, that these were the Goods of *Jane Blackham*, who died Intestate, and that Administration was granted to him; the Plaintiff proved, that *Jane Blackham*, a little before her Death, was married to him, to which it was answered, that the Spiritual Court had determined the Right to be in the Defendant, by granting Administration to him, which could not be done, but upon a Supposition that she was not married to the Plaintiff; adjudged, that the Sentence of that Court is conclusive Evidence in Causes within their Jurisdiction; but that must be intended in the Point directly tried, but not in a collateral Matter, to be inferred from their Sentence, as in this Case of Administration, where the Inference is, that it being granted to the Defendant, therefore the Plaintiff was not the Intestate's Husband. 1 *Salk.* 290. *Blackham's Cafe*.

38. Upon a Trial at Bar, in Ejectment, it was resolved, that where the Defendant puts in an Answer in Chancery, which is prejudicial to his Estate, it may be given in Evidence against him, but not against a Purchaser; and that a *Recital* of a Lease in a Deed of Release, is good Evidence that there was such a Lease against the *Releasor* and those who claim under him, but not against others, unless there is a Proof that there was such a Lease, and that 'tis lost. 1 *Salk.* 286. *In the Cafe of Ford* versus *Lord Grey*. *Mod. Cafes* 44.

39. *Indebitatus Assumpsit* for 5 *l.* received to the Use of the Plaintiff, for Fees of his Office of Clerk of the Peace for *Oxfordshire*; upon *Non Assumpsit* pleaded, it was insisted, that the Plaintiff had forfeited the Office by not taking the Oaths within the Time appointed by Law; and to prove it, the Record of the Sessions was given in Evidence, and held good. 1 *Salk.* 284. *Thurston* versus *Slatford*.

40. Action brought by a Brewer for Beer sold and delivered, the Evidence to charge the Defendant was, that the usual Way of Dealing amongst Brewers was, that the Draymen every Night gave an Account to the Clerk of the Brew-house of what Beer they had delivered, which he wrote in a Book, and the Draymen signed it; that in the principal Case the Drayman was dead, but that he had signed the Book, and there was Proof that it was his Hand-Writing, and this was held good Evidence; but 'tis otherwise of a Shop-Book singly, without other Proof. 1 *Salk.* 285. *Price* versus *Earl of Torrington*.

41. Trover, as Administrator, in which the Plaintiff declared upon the Possession of the Intestate; upon Not guilty pleaded, the Defendant at the Trial offered to give Evidence, that the pretended Intestate had made a Will, and an Executor; but adjudged, that if the Administrator himself had brought Trover upon his own Possession, upon Not guilty pleaded, the Defendant may give in Evidence a Will, &c. otherwise if it is brought upon the Possession of the Intestate, as in this Case, for there the Defendant cannot give it in Evidence, but must plead it in Abatement. 1 Salk. 284. *Blunfeild versus Marb.*

42. In Debt for Rent, if the Defendant plead, that the Plaintiff hath levied the Debt by Distress, & *sic non debet*, a Release or Payment of the Money is good Evidence, because it proves there is no Debt which is the Issue; but if the Defendant should plead a *Rasure*, & *sic non est factum*, nothing but a *Rasure* can be given in Evidence. 1 Salk. 284. *Galloway versus Tufach.*

43. At a Trial at Bar, upon an Issue directed out of Chancery, the Question was, whether by the Custom of the Borough of *Droitwich*, Salt-Pits might be sunk in any Part of the Town, or only in a particular Place, and *Camden's Britannia* was produced in Evidence, but disallowed; for tho' a general History may be allowed to prove a Thing relating to the Kingdom in general, because the Nature of the Thing requires it, yet it cannot be Evidence to prove a particular Thing or Custom: But *H. raulds Books* are good Evidence as to Pedegrees, and so are Parish Registers as to Births, Burials, and Marriages, upon the Nature of these Things; but *Dugdale's Monasticon Anglicanum* was denied to be Evidence, to prove whether such an *Abbey* was one of the smaller Abbeys, or not, because the original Records may be had in the Augmentation-Office. 1 Salk. 281. *Stainer versus Burgeses of Droitwich.*

44. In Trover for Lottery-Tickets, the Case was, the Plaintiff gave the Tickets in Question to a Goldsmith to receive the Money, &c. but he having given a Note under his Hand to pay the Defendant so many Lottery-Tickets, gave the Plaintiff's Tickets to the Defendant; it was insisted, that this Note could be no Evidence against the Plaintiff, but it was read; and it was adjudged, that since no Witnesses are present when Goldsmiths give Notes, such Notes are Evidence of the Receipt of the Money or Tickets; and the Owner hath such an Interest in them, that he may maintain an Action against any Person who detains them, because they may be distinguished by Marks, which Money cannot, therefore if Money is stolen, and paid over to another, the Owner has no Remedy against the Receiver, because Money cannot be distinguished. 1 Salk. 283. *Ford versus Hopkins.*

3 Lev.
587.

45. Upon a Trial at Bar, the Case was, a Man made a Deed of Bargain and Sale, by which a Term for Years was assigned to another; this Deed was enrolled; and the Question was, whether it might be given in Evidence, without any Proof, that it was sealed and delivered by the Bargainor; and adjudged that it might, because the Acknowledgment of the Party in a Court of Record, or before a Master extraordinary in Chancery, is good Evidence, that it was sealed and delivered; also a sworn Copy of a Deed enrolled is good Evidence. 1 Salk. 280. *Smartle versus Williams.*

5 Mod.
163.

46. Information against the Defendant for a Libel against the Government, and Depositions taken before a Justice of Peace of Matter relating to the Fact, were offered to be given in Evidence; but adjudged, that it could not be; 'tis true, in Cases of Felony such Depositions may be given in Evidence upon the Statute 1 & 2 Ph. & Mar. cap. 13. where the Deponent is dead, as he was in this Case, but this cannot be extended farther. 1 Salk. 281. *The King versus Paine.*

* Hale's
Pleas of
the
Crown
263 con-
tra.

47. Upon an Indictment for Murder, the Question at the Trial was, whether the Depositions of a Witness taken before the Coroner should be read in Evidence against the Criminal, it appearing that the Witness was gone beyond Sea, and as supposed, at the Instigation of the Offenders; and 'twas ruled, that it should be read, but the Court (except the Chief Justice) was of Opinion, that a Deposition taken before a * Justice of Peace could not be read; the Authority of a Coroner *super visum Corporis*, being very great, and in some Cases a Record, and not traversable. *T. Jones* 53. The Case of *Thatcher versus Waller.*

What Persons and Things shall be allowed to be Evidence, what not.

48. The Lord *Preston* was committed by the Court of Quarter-Sessions for refusing to give Evidence to the Grand Jury on Oath, on an Indictment of High Treason, and being brought into B. R. by *Habeas Corpus*, was bailed; but the Ch. Just. *Holt* held it to be a great Contempt, and that he ought to have been fined and committed till he paid it. 1 Salk. 278. *The King versus Lord Preston.*

49. Ruled by Treby Ch. Just. of C. B. that an Heir apparent may be a Witness concerning a Title of Land, but a Remainder-man cannot, because he hath a present Interest, but the Heirship is contingent; so where there is a Tenant in Tail, Remainder over in Tail, he in Remainder cannot be a Witness concerning the Title of these Lands, because he hath an Interest, such as 'tis. 1 Salk. 283.

50. Information against the Defendant for a Cheat, the Case was, the Defendant's Mother in Law promised him a Note for 5 *l.* and he got a Note under her Hand for 100 *l.* adjudged, that the Mother cannot be a Witness, being concerned in the Consequence of the Suit. 1 Salk. 283. *The King versus Whiting.*

Mod Ca-
ses 302.

51. Indictment for a Cheat, by imposing on the Prosecutor a Quantity of Beer mixed with Vinegar and Grounds of Coffee for Port Wine, one of the Defendants pretending to be a Broker, and

and the other a *Portugal Merchant* ; adjudged, that the Prosecutor shall be admitted as a Witness to prove the Fact. 1 *Salk.* 286. *Tee Queen versus Mackinty.*

52. *Cafe, &c.* for managing his Ship so negligently that it run over the Plaintiff's Barge ; it was ruled, that the Pilot should not be a Witness, because he was answerable to the Master, if the Fault was in his Steering. 1 *Salk.* 287. *Martin versus Hendrickson.*

53. In Trover for Money, the Cafe was, the Father gave his Son Authority to receive Money, and to pay it ; afterwards the Son took a Note under a Debtor's Hand for Money due to his Father, and sometime after received the Money, and gave a Receipt for the Use of his Father, and intending to spend it, he gave it to the Defendant ; adjudged, that the Son might be admitted, as a Witness to prove, that the Defendant had the Money, and that the Father might maintain this Action against him ; because the general Authority which the Son had to receive his Father's Money, made the Receipt of it to be to his Father's Use, and a good Discharge of the Debt against him who paid it ; if so, then it was the Father's Money, in the Possession of the Son, who as to this Purpose was his Servant, and by Consequence the Father may have the Action. 1 *Salk.* 289. *Anonymus.*

54. An Indictment was exhibited against one *Johnson*, for Felony, and *Browning* and his Wife were the Witnesses to prove the Felony, who gave Evidence, but *Johnson* was acquitted ; afterwards he brought an Action against *Browning*, for a malicious Prosecution, in which Cafe it was necessary for his Defence, to prove, that a Felony was committed ; for otherwise he had no probable Cause to prosecute the Plaintiff : Now, there being no Body present but he and his Wife, when this Felony was done, and because she could not be a Witness for her Husband in this Action, *Holt*, Ch. Just. allowed, that the Oath which she had made at the Trial of the Indictment, to be given in Evidence to prove a Felony committed. *Mod. Cases* 216. 216. *Johnson versus Browning.*

55. Feme Covert may plead *Non Assumpsit* to an Action on the Cafe, or *Non est factum* to a Bond, and give * Coverture in Evidence, because that makes it no Promise, and not her Deed. *Mod. Cases.* 230. Raym. 395.

56. The Plaintiff, and likewise the Defendant, and several others, were Part-owners of a Ship, and the Defendant received several Sums of them for the Use of the Ship, and gave Receipts for what he received, and afterwards he laid out the said Sums in the Ship and Voyage, of which he kept an Account in a Book, and in which Book Allowances were made him for what he so laid out ; this Book belonged to the Plaintiff, and to the Defendant, and all the Part-owners, but was now in the Possession of the Plaintiff, who brought an *Indebitatus Assumpsit* against the Defendant, for so much Money, received to his (the Plaintiff's) Use ; upon Affidavit of this Matter, the Court was moved, that the Plaintiff might produce the Book at the Trial, or give the Defendant Copies of what Allowances had been made, that he might Use it as Evidence for him at the Trial ; but it was denied ; 'tis true, if Covenant is brought on an Indenture, the Court will not compel him to plead, till the Plaintiff give him (the Defendant) a Copy, if he will made Affidavit that he never had any ; but here the Plaintiff was trusted with the Book by all the Parties concerned, and if he breakes his Trust, the Remedy is in a Court of Equity ; the Court never compels a Tradesman to produce his Books ; but if a slender Evidence be given against him, and he will not produce them, he seems to have an ill Cause. *Mod. Cases.* 264. *Ward versus Apprice.*

Exception.

Where 'tis void, and not good. (A) | Where 'tis good. (B)

(A)

Where void, and not good.

Bendl.
181.
Moor
880.
Lane 69.
1 And. 52.

1. **A** Lease of an House and Shops, *excepting the Shops*; this extends to the Shops of any other House, but 'tis void as to the Shops belonging to the House demised, because 'tis repugnant to the Lease. *Dyer 265. Hornby's Case.*

2. Lessee for Years of a Rectory and the Glebe, excepting the Parsonage-House, saving and allowing to the Lessee a Chamber; adjudged, that a Saving out of an Exception, is as if there had been no Saving at all; and then this Chamber not being excepted out of the Lease, shall pass by the Lease of the Rectory. *Owen 20. Leigh's Case.*

3. Lessee for Years assigned his Term, excepting the *Wood and Trees*; adjudged, that the Exception is void, because no Person can have such a Special Property in the *Trees, &c.* but the Owner of the Land. *Godb. 116. Lewkner Mil. versus Ford. 1 Leon. 48. S. C. Cro. Eliz. 683. Saunders versus Norwood, S. P. 5 Rep. 12. S. C. Golds. 241. S. C.*

4. Lease of Lands, excepting Timber-Woods, and Under-Woods. *Godb. 98, 99.*

5. The Lessor made a Lease of *Woods* amongst other Things, Proviso, and it was agreed between them, that he (the Lessor) his Heirs and Assigns might at all Times during the Term, fell, cut and carry away *omnes præd' Boscos & Arbores*, and all Timber growing on the Premises, and in an Action of Waste brought, the Question was, whether this was a Lease, with an Exception of the Woods; and adjudged, that it was not, but that the Woods were demised. *2 And. 133. Leehford's Case.*

6. A Man covenanted to stand seised, &c. of all his Lands in *R.* except such as he had or should devise by his last Will; adjudged, that this Exception is void, because 'tis the Undoing the whole Conveyance; for the Covenant was to take Effect from the making the Indenture, and there could be no Devise of the Lands at that Time, for that is not to take Effect till after the Death of the Party; 'tis like the Case where a Man leased all his Lands in *R.* except the Manor of *R.* and he had no Land there but the Manor, the Exception is void. *Hob. 72. Shirley Mil. versus Wood.*

7. A Man made a Lease of a *Manor*, excepting all Courts, and Perquisites of Courts, the Exception is void, as to the Courts; for having leased the Manor, it cannot be such without Courts; but 'tis good as to the Perquisites. *Hob. 108. Brown versus Goldsmith. Moor 870. S. C. Leon. 118. Wheeler versus Twogood. S. P.*

8. A Lease of all his Lands in *Lamberhurst*, excepting his Manor of *Hoathly*, and he had no Lands in *Lamberhurst* but the Manor of *Hoathly*; adjudged, that the Manor passed, and that the Exception was void. *Hob. 170. Dorrell versus Collins.*

9. Lease of a Farm, &c. with all Woods, Under-woods and Trees there growing, *excepting six great Oake Trees, habendum* for 40 Years, rendering Rent, with *Liberty to fell and cut down any during the Term*; the Lessee assigned the Term to the Defendant, excepting the Liberty of felling and cutting down the Trees; adjudged, that the Exception is void; for having made an Assignment of the Whole, he could not make such Exception of felling the Trees, and therefore the Liberty which the Lessee had to fell them shall go to the Assignee, with the Privy of the Land. *2 Bulst. 5. Billingsly versus Hercie. Moor 831. S. C.*

Raym.
207.
1 Lev.
287.

10. In Debt against an Heir, and upon *Reins per descent* pleaded; the Jury found, that his Ancestor was seised in Fee, and made a *Feoffment* to divers Uses (*excepting two Closes, for the Life of the Feoffor only*) the Question was, whether they did descend to the Heir? and adjudged they did, for there was no Limitation of any Use in them, therefore they must result to the Heir, and this Exception being an entire Sentence, and having that Effect which the Law doth not admit, must for that Reason be totally rejected; 'tis like the Grant of an Advowson, excepting the Presentation for the Life of the Grantor, which is wholly void; and 'tis not like * a Lease of an House, excepting a Chamber in it *pro usu suo proprio*, because those are apt Words to give the Lessor Power to dispose of it as he Will. *1 Vent. 87, 78, 106. Wilson versus Armorer. * 1 And. 122. S. P.*

(B)

Where good, &c.

1. **L**ease of Lands, with all Manner of Timber-Woods, Under-woods and Hedge-rows, excepting great Oakes, growing in such a Close; adjudged, that the Lessee could not cut down those Timber-Trees which were not excepted, because they were not severed from the Inheritance,

nor passed by the Lease; for the Lessee had but a particular Interest in them to have the Mast and Shade, and the Interest in the Body of the Trees is in the Lessor, as Parcel of the Inheritance. 23 *Eliz. Dyer* 374.

2. A Man made a Lease of his Lands for 21 Years, excepting the Trees, &c. and afterwards granted the Trees to the same Lessee; resolved, that tho' by the Exception they were severed from the Lands, yet by the subsequent Grant they were reunited to the Possession, and the Lessee shall have them. 4 *Rep.* 62. *Herlakenden's Case*.

3. Lease for 30 Years of a Manor, excepting all Woods and Under-Woods, &c. afterwards the Lessor demised to the same Lessee the Manor for 30 Years, without any Exception, the first 30 Years expired; resolved, that by the Exception the Soil it self was excepted, and that the Wood did still remain Parcel of the Manor, because the Lessor had the entire Freehold, and by Consequence by the second Lease of the Manor the Wood passed; but if the first Lease had been for Life, with an Exception of the Wood, it had been otherwise. 5 *Rep.* 11. *Ives's Case*.

4. By the General Pardon 28 *Eliz.* Burglary was excepted; adjudged, that a Person, who was attainted of Burglary, shall have no Benefit of the Pardon; because the Offence on which the Judgment is founded, is excepted, and so shall all the Consequents thereon. 6 *Rep.* 13. *Case of Pardons*.

5. Lease of a Manor for Years, excepting great Trees growing on the Lands, at the Time when the Lease was made, there were several small Trees growing, which were great before the Term expired, and those the Tenant cut down; resolved, that the Exception did extend to those Trees, tho' they were but little ones, when the Lease was made; but if the Exception had been of all great Trees now growing on the Land, it had been otherwise. *Leon.* 61. *Gammock versus Cliffe*.

6. Trespass for cutting and carrying away Wood in the *Frith-Close*; the Defendant pleaded, that B. G. was seised of the Manor of R. of which the *Frith-Close* was Parcel, and that he demised the said Manor to the Defendant for Years, excepting the Woods and Trees in the *Frith-Close*, and covenanted with the Lessee, that he might take Hedge-bote and Fire-bote *super dict' premissa*; adjudged, that by the Exception the Soil of the *Frith-Close* was excepted, and did not pass by the Lease of the Manor, tho' it was Parcel of it; and the Covenant to take Fire-bote *super premissa predict'* could not extend to the *Frith-Close*, because that Close was not demised. 1 *Leon.* 117. *Case versus Parlin*.

7. In Debt on a Bond, the Defendant pleaded a Release of all Actions, &c. the Plaintiff demanded Oyer of the Release, and it appeared to be of all Actions, &c. excepting one Bond, and thereupon he replied, that was the Bond now put in Suit; and upon Demurrer to the Replication, it was adjudged, that the Bond being excepted, all Actions on the Bond are likewise excepted. *Cro. Eliz.* 720. *Brook versus Wheeler*.

8. Debt on a Bond conditioned, that if the Obligor was seised in Fee, and if he discharged the Land from all Incumbrances, except the Jointure to his Wife, that then, &c. and the Breach assigned was, that before the Bond was made he had surrendered the Lands *apud R.* &c. to the Use of his Wife for Life; and upon Demurrer, it was objected, that here was no Breach assigned, because the Title of his Wife was excepted, and that this Exception extended only to the last Clause (*viz.*) the Discharge of Incumbrances, except, &c. but adjudged, that it extended to the first Clause, as well as to the last (*viz.*) that he was seised in Fee, except the Jointure to his Wife, and that the Land should be discharged of Incumbrances, except the Jointure, &c. *Cro. Eliz.* 761. *Woodward versus Darcy*.

9. The Queen granted the Manor of R. and all Woods and Under-Woods, *exceptis omnibus grossis arboribus Boscis & maeremio*, &c. Proviso, that the Grantee shall have sufficient House-bote, &c. It was insisted, that the Under-Woods passed notwithstanding the Exception; because they were expressly granted, and the Exception extended only to Timber and Trees; for tho' the Word *Boscus* was in the Exception, yet, because it was placed between *grossus Arbores & maeremium*, that shews what was intended to be excepted by the Word, (*viz.*) Great Trees and Timber, and nothing else; but adjudged, that if the Word *Boscus* in the Exception should not extend to the Under-woods, it was placed there in vain, which the Court would not admit in the Queen's Grant. 1 *Leon.* 247. *Kensum versus Reding*.

10. Lease for Years of Lands, excepting all Woods, Under-woods, and Coppices, growing on the Premises; adjudged, that by this Exception the Soil of the Coppices is excepted. *Poph.* 146. *Hide versus Whistler*. 2 *Cro.* 487. *S. C.* and 524. *Pincomb versus Thomas. S. P.*

11. In Trespass, the Defendant pleaded, that J. L. was seised in Fee, and by Indenture demised the Lands to two, for their Lives, excepting Trees above 21 Years Growth, and covenanted to stand seised of the Reversion *de ten'is predict' superius dimissis*, to the Use of R. L. in Tail, who entered, and felled Oakes, and adjudged, that he might; for notwithstanding the Exception, the Trees remained Parcel of the Inheritance, and that the Soil on which they grow is not excepted, but sufficient Nourishment out of it, to support the vegetative Life; so that by this Covenant to stand seised of the Reversion, &c. the Lands passed, and thereby the Trees annexed to it. 11 *Rep.* 48. *Liford's Case*. 2 *Cro.* 387. *Whistler versus Pastowe. S. P.*

12. Lessee for Life made a Lease for Years, excepting the Wood, Under-wood, and Trees, growing on the Land; adjudged, that 'tis a good Exception, tho' the Lessee for Life had no Interest in them himself, because he always remains Tenant, and is chargeable in an Action of Waste; but

1 Roll.
Rep. 95.
by the
Name of
Stamp &
Liford.

but if the *Lessee for Years* assign over his whole Term, with such an Exception, 'tis void. 2 *Cro.* 296. *Bacon versus Girling.* Mich. 7 *Jac. in Cur' Ward.* Sir Allen Peircie's Case.

13. Lease of an House (excepting certain Chambers) rendring Rent, with a Clause of Re-entry, &c. and the Lessor did enter for Non-payment, &c. and in an Action brought against him by the Lessee, he justified for Rent arrear, and not paid, and averred, that he demanded the Rent *ad domum prædictam*; after a Verdict for the Defendant, it was moved in Arrest of Judgment, if his Plea was ill, because it did not appear in what Part of the House he demanded the Rent, and it might be in the Chambers excepted. *Sed per Curiam*, the Defendant having set forth the Demand to be made *apud domum prædictam*, it shall be intended, that Part of the House which was leased. 2 *Roll. Rep.* 42. *Dorrell versus Truffell.*

14. Covenant to stand seised to the Use of himself and Wife, for Life, and after to his Son and Heir, excepting the Timber-Trees, which his Wife should have Power to lop; the Heir cut down Oakes, &c. and the Wife brought her Action, and had Judgment; upon which it was objected, that the Exception of the Trees coming after the Limitation of the Uses was void; but it was adjudged well enough to shew his Intent, that they should not be annexed to the Estate for Life. *Cro. Car.* 306. *Tremaile versus Reeves.*

15. Lessee for Life, without Impeachment of Waste, and with Power to make Leases for three Lives, made such a Lease, excepting the Trees, and adjudged good; and that if he assign over *all his Estate*, without such Exception, yet he might cut down the Trees during the Lease for Lives. *Poph.* 194. *Sacheverell versus Dale.*

16. In Trespass, &c. for breaking his Close, putting in his Cattle, and cutting the Branches of his Trees there growing; the Defendant as to putting in his Cattle, justified under a Custom, &c. and as to the Cutting the Boughs, he pleaded, that he made a Lease to the Plaintiff, &c. *exceptis arboribus Manerii & Boscis*, and so justifies the Cutting; the Plaintiff replied, and confessed the Exception, but said, that in the Lease, the Defendant covenanted and granted, that *liberum foret* to the Plaintiff to cut and take the Loppings of the Trees; and upon Demurrer to this Replication, the better Opinion was, that an Action of Trespass would not lie against the Defendant, but an Action on the Case for cutting the Boughs, because by this Exception the Plaintiff had no Property in the Trees, but only an Interest to cut the Boughs. *Palm.* 211. *White versus Sawyer.*

17. Case, &c. in which the Plaintiff declared upon a Lease of a House to the Defendant for seven Years, &c. and that he so negligently kept his Fire, that the House was burn'd; the Defendant pleaded, *Non dimisit modo & forma*; upon which they were at Issue, and the Jury found, that the Plaintiff did lease the House to the Defendant for seven Years, *Except the House called the New House, for the Use of the Plaintiff and his Father, if he or they will dwell therein, and not to be let to any other Person, and at all other Times to the Use of the Defendant, and his Assign*; they find a Fire happened in the *New House*, then in the Possession of the Defendant, by which it was burnt down; and if this was a Demise *modo & forma*, then they find for the Plaintiff. *Et per Curiam*, 'tis not a Demise *modo & forma*, for 'tis only a Lease at Will to the Defendant, and not for seven Years; because it was at the Will of the Plaintiff, when, and how long the Defendant should enjoy it, and that was to be when he and his Father did not think fit to dwell in it; so that this *New House* is absolutely excepted out of the Demise, and 'tis an Exception not qualified by the subsequent Words. 4 *Mod.* 11. *Cudlip versus Rundall.*

Exchange.

See Estate at Sufferance. (A) 1.

1. **I**N Exchanges, the Estates of both Parties may not be alike in Value, but they must in Title; as if one hath an Estate in Fee, the other must have the like Estate; and therefore, if an Exchange is between Tenant for Life, and Tenant in Tail, after Possibility of Issue Extinct, the Exchange is good, because their Estates are equal. 11 *Rep.* 80. in *Lewes Bowles's Case.* Moor 665. S. P.

2. In every lawful Exchange of Land, the Word *Exchange* is necessary, and it imports in itself a Condition and a Warranty, which is a Special Warranty in Respect of the mutual Consideration of the Lands exchanged; but none shall vouch by Force of such Warranty, but the Exchangers and their Heirs, and no Lands shall be recovered upon such Voucher in Value, but the Lands only which were given in Exchange.

3. If *B. G.* give five Acres of Land in Exchange to *W. S.* for five other Acres, and afterwards *W. S.* is evicted of one Acre, in this Case all the Exchange is defeated, and *W. S.* may enter on his own again. 4 *Rep.* 121. *Bustard's Case.* *Cro. Eliz.* 903. *S. C. Yelv.* 8. *S. C. Moor* 665. *S. C. By the Name of Boulton versus Bustard.*

4. Husband and Wife seised of Lands in *Right of the Wife*, made an Exchange for other Lands, which Exchange was executed by Deed; and afterwards the Husband and Wife seised of the Land in Exchange, as aforesaid, aliened the same by Fine; adjudged, that the Wife, if she survive, the Husband may enter into her own Lands, notwithstanding the Exchange and the Fine. 28 *Eliz.* 1 *Leon.* 285.

Exchequer.

(A)

1. **S**ummons of the Pipe issued against the Defendant to levy 500 *l.* on a *Super* set upon him Hardres by one *Jones*, Treasurer of certain Sums of Money in the Time of the *Protector*; 504. *S. P.* the Defendant moved for *Superfedeas*, because this being an Execution both against Body and Goods, he cannot otherwise plead in Discharge of it; and *Hale* Ch. Baron, and the Court held, that this Summons ought not to issue, but for a Debt due to the King, stated or determined, or for a Debt on Record; therefore where a Collector in Chief charges his Sub-collector, &c. a Summons of the Pipe shall not Issue, but a *Scire facias* or *Distringas ad computandum*, to which the Defendant may plead. *Hardr.* 322. *Mildmay's Case.*

Exchequer-Court.

(A)

1. **I**T hath been a Question, whether the King could grant a Freehold, but under the Great Seal; but adjudged, that he may, under the Seal of the Exchequer, being of Lands usually leased for Life, and reserving the antient Rent. *Cro. Car.* 369. *Kemp versus Bernard.*

Excommunication.

What it is, and Cases concerning Excommunication. (A)

Where 'tis a good Plea, and where not. (B)

Of the Certificate of the Ordinary. (C)

(A)

What it is, and Cases concerning Excommunication.

1. **T**HIS is a Sentence in the Spiritual Court, by which the Party is disabled to bring any Action in the Temporal Courts; and if he remain so forty Days, then the Bishop may certify the Excommunication to those Courts, upon which a *Capias Excommunicatum* may be issued, which is a Writ directed to the Sheriff to take and imprison the Person, where he is to remain till he is *absolved* from the Contempt; and then the Bishop likewise certifying the same, another Writ *de excommunicato deliberando* shall go to the Sheriff to discharge him. See *Stat. 5 Eliz. cap. 23.*

2. The Statute 5 *Ed. 6.* inflicts a Punishment for Drawing a Weapon in a Church-yard, (*viz.*) Loss of one Ear, and Excommunication *ipso facto*; a Man was excommunicated for this Offence; adjudged, that the corporal Punishment shall not be inflicted, without Conviction or Outlary. *Dyer 275. Foreman's Case*; for such an Excommunication must be pleaded *sub pede sigilli*; and tho' 'tis said *ipso facto*, yet it must be intended upon Conviction and Sentence declaratory. *Cro. Eliz. 919. Senham versus Trundle. Herley 86. Viner versus Eaton. S. P.*

3. The Wife was excommunicated for Adultery, and upon a *Capias Excommunicat'*, the Officer, with a Constable, *broke open the House in the Night*, where she was, and took her; adjudged; that this was not justifiable, for the Spiritual Court hath no Power to meddle with the Body of any Person whatsoever, or to send Process to take them; for if a Person who is excommunicated stand in Contempt forty Days, they ought to certify it into the Chancery, and from thence 'tis sent into *B. R.* and so the Process of *Excom' capiend'* issues. *Cro. Eliz. 741. Smith versus Smith.*

* W.
Jones
227.

4. This being for a Contempt of the Spiritual Court, is pardoned by a General Pardon * *Codrington versus Redman. Cro. Car. 199.* tho' it was a Doubt in *Richardson's Case*, if the Party could be pardoned without Absolution. 2 *Cro. 212.* See 8 *Rep. 68. Trollop's Case.*

5. Excommunication must be in the Diocese where the Party dwelleth, and a Bishop of one Diocese cannot excommunicate a Man in another Diocese. *Godb. 191. Frances versus Powell.*

6. If a Man is excommunicated for an Offence which is pardoned by a General Pardon, and this being shewed to the Bishop, and he refuses to absolve him, an Action on the Case lieth against him. 12 *Rep. 76.*

7. One was taken upon an *Excommunicato capiendo*, and the Question was upon the Statute 5 *Eliz. cap. 23.* whether he was bailable, or not; adjudged, that he might by the Court of King's Bench, but not by the Sheriff, or Justices of Peace. 1 *Bulst. 122. Keyser's Case.*

8. The Defendant was taken upon a *Capias Excommunicatum*, and because it was not mentioned in the *Significavit*, that he lived in that Diocese at the Time of the Excommunication; it was adjudged to be incertain, and the Party was discharged. *Moor 467. Beaumont's Case.*

1 Roll.
Rep. 377.

9. *Martha Powell* sued *Harman* in the Spiritual Court, upon a Contract to marry her, and she obtained a Sentence, but he refusing to marry her, was excommunicated; then he appeals to the Delegates, and the Cause being remanded by them to the first Court, in which the Sentence was given, they gave another Sentence, as before; and he was again excommunicated for not obeying this second Sentence; thereupon he appealed to the Audience, and there he was *absolved*; but being taken by an *Excommunicato capiendo*, upon the first Excommunication, he brought a *Habeas Corpus* in *B. R.* where it was adjudged by the Advice of Civilians, that tho' the Absolution purged the last Excommunication, yet the first stood good, because *Ecclesia decepta fuit* in absolving him from the last Excommunication, when the first was in Force, of which they had no Notice; and tho' the first Sentence might be suspended by the last Appeal, yet that did not suspend the first Excommunication. *Moor 849. Powell versus Harman.*

10. The Defendant was taken upon the *Capias Excom'*, and the *Significavit* was, that he was excommunicated for not answering Articles, and did not shew what those Articles were: *Per Curiam*, 'tis not good, and he was bailed. 1 *Roll. Rep. 136. Fox's Case.*

11. *Per Coke Ch. Just.* where an Excommunication is returned in *B. R.* tho' it appears, that 'tis for none of the nine Causes mentioned in the Statute 5 *Eliz.* yet Process shall Issue till the Party is taken; but if Process be awarded with a Penalty, where 'tis not for one of the nine Causes, yet the Penalty shall not be avoided, without Pleading; but the Clerks ought not to make any such Process, where 'tis for none of the Causes. 1 *Roll. Rep. 174. Sterling's Case.*

12. *Sterling*

12. *Sterling*, beforementioned, was taken upon the Writ *de Excommunicato Capiendo*, and the Cause of his Excommunication being certified by the Bishop, it appeared to the Court it was for not permitting *T. S.* to enjoy a Seat in the Church of *C.* according to a Sentence of one *Newcomb* a Commissary, *authoritate ei assignatâ*. It was objected that it was not averred that the Church was within the Archdeaconry, and therefore the Excommunication *Coram non iudice; sed per Cur'*, the Bishop may make a Commissary within the Archdeaconry, or throughout the whole Diocese; besides, when an Excommunication is certified by the Bishop, tis not usual to certify it to within an Archdeaconry, because the Bishop hath a Jurisdiction throughout the whole Diocese. 1 *Roll. Rep.* 434. *Sterling's Case*.

13. Upon an *Habeas Corpus*, the Sheriff returned that the Party was in his Custody, by virtue of an *Excommunicato Cap.* but he was discharged upon a Motion, because the Writ was not delivered to the Sheriff as a Record of *B. R.* as it ought to be by the Statute, 5 *Eliz.* for it must be sent from the Chancery thither. *Sid.* 165. *The King versus Colgate*, but this should be pleaded. *Sid.* 285. *The King versus Thewon*.

14. Upon a Motion for a *Superfedeas* to an *Excommunicato Capiendo*, upon a Suggestion that the Party was not excommunicated for any of the Causes mentioned in the Statute 5 *Eliz.* it was held that the Statute did not take away Excommunications at Common Law, but gave the Writ with a greater Penalty, in certain Cases therein mentioned, besides, this Matter is not properly in Court, till an *Habeas Corpus* is granted and returned. *Sid.* 181.

15. By the Statute, *Edw.* 6. tis enacted, that he who strikes in the Church-Yard, is *ipso facto* excommunicated; but that shall not be intended, till after he is convicted of the Offence, and that Conviction is transmitted to the Ordinary. 1 *Vent.* 146. *Dier versus East*. *Dier* 275. *S. P. Cro. Car.* 680. *S. P.*

16. In Trespass, the Defendant pleaded that *ante quinden' Sancti Martini*, (the Plaintiff) *Excommunicatus fuit & adhuc existit & protulit hic in curia literas Testamentarias Epif. Sarum, quæ notum faciunt Universis quod scrutatis Registeriis invenitur contineri quod Excommunicatus fuit, &c. pro contumacia in non comparend', &c. In cujus rei testimonium præd' Episcopus sigillum apposuit*; it was objected against this Certificate, that it was only a Relation of what might be found in the Register; but ruled that their Cause was sometimes to certify Excommunications *sub sigillo Episcopi*, and sometimes *per literas Testamentarias*, as in this Case. 1 *Vent.* 222. *Jay versus Bond*.

17. Motion to discharge the Parties who were taken upon the *Excommunicato Capiendo*; for that it did not appear by the *Significavit*, that they dwelt in the Diocese of the Bishop, where they were excommunicated, and at that Time; and * *Fox's Case* was cited, who was bailed upon the *Capias*; *sed per Cur'*, the Parties were remanded; for in *Fox's Case*, the Cause mentioned in the *Significavit*, was for not answering certain Articles, without shewing what those Articles were, that it might appear the Court had Jurisdiction of the Matter, and therefore he was bailed; and though it was not for any Cause mentioned in the Statute, 5 *Eliz.* and so no Penalties are incurred, yet the Excommunication is good; tis true, there must be an *Addition*, &c. to make the Offender incur the Penalties, and they are discharged without it, but not the Excommunication. *T. Jones*, 89. *Bermondsey Inhabitants Case*.

* 1 *Roll. Rep.* 134.

18. By the Statute, * 5 *Eliz.* tis enacted, that if the Person excommunicated hath not a sufficient *Addition*, according to the Statute of † *H.* 5. he shall not incur the Penalties: Now the Statute of *Additions* requires that the *Dwelling-Place* of the Person shall be inserted, which was not done in this Case; for the Defendants were excommunicated by the Names of *A. B. Merchant*, *B. C. Taylor*, and *E. F. de Parochia*, &c. which last *Addition* of the Parish, relates only to him last mentioned; *sed per curiam*, in Informations for Riots, the Word Parish goes to all preceding, and the Penalties being now incurred, there is no Remedy. 3 *Mod.* 42. *The King versus Barnes*.

* 5 *Eliz. cap.* 23.
† 1 *H. 5. cap.* 5.

19. By the same Statutes tis enacted, that if tis not contained in the *Significavit*, that the Excommunication proceeds from some Cause of Contempt, or for Heresy, for refusing to have his Child baptized, or to receive the Sacrament, or to come to divine Service, or for Errors in Matters of Religion, or Doctrine, or for Incontinence, Usury, Simony, Perjury in the Ecclesiastical Court, or for Idolatry, he should not incur the Penalties in the Act; Serjeant *Hampson* was excommunicated for not paying Alimony; and upon a Motion that he might be discharged, because none of those Causes were contained in the *Significavit*, *per curiam*, he may be discharged of the Penalties, but not of the Excommunication. 3 *Mod.* 89. *Serj. Hampson's Case*.

20. The Defendant being taken upon an *Excommunicato Capiendo*, was discharged, because the Writ was not delivered into *B. R.* and enrolled there, as required by Statute, 5 *Eliz.* 1 *Vent.* 309, 338, *S. P.*

21. Debt upon Bond, the Defendant craved Oyer of the Condition, which was, that whereas he was excommunicated for not coming to Church, at his Instance, and Request, was absolved by the Plaintiff; if therefore he should obey all the lawful Commands of

* No
Judgment
is entered
on the Roll.
Mod.
Cases, 71.

the Church, then the Obligation should be void; the Defendant supposing this Condition to be against Law, demurred to the Declaration, and *Hale Chief Justice* inclined that it was * void; for when a Man is excommunicated, there is a Writ *de cautione admittenda*; and sometimes they take an Oath of the Person, *parere mandatis Ecclesie in licitis & bonis*, which is called, *Cautio juratoris*, and sometimes *Cautio pignoratitia* is given. 1 Vent. 166. Bishop of *Exeter* versus *Starr*. Raym. 225. S. C. 1 Lev. 36. S. P. See 1 Bulst. 122. but never a Bond to a Bishop. See *Mod. Cases* 71. Bishop of *Durham* versus *Ladler*.

22. The Return of an *Habeas Corpus* was, that *Fowler* was taken and in Custody upon a Writ *Excommunicato capiendo*, reciting the Cause to be *pro quibusdam causis subtractionis decimarum, sive aliorum jurium Ecclesiasticorum*; adjudged upon a Motion that this Return was uncertain, because those *Alia jura* might be such Matters which are not within the Jurisdiction of the Spiritual Court; tis true, at Common Law the Writ was always general *pro contumacia*, without mentioning any special Cause, and it was returnable in Chancery, and founded on a *Significavit*, or Certificate of the Bishop, in which the Cause was set forth; and if that was insufficient, the Party could not be discharged but by a *Superfedeas* in Chancery; but now the Cause must be set forth in the *Excommunicato capiendo* it self, because by the Statute 5 *Eliz.* the Writ must be returnable in *B. R.* which shews that the Court must be proper Judges of the Cause; now before this Statute there were no Discharges in *B. R.* on an *Excommunicato capiendo*, unless the Party was excommunicated *pending a Prohibition*; but now *B. R.* may quash the Writ, or award a *Superfedeas*, for the Party cannot resort to the Chancery for it, because the Writ being returnable in *B. R.* that Court are Judges of the Cause. Accordingly this Writ was quashed, and the Party discharged. 1 *Salk.* 293. The *King* versus *Fowler*.

23. In an *Excommunicato capiendo*, the Recital of the *Significavit* was, that the Party was excommunicated for not paying Costs in a certain Business *puerorum Educationis sive instructionis*, without any License in that Part first had and obtained; this was quashed for the Incertainty, because it might be in teaching Youth to dance, or fence, as well as in Learning. 1 *Salk.* 294. The *Queen* versus *Hill*.

24. The Defendant was taken upon an *Excommunicato capiendo*, *pro quadam causa jactitationis maritægii*, and this *Capias* being with a Penalty, and the Defendant brought up by *Habeas Corpus*, it was objected against the Writ, that this being none of the nine Causes mentioned in the Statute 5 *Eliz. cap. 23.* there ought not to be a Penalty in the Writ, besides the Defendant had no *Addition*; adjudged that for any of the nine Causes there must be a *Capias* with a Penalty, and an *Addition* in the Writ; but if 'tis for any other Cause, then there needs no *Addition*; and though the *Capias* was with a Penalty, yet the Court would not discharge the Party, but the Penalty only. 1 *Salk.* 294. The *Queen* versus *Sungway*. *Farr.* 82. S. C.

25. The Defendant being taken upon the *Capias*, and in *Newgate*, moved for an *Habeas Corpus*, and had it; and being brought into Court, it appeared that he was brought up before the Return of the Writ, whereupon the Court resolved, that he should not be allowed to plead, or move to quash the Writ before it was returnable; that though the Writ recites the *Significavit*, which is in Chancery, yet that Writ is enrolled in *B. R.* before it goes to the Sheriff; which Enrolment is to inform the Court, that at the Return of the *Capias* they may award farther Process; that if by the Recital of the *Significavit*, it appears that there was no Cause for the *Capias*, *B. R.* may quash it, but the Chancery cannot, though the *Significavit* is there. 1 *Salk.* 294. The *Queen* versus *Bishop of St. David's*.

(B)

Where 'tis a good Plea, and where not.

1. **T**HE Parties being at Issue, and the Jury at Bar, the Defendant pleaded that the Enquest ought not to be taken, because after the last Continuance, and before Issue joined, the Plaintiff was excommunicated, of which he produced the Bishop of *Landaff's* Certificate; but it did not shew *when*, or by what Bishop he was excommunicated, for it might be before the last Continuance, and then tis no good Plea; neither is it averred, that the Plaintiff and the Party excommunicated are one and the same Person; and for these Reasons, the Plea was adjudged ill. 2 *Cro.* 82. *Baker* versus *Gough*. *Moor* 775. S. C. by the Name of Lord *Abergavenny* versus *Edwards*.

2. In Assault and Battery, the Defendant pleaded that the Plaintiff was excommunicated under the Seal of the Chancellor of *Oxford*, setting forth that the Court there was a *Spiritual Court*, and that Time out of Mind, they have excommunicated Defendants, for not appearing to an Action of Debt brought in that Court; and that they had Power Time out of Mind, to hold Pleas in Debt, and then plead a Confirmation of their Privileges by the Statute, 13 *Eliz. Sec.* and upon Demurrer to this Plea, it was objected, that it was a repugnant Prescription, to give the Spiritual Court a Liberty to Censure in a temporal

temporal Cause, and so it was adjudged, let the Excommunication be either *major* or *minor*, the one being *de Communione*, the other from the Company *fidelium*. 2 Roll. Rep. 487. *Anderson versus Cutbbert*.

3. Sentence was given against the Defendant in the Chancellor's Court, at Oxford, upon which he was excommunicated, and afterwards he came into B. R. and pleaded that there was no *Addition* in the *Significavit* according to the Statute, 5 Eliz. and so he prayed to be discharged; *sed per curiam*, by this Means the Penalties mentioned in the Statute are discharged, but not the Excommunication, nor Commitment thereon. *W. Jones* 286. *Hughes versus Bendy*. Cro. Car. 196.

4. In Debt for Rent by three Plaintiffs, as Executors, &c. The Defendant pleaded, in Abatement, that one of the Plaintiffs is a popish Recusant convict, and therefore *quasi* excommunicated by the Statute 3 Jac. 1. and upon a Demurrer, it was adjudged, that this ought not to have been pleaded in Abatement, by *petit judicium de Brevis*; but it ought to be *suspenderi non debet*, because the Writ is not abated, but only suspended. 3 Lev. 208. Lord Sturton & al' versus Pierpoint.

5. Debt upon Bond, the Defendant pleaded in Abatement, that the Plaintiff was Excommunicated for not paying Alimony, and sets forth the *Capias Excom. Et hoc paratus est verificare unde petit judicium*, &c. and averred the Identity of the Person; and upon Demurrer, it was adjudged an ill Plea, because the Defendant did not set forth any Certificate of the Excommunication from the Judges Delegates; he ought to have set forth the Certificate under Seal witnessing the Excommunication, and then pray Judgment, *si respondere debeat*. 1 Lutw. Rep. 17. *Bradley versus Glynn*.

6. In an Information, the Case upon a special Verdict was, that Sir John Read was divorced *a mensa & thoro*, and for not paying of Alimony, he was excommunicated afterwards by the Statute, 25 Car. 2. it was enacted, *That every Person in Office shall take the Oaths of Allegiance and Supremacy, and receive the Sacrament, &c. otherwise shall be incapable to execute the Office, &c.* Sir John Read was made High Sheriff of Hertfordshire, and being under the Sentence of Excommunication, and by Consequence not to be admitted to the Sacrament, he thought himself discharged of the Office of Sheriff by this Statute, and so refused to serve it; *sed per curiam*, Sir John Read is punishable for not removing the * Disability, it being in his Power to get himself absolved from the Excommunication. 2 Mod. 306. *Attorney General versus Sir John Read*. 2 Vent. 273.

* See the King ver. *Larswood*.

(C.)

Of the Certificate of the Ordinary.

1. THE Defendant in a Writ of Error, pleaded that the Plaintiff was excommunicated, and shewed the Certificate thereof by the Official of *Durham*, directed *Universis Clericis & literatis per totum Diocesim Dunelm'*; resolved, that the Official cannot certify an Excommunication, because the Court cannot write to him, but to the Bishop, who is the proper Officer to absolve the Party; besides the Certificate it self is not good, because 'tis directed *Omnibus Clericis &c. Dunelm'*, when it should be to the King's Courts. 8 Rep. 68. *Trollop's Case*.

Execution.

By <i>Capias ad Satisfaciendum</i> . (A)	Against the Heirs of the Debtor, and
By <i>Elegit</i> . See Title <i>Elegit</i> . (B)	against those who have Reversions and
By <i>Extendi facias</i> & <i>Liberate</i> . (C)	Remainders. (G)
By <i>Fieri facias</i> , and <i>Levari facias</i> . (D)	Executions on Statutes and Recognizances. (H)
By <i>Habere facias possessionem</i> & <i>seisinam</i> . (E)	Of <i>Superfideas</i> , and Discharges. (I)
By <i>Scire Facias</i> , and other Actions, against Principal and the Bail. (F)	Of those who die before Execution, or die, or escape in Execution. (K)
	Of Sales made after Judgment, and before Execution. (L)

(A)

By *Capias ad Satisfaciendum*. See postea (F) per totum.

1. **A**N Agent of the Plaintiff and the Sheriff arrested a Man *without a Writ*, and he being in Custody, they got a *Ca. fa.* against him upon a Judgment in Debt, and arrested him again; this appearing to the Court, he was committed in Execution, but the Agent and the Sheriff were fined for the Misdemeanor. *M. 8. Eliz. Dyer 243.*

2. A *Ca. fa.* will lie against a Man who is outlawed for Felony, and he may be taken in Execution at the Suit of a common Person. *Owen 69. Trussell's Case.*

3. Judgment was had against two who were bound to pay the Debt, one of them was taken upon a *Ca. fa.* and committed, and the Creditor brought a *Fi. fa.* against the Goods of the other; but adjudged, that it did not lie; he might have a *Capias* against both, but not against one, and a *Fi. fa.* against the other. *Godb. 208. Rossiter versus Welch. Postea B. 5. S. P.*

4. A Judgment-Creditor could not take the Body of his Debtor, or his Lands in Execution at common Law; his only Remedy was by *Fi. fa.* or *Levari facias*, by which Writs his Goods and Chattels, and the Profits of his Lands, only were affected; afterwards a *Capias ad Satisfaciendum* was given by the Statute, 25 *Edw. 3. cap. 17.* and an *Elegit* by the Statute, *Westm. 2. cap. 18.* which was the first Act which subjected Land to Execution, and that only of a Moiety; and if those Writs of *Fi. fa.* or *Levari facias*, were not prosecuted within a Year after Judgment, the Party had no Remedy at common Law, but by an Action of Debt on the Judgment. *3 Rep. 11. Sir William Herbert's Case.*

5. Where a Man is taken upon a *Ca. fa.* the Execution is good, though the Writ is not returned; and so in all Writs of Execution, where either Goods, or Lands are to be taken, except in *Elegit*, and that must be returned, because the Court may judge of the Sufficiency of the Inquisition. *Fulwood's Case. 4 Rep. 64. Hoc's Case. 5 Rep. 89. S. P. Cro. Eliz. Mount's Case. S. P. 2 Leon. 279. Penruddock versus Newman 49.*

Cro. Eliz.
707.

6. A Man was outlawed upon a Judgment in Debt, and on a Writ of Error brought, the Judgment was affirmed; a *Capias utlegatum* awarded within the Year, and the Defendant was taken, and escaped before the Return of the Writ; adjudged, that at common Law, if a Man was outlawed after a Judgment in Debt, the Plaintiff was at the End of his Suit; for he could have no other Process after that personally; for he could not have a *Sci. fa.* or any other Execution upon that Judgment, but was put to his new Original; and though a *Ca. fa.* did not lie, before the Statute 25 *Ed. 3.* in Debt, yet if the Party was taken upon a *Cap. utlegatum*, which is at the King's Suit, he shall be in Execution at the * Suit of the Party if he would; adjudged also, that if Judgment be affirmed in a Writ of Error, the Plaintiff may have a *Ca. fa.* or *Fi. fa.* within the Year, and shall not be put to bring a *Sci. Fa.* *5 Rep. 88. Garnon's Case. Moor 566. S. C. By the Name of Layton versus Garnon. Moor 598. West versus Blackhead, S. P.*

* Outlawry,
B. 6, 7.

7. Upon a *Ca. fa.* delivered to the Sheriff of *Middlesex*, he made a Precept to the Bailiff of the Dutchy of *Savoy*, to take the Debtor, *ad respondendum* the Plaintiff, when it should have been *ad satisfaciendum*, the Bailiff of the Dutchy returned the Precept executed, and the Sheriff returned a *Cepi Corpus secundum exigentiam brevis*; now though the Sheriff had by this Means charged himself to the Plaintiff, so as he might demand Execution against him; yet because the Defendant was never taken in Execution, the Court awarded a new Process of Execution against him. *Tel. 52. Wood versus Holborn.*

8. Judgment

8. Judgment against the Defendant in *C. B.* and *after the Tear* a *Ca. fa.* was awarded, whereas there ought to have been a *Sci. fa.* and the Defendant being taken upon the *Ca. fa.* he brought a Writ of Error in the King's Bench, and the Execution was reversed, and the Defendant discharged; afterwards the Plaintiff sued out an *Alias Ca. fa.* without a *Sci. fa.* and the Sheriff returned *Capi*, and thereupon the Defendant moved to be discharged, because he being once in Execution, and let at large, shall not be in Execution again; but adjudged, that being in Execution as aforesaid, and discharged for Error, in *adjudicatione Executionis*, he may be in Execution again. *Latch. 192. Wiseman versus Fish.* Palm. 447. Godb. 371.

9. Two were bound in a Bond, and in Action of Debt brought against them, the Plaintiff had Judgment, and took out a *Ca. fa.* against one, and a *Fi. fa.* against the other; adjudged, that these Writs are not well awarded; but if a *Fi. fa.* be served for Part, a *Capias* may be awarded for the Residue, but not where a *Fi. fa.* is executed for all; for the Plaintiff shall have but one Execution with Satisfaction against both the Defendants. *Winch. 113. Holt versus Holt.*

(B)

By Elegit. See Title Elegit.

1. Executions by *Elegit* ought to be made by Inquisition, and if a Term for Years be recited in the Inquisition, and 'tis mistaken in the Commencement of it and fold, the Sale is void, because the Sheriff cannot sell any Thing but what is appraised by the Jurors, and there was no such Term as they appraised. 4 *Rep. 74. Palmer's Case. Godb. 172. S. C. Cro. Eliz. 584. S. C.*

2. The Lands were delivered by the Sheriff in Execution upon an *Elegit*, and afterwards the Creditor suggested that the Debtor had more Lands, and moved for a new Writ of *Elegit*; but adjudged, that he having accepted the Lands upon the first *Elegit*, he cannot afterwards have a new one; 'tis true, if at the Return of the Writ he had not accepted the Lands, but waved it, he might have a new *Elegit*. *Cro. Eliz. 310. Hanger versus Fry.*

3. Before the Stat. *Westm. 2. cap. 18.* the Land of the Creditor was not subject to Execution for a Debt, even upon a Judgment, and by that Statute a Moiety only is made liable; but by the Stat. *13 Ed. 1. de mercatoribus*, and *27 Ed. 3. cap. 9.* and *23 H. 8. cap. 6.* in Statutes Staple and Merchant, all the Lands of the Cognisor which he had at the Day of the Acknowledgment thereof shall be extended. 3 *Rep. 11. In Sir William Herbert's Case.*

4. A Recognizance was acknowledged to the Chamberlain of London, &c. and another to B. G. who sued out Execution by *Liberate*, and had the Lands delivered to him, but the *Liberate* was not returned; afterwards the Chamberlain sues forth an *Elegit*, and had a Moiety delivered to him; adjudged, that this Execution by *Elegit* was good, without suing a *Sci. fa.* against B. G. the last Cognissee, though he was in by Matter of Record, because the *Liberate* was never returned; adjudged likewise, that the Execution by *Liberate* was good, though it was never returned; and so 'tis in all other Writs of Execution where Land is to be delivered, *Seisin* had, or Goods to be fold, though the Writs are not returned; but in the Case of an *Elegit* where an Inquisition is to be taken, there it ought to be returned, that the Court may judge of the Sufficiency of the Inquisition. 4 *Rep. 64. Fulwood's Case. 5 Rep. 89. Hoe's Case. S. P.*

5. Two were jointly and severally bound in a Bond, there was Judgment against both, and the Creditor took out an *Elegit*, and had the Lands of one of them in Execution, and afterwards he took the Body of the other upon a *Ca. fa.* adjudged, that a *Ca. fa.* would not lie after an *Elegit*, unless the Sheriff returneth that the Party hath no Lands; because an *Elegit* is in its self a satisfactory Execution, and a Man shall never have but one Execution with Satisfaction. 2 *Bulst. 79. Cowley versus Lydcot. Godb. 257. S. C. 1 Leon. 176. Palmer versus Knowles. S. P. Audita querela. (B) 4. antea (A) 3. S. P.*

(C)

Of Extendi facias, and Liberate.

1. UPON an *Extendi facias* on a Statute-Staple, the Sheriff extended the Lands, and fold the Goods, and returned the Extent, then upon a *Prerogative Writ*, he was commanded to levy a Debt due to the King, which he did, because neither the Lands, nor Goods were delivered to the Cognissee upon a *Liberate*, for till then he hath no Property; yet it was made a *Quare*, whether upon the *Extent* they are not in the Custody of the Law, for the Benefit of the Cognisor, and by Consequence exempted from

from all other Executions. *Dyer* 67, 69. *Stringfellow's Case*. *Cro. Eliz.* 266. 'The *Queen* versus *Wall*. *S. P.* *Dyer* 98. *Milton* versus *Edrington*. *S. P.* 4 *Leon.* 10. *Curson's Case*. *S. P.*

2. Nothing shall be extended but what may be assigned over, and therefore an Office of 'Trust cannot be extended, because 'tis not assignable. *Dyer* 7.

3. Every Extent ought to be by Inquisition and Verdict; for the Stat. *Westm.* 2, which gives the *Elegit*, provideth, that the Sheriff *Liberet ei omnia Catalla, &c. & medietatem terræ, quousq; debitum fuerit liberatum per rationabile pretium.* *Dyer* 100.

4. The Lands of a Bankrupt were extended, but before the *Liberate*, the Commissioners sold them to the Creditors; adjudged, that the Sale was not good; for though the Cognisee had no absolute Property in them by the Extent, nor until they are actually delivered to him by the *Liberate*, yet by the very Extent they are *in custodia Legis*, for his Benefit. *Cro. Car.* 106. *Audley* versus *Holsey*.

5. An Extent issued out of the Exchequer to levy a Debt due to the Queen, and it was found by Inquisition that the Debtor was possessed of a Lease for the Term, *quorundam annorum adhuc ventur'*, and because the Certainty of the Term was not found, the Court held the Inquisition void, and a new Commission was awarded. 2 *Leon.* 121. *Rushton's Case*. *Dyer* 4. *S. C.*

6. Lessee for Years rendring Rent, an *Extendi facias* was awarded to the Sheriff to seize Lands; after which, and before the *Liberate* awarded, the Rent became due; adjudged, that until the *Liberate* awarded and returned, the Lessee still remained Tenant to the Lessor. *Cro. Eliz.* 46. *Pain's Case*.

7. An Extent was sued upon a Statute-Merchant, and the Sheriff put the Cognisee in Possession of Part, and left the Conusor in Possession of the Rest; afterwards the Conusor, in order to have the Possession of the whole, charged the Sheriff to make a Return of his Writ, and thereupon it was entered on the Roll, *quod Vicecomes nihil fecit nec misit breve*; and then an *Alias extendi facias* issued to the new Sheriff, who returned that a Writ of Extent came to the old Sheriff, and that he extended the Lands, wherefore he could not extend them upon an *Alias*; adjudged to be an ill Return, because it appeared on Record that no Execution was done. 2 *Leon.* 13. *Colfield's* versus *Hastings*.

8. If Lands be once extended, and delivered by a *Liberate*, though the Party should be afterwards evicted, he shall never have a Re-extent. 2 *Cro.* 693. *Clerke* versus *Andrews*.

9. Tenant in 'Tail entered into a Recognizance to B. G. who made his Wife Executrix and died; she proved the Will, and sued out an Extent, but before the Return of the Writ she died, and Administration *de bonis non*, &c. was granted to R. L. the Sheriff proceeded to take an Inquisition, though the Executrix was dead, and afterward delivered the Lands to the Administrator *de bonis non*, &c. to have and to hold according to the Extent; adjudged, that this Extent, and *Liberate* were both void; for the Extent was to apprise, and seize the Lands into the King's Hands, *ut eas liberari faciamus* to the Executrix, and she dying before that could be done, the Inquisition taken afterwards is void; but if it was good, the *Liberate* is not well executed, to deliver the Lands to the Administrator *de bonis non*, because the Extent being sued out by the Executrix, and she dying intestate, the Administrator *de bonis non* comes in Paramount to her, and must claim immediately under the Testator, and so can never have a *Liberate* upon the Extent sued by the Executrix, but must begin *de novo*. 1 *Cro.* 325. *Cleeve* versus *Veer*.

10. Debt for Rent, the Defendant pleaded that the Land was extended by a Stranger upon a Statute acknowledged by the Lessor, before the Lease made to the Defendant, but did not shew that a *Liberate* was executed after the Rent was due; and upon Demurrer to the Plea, for that Reason it was adjudged ill. *Hob.* 82. *Grubham* versus *Thornborough*.

11. A Creditor recovered four Thousand Pounds in an Action on the Case, and was afterwards outlawed in a personal Action and died, the King reciting the Outlary, and the Death of the Party, granted all his Goods to W. R. who assigned the said Debt and Judgment to B. B. but notwithstanding such Assignment, an Extent issued in the King's Name, to extend all the Lands which the Debtor had at the Time of the Judgment for four Thousand Pounds given against him, and the Lands in the Possession of his Tenant which he purchased afterwards; adjudged, that the Debt, which was forfeited to the King by the Outlary of the Creditor, was well granted, and that the Patentee may levy it in the King's Name, though there may be no Words in the Patent for that Purpose, and that the Assignment of this Debt was void, because 'tis not assignable by Law. *Trin.* 5 *Jac.* 2 *Cro.* 178. *The King* versus *Twyne*.

12. Debt against an Administrator upon a Bond of three Hundred Pounds by the Intestate, the Defendant pleaded in Bar, that the Intestate, &c. entered into a Recognizance of six Hundred Pounds to E. O. &c. for a just Debt not paid, and so pleads *plene administravit*, except Goods to the Value of twelve Pence, and that he had not Assets *ultra*, the Plaintiff replied, that a *Ca. sa.* issued out to take the Body of the Intestate, and

and that the Sheriff returned that he was dead, and thereupon an *Extent* was sued against his Lands; and upon an Inquisition taken, the Sheriff returned Houses and Lands to such an yearly Value, and thereupon a *Liberate* issued to deliver the said Lands to *E. O.* the Cognifsee, and the Sheriff returned that he delivered them accordingly, &c. and that the Cognifsee was seized thereof, until her Debt should be satisfied; and upon a Demurrer to this Replication the Plaintiff had Judgment, because where Lands are delivered in an *Extent*, 'tis a full Satisfaction of the Debt for which they are extended, and 'tis as if the Cognifsee had taken a Lease thereof for Years, till the Debt should be satisfied, and he shall never afterwards take out a new Execution; so that this Recognizance is no longer a Charge upon the Estate of the Intestate, because the Cognifsee having accepted the Lands upon the *Liberate*, the Law presumes the Debt is satisfied. 1 *Lutw.* 429. *Young versus Johnson.* 2 *Cro.* 338. *S. P. Sid.* 356. *S. P. 3 Lev.* 369. *S. P.*

13. A Man being seized of a *Rent-Charge*, entered into a *Statute-Merchant*, and afterwards this Rent was taken in Execution, and adjudged that it might, tho' the *Statute de mercatoribus*, appoints only that the Goods and Lands of the Debtor shall be delivered by a reasonable *Extent*; and it was held, that after Execution thus taken, the Cognifsee may avow for the Rent, without any Attornment made by the Tenant of the Lands, because he has the Estate by an Act of Law. *Moor* 32.

14. A Statute was acknowledged, and upon an *Extendi facias*, the Sheriff returned that the Conufor was dead; afterwards his Widow married again, and a new *Extendi facias* issued against the Goods of the dead Man, upon which the Sheriff returned, that the Widow who was Administratrix, &c. had sold the Goods; and thereupon another *Extent* issued against the Goods of the second Husband. *Moor* 761. *Heyward's Case.*

15. Adjudged, that where there is Execution upon a *Statute-Merchant*, there is no Occasion for a *Liberate*, as there is upon a *Statute-Staple*; for in this last Case, the Cognifsee cannot bring an Ejectment before the *Liberate*; neither can the Sheriff upon the *Liberate*, turn the Tertenant out of Possession, as he may upon an *habere facias Possessionem.* 1 *Vent.* 41, 42.

16. A *Statute-Staple* was certified into the Court of Chancery from *Excester*, and an *Extendi facias* returnable in *B. R.* and the *Extent* filed; and afterwards it was discovered that several Lands were omitted, and the Court was moved for a Re-*extent*; but it was denied, because the *Extent* was filed. *Sid.* 356.

(D)

By *Fieri facias*, and *Levari facias.* See *Death of either Party.* (A) 10.

1. IF the Sheriff by virtue of a *Fi. fa.* &c. selleth a Term for Years, and afterwards the Judgment is reversed, the Term shall not be restored, but only the Money for which it was sold. 8 *Rep.* 141. in *Dr. Drury's Case.* 5 *Rep.* 89. *Hoe's Case.* *S. P. Moor* 573. *S. P. Cro. Eliz. Amner versus Ladington.* *S. P. 2 Leon.* 92. *S. C.*

2. If he sell a Term for Years, and take upon him to recite the Commencement, and the End of it, and recites it falsely, the Sale is void; but if he recites it generally, viz. that he sold a Term for diverse Years yet to come, or all the Interest which the Defendant had in the Land, 'tis good. 4 *Rep.* 74. *Palmer's Case.* *Cro. Eliz.* Sir *S. Sydenham's Case.* *S. P.*

3. If the Sheriff take Goods, and levy Money by virtue of a *Fi. fa.* he ought not to pay it to the Party, but to bring it into Court. *Godb.* 147. *Cro. Eliz.* 504. *Thompson versus Clerke.* *S. P. Hetly* 77. *S. C. postea Sheriff* (B) 6. *S. C.*

4. If the Sheriff levy Goods by a *Fi. fa.* and doth not return his Writ, and afterwards another *Fi. fa.* is brought to levy the Money, the Defendant may plead this Matter. *Godb.* 171. *Fox versus Bolton.*

5. The Debtor made a Bill of Sale of his Goods, dated on the same Day with the *Fi. fa.* adjudged, that though the Sale had been *Bona fide*, yet since Execution was taken out, the Property of the Goods are bound by it, so as no Bill of Sale on the same Day, or after, can stop the Execution. *Cro. Eliz.* 440. *Bonchier versus Wiseman.*

6. The Sheriff cannot break open the Door of an House, to execute a *Fi. fa.* upon the Goods of the Owner, or Occupier, but he may to execute on the Goods of a Stranger, upon Request, and Denial to open them; for a Man's House shall be a Protection for his own Goods only, but not for the Goods of another. 5 *Rep.* *Semayne's Case.* 91. *Cro. Eliz.* 908. *S. C.*

7. Upon a *Fi. fa.* against the Executor, to levy the Debt *de bonis Testatoris*, the Sheriff returned *nulla bona*; then a Writ issued to him to take Inquisition, whether the Executor had wasted, &c. who returned that he had; and thereupon Judgment was given against him *de bonis propriis*, and upon a Writ of Error by him brought *in redditione Executionis*, this Judgment to have Execution *de bonis propriis* was reversed; because when *nulla bona* of the

Testator

Testator is returned, the Courſe is to have a ſpecial *Fi. fa.* to levy the Debt *de bonis Teſtatoris*, & ſi tibi conſtare poterit, that the Executors have waſted, then *de bonis propriis*, and the Reaſon is, becauſe if upon ſuch ſpecial Writ the Sheriff returneth that the Executor hath waſted, when in Truth he hath not, he hath a proper Remedy againſt him for this falſe Return; but if he taketh an Inqueſt and returneth it, though what is found is falſe, there is no Remedy againſt the Sheriff, or any other. 5 Rep. 32. Pettifer's Caſe.

8. A *Levari facias* iſſued upon a Recognizance, the Sheriff levied the Money, and returned the ſame on the Writ, and that he had *denarios paratos*, and yet did not deliver the ſame into Court as he ought; in an Action of Debt brought againſt him, as to Part, he pleaded *nil debet*, and as to the Reſidue, that before the Return of the Writ he paid it to the Plaintiff, for which he had his Acquittance; and upon Demurrer to this Plea, reſolved that after ſuch a Return as *paratos habere*, he cannot plead that he paid it to the Plaintiff, and had his Receipt. Hop. 206. Speck verſus Richards. Moor 886. S. C. that the Plea is good, becauſe the Receipt and Acquittance are confeſſed by the Demurrer.

9. Where a Sheriff hath ſeized Goods by a *Fi. fa.* and is going out of his Office, he muſt deliver them to the new Sheriff, and return his Writ executed *pro tanto*; for by the Seizure, the Property is not deſtroyed from the Owner; but he ought not to deliver them to him, becauſe as the Writ of Execution is warranted by a Record, ſo the Diſcharge thereof muſt appear by Reward. Tel. 44. Ayre verſus Aden. 2 Cro. 73. S. C. 2 Rep. S. C. Sale. (A) 5. S. C. 4. Leon. 20. Comy's Caſe. S. P.

10. Where the Sheriff ſells Goods which he levied by a *Fi. fa.* and doth not pay the Money, an Action of Debt will lie againſt him, becauſe the Defendant is diſcharged as to the Plaintiff, and the Sheriff is now become his Debtor in Law; and in ſuch a Caſe, if the Sheriff die after he hath levied the Debt, the like Action will lie againſt his Executors, becauſe 'tis a Duty when levied. March. 13. Parkinson verſus Culliferd. Cro. Car. 387. S. C. 1 And. 247. Rokes verſus Wilmore. S. P. She Sheriff (F) 8. S. C.

11. The Plaintiff obtained a Judgment in Debt, and thereupon he brought a *Fi. fa.* and above a Year afterwards he took the Defendant's Goods in Execution upon a ſecond *Fi. fa.* without ſuing out a *Sci. fa.* and upon a Motion to ſtay the Money in the Sheriff's Hands till the Practice was examined, it was ruled, that if the firſt *Fi. fa.* is not executed, a ſecond *Fi. fa.* or *Elegit*, may be ſued out ſeveral Years after, without a *Scire facias*; provided Continuances are entered from the firſt *Fieri facias*, which may be entered after the ſecond *Fieri facias* taken out, unleſs a Rule is made that Proceedings ſhall ſtay, and nothing be amended. Sid. 59. Welden verſus Gregg.

12. Upon a *Fi. fa.* the Sheriff returned that he had levied Goods *ad valentiam* of the Debt, which were mercenary Ware; the Return was filed, and a Motion was made that he might bring in the Money, which not being done, an Attachment was granted, and then he appeared, and prayed to amend the Return, for that the Goods were damaged by laying, and he could not get Buyers; but adjudged, that the Return ſhall not be altered, for he might have returned this Matter by Way of Excuse at firſt; but having returned that he had levied *ad valentiam*, he ſhall pay the Money, and answer upon Interrogatories for his Contempt. Sid. 407. Needham verſus Bennet.

13. In Treſpaſs, the Defendant juſtified under a Judgment in an inferior Court, and a *Levari facias*, and a Warrant thereon, directed to the Defendant to levy the Debt *de terris & catallis*, and upon Demurrer it was objected, that the *Levari facias* ought to be directed to the *known Bailiffs*, and it doth not appear that the Defendant was ſo, but only named for this particular Purpoſe; beſides, the Precept was to levy the Money *de terris & catallis*, which is wrong, for it ought to be *de bonis & catallis*, and ſo it was adjudged. 2 Lutw. 1410. Walker verſus Treeby. See Error, (G) 34. S. C.

14. Treſpaſs, &c. for breaking and entering his Cloſe, and taking and detaining his Cattle, until he paid ten Pounds ſeventeen Shillings, the Defendant juſtified under a *Levari facias*, upon a Judgment had in the Hundred Court, and ſets forth the Proceedings at large, and that a Precept was directed to him, &c. who as Bailiff of the ſaid Hundred, by virtue thereof did enter the Cloſe, &c. and did take and drive away the Cattle, and detained them until the Plaintiff paid ten Pounds, ten Shillings and nine Pence, for Damages, and Coſts recovered, and fix Shillings and three Pence, for the neceſſary Keeping of the Cattle, &c. and upon Demurrer, this was held an ill Plea, becauſe he had no Authority to deliver the Cattle till he was paid for the keeping; 'tis true, he might have juſtified the Taking, without mentioning for what he detained them, becauſe the Detaining them until he paid the Money, is no Part of the Treſpaſs, but inſerted by Way of Aggravation of Damages; yet he having made it as Part of his Plea, and it being not warranted by any Proceſs, it made his Plea ill. 2 Lutw. 1439. Clerke verſus Lockey.

15. Treſpaſs, for taking a Mare and converting her to his Uſe; the Defendant juſtified under a *Levari facias* out of a Court-Baron, ſetting forth that a Plaint was levied, &c. but did not ſay before whom, or in what County: It ſhould have been, *Quidam T. S. levavit querelam*

querelam, &c. in curia Baron' S. W. materii sui C. in Com. W. coram L. D. Ar. Seneschallo ejusdem S. W. curiæ suæ prædict' versus præfat' R. &c. 2 Lutw. 1524. Hardall versus Smith. See Joint Action (D) 6. S. C.

16. The Case was, the Sheriff took Goods by virtue of a *Fi. fa.* and the Defendant promised the Officer, that in Consideration he would restore the Goods, he (the Defendant) promised him to pay the Debt, who brought an *Indebitatus assumpsit* for the Money; it was objected, upon a Demurrer to the Declaration, that it was ill, for it was like a Consideration to suffer a Prisoner to escape; but adjudged, that Goods taken in Execution upon a *Fi. fa.* may be sold by the Sheriff, and this is no more in Effect than a Sale. 1 *Salk.* 28. *Love's Case.*

17. Judgment was had in an Action laid in *Staffordshire*, and the Plaintiff sued out a *Testatum fieri facias into Worcestershire*; it was moved that this was irregular, because no *Fieri facias* went first into *Staffordshire*; but adjudged, that the *Fieri facias*, upon which this *Testatum* is grounded, is returned of Course by the Attornies, as Originals are. 2 *Salk.* 589. *Palmer versus Price.*

18. Adjudged, that if all the Money is not levied on a *Fi. fa.* the Writ must be returned before a second Execution can be taken out, because such Execution must be grounded upon the first Writ, by reciting that all the Money was not levied, for if it had, then no farther Process had been necessary. 1 *Salk.* 318. *Oviat versus Vyner.*

19. Two Creditors had obtained each of them a Judgment against *W. R.* one of them delivered a *Fi. fa.* to the Sheriff about nine a-Clock in the Morning, and the other, about ten of the Clock in the same Day, delivered another *Fi. fa.* to the Sheriff, who executed the last first, and afterwards he executed the first, and took the same Goods in Execution, which were taken at the Suit of the other; and upon this, the first Vendee, to whom the Goods were sold, brought Trover against the second Vendee, and the Sheriff; and adjudged good, for as at common Law, the Property of the Goods was bound from the Day of the * *Test of the Writ*, so now by the Statute, 29 *Car. 2. cap. 3.* 'tis bound from the Day of the *Delivery of the Writ*; now at common Law, if two Writs had been delivered to the Sheriff *Teste* the same Day, he was bound to execute that first, which was first delivered; and so he is now since the Statute, for he has no Election; therefore if he execute the last first, he must answer it to the Party that brought the first, who may bring an Action against him; but the Execution shall stand good. 1 *Salk.* 330. *Smallcomb versus Buckingham.* 5 *Mod.* 376. * 3 *Cro.* 174.

20. An Administrator had Judgment, *by Default* against one *Clerke*, upon a Bond of his Intestate, and brought a *Fi. fa.* which he delivered to the Sheriff 1 *Aug.* the Sheriff seized the Defendant's Goods, and on the ninth of *Sept.* following the Administrator died, the Sheriff returned that he had seized Goods to the Value, but that they remained in his Hands for want of Buyers; afterwards on the 29th of *September* following, the Sheriffs were removed, and the Defendant supposing that the Execution was abated by the Death of the Administrator, brought a *Sci. fa.* against the old Sheriffs, to have Restitution of his Goods, for that the Property was not divested out of him by the Seizure, because the Execution was not perfected, but Judgment was given against him in *C. B.* and now upon a Writ of Error in *B. R.* it was insisted that the *Execution was abated by the Death of the Administrator*, and that no Body could perfect it for want of Privity; not the Executor of the Administrator, because he came in *auter droit*, not the Administrator *de bonis non* of the Intestate, because he came in Paramount the Judgment; but adjudged, that the *Execution was not abated by the Death of the Administrator*, but that the Sheriff might proceed, for he hath nothing more to do with the Administrator who was Plaintiff, because the Writ commands him to levy, and bring the Money into Court, and this is not hindered by the Death of the Administrator, for that the old Sheriff is compellable to proceed; for an Execution is an entire Thing, and he who begins must end it; therefore the Administrator *de bonis non*, may pursue an Execution thus begun by the *Desiringas super Vicecomitem*; that is, that the new Sheriff shall distrain the old Sheriff to sell the Goods, and to bring the Money into Court, or to sell, and to deliver the Money to the new Sheriff; both which shew, that his Authority continues by virtue of the first Writ; that when the old Sheriff hath seized, he is compellable to return the Writ, and is liable to answer the Value according to the Return, and by the Seizure, the Property is divested out of the Defendant, and he is discharged, so no further Remedy can be had against him; and lastly, that since an Administrator *de bonis non*, &c. may by virtue of the Statute, 17 *Car. 2. cap. 13.* bring an Execution upon a *Judgment after a Verdict*, obtained in one Action *by an Executor, or Administrator*, and here it was by Default, 'tis reasonable, and within the Equity of the Statute, that he should be permitted to perfect an Execution thus begun, though the Statute doth not mention Executions, especially since the Right now is vested in him. 1 *Salk.* 322. *Clerke versus Withers.* 5 *Mod.* 390. 1 *Cro.* 459.

21. In Trespass, against the Defendant *John Cole*, for taking forty-three Sheep, the Defendant pleaded, that a *Levari facias* issued out of the Exchequer, reciting a Judgment in Debt, obtained by *Cole* against *Creswick*, and an Outlawry on that Judgment, 5 *Mod.* 112.

and a Seizure and Inquisition returned, which found the Land, and the yearly Value to be fifty-five Pounds *per Ann.* and by this Writ the Sheriff was commanded to levy, &c. *de exitibus & profectibus terræ*, and that on a Warrant made by the Sheriff to *W. R.* and *T. P.* his Bailiffs, the Defendant *Cole* required them to take the Cattle, and upon a Demurrer it was adjudged, that the Sheriff might take the Cattle of a Stranger, levant and couchant on the Lands of the Person outlawed, because that is the Debtor, and the Cattle are the Issues of the Lands; and that if the Owner of the Cattle was Tenant in Common with another, yet they might be taken on the Land, unless the Title of the Commoner is found by the Inquisition; for the Title is bound by the Inquisition, till 'tis avoided by a *monstrans de droit*. 1 *Salk.* 395. *Britton* versus *Cole*. *aliter* upon a *Fieri facias*.

(E)

By Habere facias possessionem & seisinam.

1. Judgment in Dower, and upon an *Habere facias seisinam*, the Sheriff returned that he offered to the Demandant *seisin* of a third Part of the Lands, which he shewed to her by certain Metes and Bounds, according to the Tenor of the Writ, and she refused to accept the same; adjudged a good Return, and that she shall not have an *Habere facias seisinam de novo*, for it was never yet done. *Mich.* 11. *Eliz.* *Dyer* 278.

2. Tenant in Tail had issue two Sons, the eldest had Issue a Daughter, and died, leaving his Wife with Child of a Son; Tenant in Tail suffered a Recovery to the Use of himself for Life, and afterwards to the Use of *J. S.* for twenty-four Years, and afterwards to the Heirs Male of the Body of the Tenant in Tail, and to the Heirs Male of such Heirs Male, and presently after died; on the same Day on which he died, an *Habere facias seisinam* was awarded, and about ten Days afterwards the Recovery was fully executed, by giving *Seisin* of the Land; about three Weeks afterwards the Widow of the eldest Son was delivered of a Son; adjudged, that Execution might be sued against the Issue in Tail, because the Right of the Entail was bound by the Judgment had against the Tenant in Tail. 1 *Rep.* 93. *Shelley's Case*.

3. The Sheriff cannot return upon an *Habere facias possessionem*, that another is Tenant of the Land by Right, because that cannot come in Issue between the Demandant and him; therefore he must execute the Writ, and leave the Right to be determined by Law. 6 *Rep.* 52. in *Boswell's Case*.

4. Where a House is recovered in a real Action, or by Ejectment, the Sheriff may break open the Doors upon an *Habere facias possessionem*, and deliver Possession; but he ought to signify the Cause of his Coming, and request that the Doors may be opened. 5 *Rep.* 91. *Semain's Case*. *Telv.* 28. *S. C.* *Moor S. C.*

5. Judgment in Ejectment, and upon an *Habere facias possessionem*, the Sheriff returned that he offered to deliver Possession, but he would not accept it; adjudged, that the Plaintiff cannot have another Writ, because it appears on Record, that he refused the Possession. 2 *Brownl.* 168. *Fetherston's Case*.

6. Judgment in Ejectment, and by a Writ of *Habere facias possessionem*, the Plaintiff was put into Possession, and soon afterwards the Defendant re-entered, the Writ being returned, but not filed; in this Case the Court refused to grant a new Writ of *Habere facias*, &c. but that the Plaintiff might bring a new Action, and 'tis not material whether the Writ was filed or not, for it was fully executed, and 'tis in the Election of the Sheriff, whether he will file, or return it, or not; but where Possession was delivered, and some Persons hiding themselves in the House, as soon as the Sheriff was gone, put the Plaintiff out of Possession again, in such Case he shall have a new Writ of *Habere facias*, because the other was not fully executed. 2 *Brownl.* 296. *Stile's Case*. 1 *Leon.* 145. *Upton* versus *Wells*. *S. P.*

7. The Plaintiff had Judgment in Ejectment, and was put in Possession by an *Habere facias possessionem*, and afterwards the Defendant turned him out again; whereupon the Plaintiff moved for a new *Habere facias possessionem*; it was objected, that it ought not to be granted, because it did not appear, that he ever was in Possession, by the other Writ, for it was never returned. *Sed per Coke* Chief Justice: It hath been often ruled, that he may have a new Writ, though the first is not returned. 1 *Roll. Rep.* 353. *Peirson* versus *Taverner*.

8. In Ejectment, &c. there were five Hundred Acres in Demand, and the Plaintiff recovered for one Hundred Pounds, by which, finding the Plaintiff was Tenant in Common with another, who would not suffer the Plaintiff to enjoy the Lands upon an *Habere facias possessionem*, because the Acres were not severally set out for him, and therefore he moved for another *Habere facias*, &c. it was objected, that he could not have it, because Execution was already executed; 'tis true, where the Sheriff returns that he hath made Execution,

Execution, and that Return is filed, the Court never grants a new *Habere facias*, &c. so likewise before the Day of the Return, 'tis never granted; but before the Writ is filed, it may be granted, and so it may after the Day of the Return, upon the Sheriff *non misit breve*; now in the principal Case, where more Acres are in Demand, and part only recovered, 'tis not sufficient for the Sheriff to deliver one Acre, in the Name of the whole; but he must set forth every Acre in particular, so that he who recovers may have the Benefit of the Judgment, and he must leave him in the peaceable Possession of what is recovered. *Palm. 289. Molineux versus Fulgeam.*

9. Judgment in Ejectment, and an *Habere facias possessionem* awarded, if it contain more Acres than are in the Declaration, 'tis Error; and if the Sheriff deliver Possession of more than are contained in the Writ, an Action on the Case will lie against him, or an Assize for the Lands. *Stile 238. Lumley versus Nevill.*

10. Trespass, &c. for taking, and carrying away several Goods, the Defendant justified by virtue of an *Habere facias possessionem* upon a Judgment in Ejectment, &c. and that he as Sheriff entered, &c. *Et bona in Executione brevis præd. extra domum amovebat*, and upon Demurrer, this was held an ill Plea, because it was not a sufficient Answer to the Carrying away the Goods; for he ought to shew to what Place they were carried, and where he left them. *2 Lutw. 1483 Rowley versus Haffard.*

11. The Sheriff delivered Possession in the Morning, by virtue of an *Habere facias possessionem*, and some Time in the same Day, after he was gone, and the Plaintiff in Possession, the Defendant turned him out; adjudged, that if he had been turned out immediately, or whilst the Sheriff, or his Officers were there, an *Attachment* would be granted, for this had been a Disturbance in Contempt of the Execution; but it being several Hours after he was in Possession, the Court doubted, &c. but agreed to grant a new *Habere facias possessionem*, if the first was not returned. *1 Silk. 321. Kingsdale versus Mann.*

Mod.
Cases, 27.

(F)

By *Sci. facias*, and other Actions against Principal and Bail. See *Sci. fa.*
(C) per totum.

1. A Debtor by Judgment, died before Execution, a *Sci. fa.* doth not lie against his Executors, because the Creditor may have an *Elegit* against the Heir. *Dyer 207. Owen's Case.*

2. Judgment in an inferior Court, and a Writ of false Judgment was brought, only to delay the Execution, upon which the Record was removed, and the Plaintiff in the Writ was Nonsuit; and thereupon the Defendant brought a *Sci. fa.* to have Execution; and adjudged, that it did lie, for otherwise he could have no judicial Writ to have Execution, because the Record could not be sent back again. *Dyer 339.*

3. Judgment in Debt was given against the Defendant in the Grand Sessions in *Wales*, and he died there intestate; adjudged, that a *Sci. fa.* would not lie against his Administrator, who lived in *London*, because it lies only in the Court where the Judgment was given. *Cro. Car. 23.*

4. A Judgment given on a *Sci. fa.* upon a Recognizance, was reversed, because the Execution was awarded upon *one nihil* returned, when there ought to be *two*; but in a *Sci. fa.* upon a Judgment against the Party himself, and not against his Executor or Administrator, *one nihil* is sufficient. *Dyer 161, 198. S. P.*

5. Judgment was against the Principal, who died before Execution, a *Sci. fa.* was brought against the Bail, and upon two *nibils* returned, Execution was awarded; thereupon they brought an *Audita querela*, and adjudged, that a *Sci. fa.* did not lie against the Bail, until some Default was returned against the Principal. *Golds. 175. Hobbs versus Tedcastle. antea audita querela. (D) 2. S. C. Moor 432. S. C. * Latch. 149. Calfe versus Bingley. S. P. Poph. 185. S. C. Noy 82. S. C.*

W. Jones;
123.

6. The Lord *Stafford* was Debtor to the Queen, and to a common Person, his Lands were extended by *Elegit*, at the Suit of the latter, and afterward the Queen by her Prerogative had the Lands extended for her Debt; and though she was satisfied, her Debt, the Creditor shall not have a Re-extent without a *Sci. fa.* against the Debtor, to shew Cause why a Re-extent should not issue. *1 Leon. 279. Lord Stafford's Case.*

7. Judgment against the Principal in *London*, and Execution being had against him, one of the Bail brought an Action against the other, to have him contributory, according to the Custom of *London*, *Ut uterque eorum exoneretur pro rata*, towards the Discharge of the said Execution, and the Cause being removed to the King's Bench; but it being an Action grounded upon the Custom, and not at Common Law, a *procedendo* was awarded. *2 Leon. 166. Offley versus Johnson.*

8. At Common Law, there was no Remedy for a Judgment-Creditor either against the Body, or Lands of his Debtor, his Goods were only liable, either upon a *Levari*

facias, or *Fi. fa.* which Writs must be prosecuted within a Year after the Judgment, otherwise the Creditor must bring an Action of Debt thereon; but by the Statute, *West. 2. cap. 45.* a *Scire facias* is given. 3 Rep. 11. In Sir William Herbert's Case.

9. Upon a *Capias ad satisfaciendum* against the Principal, and *non est inventus* returned, there was a *Sci. fa.* against the Bail, and a *nihil* being returned, the Defendant brought a Writ of Error to reverse the Judgment, and the Record being removed into *B. R.* another *Sci. fa.* issued out of the Court against the Bail, who before the Return of it brought in the Body of the Principal; but adjudged, that it was too late. 3 Bulst. 182. *Spanish Ambassador versus Gifford.* Sir George Bowes Case.

10. A Creditor having got Judgment, did not sue out Execution within a Year, the Defendant brought a Writ of Error, but not prosecuting it, he was afterwards committed to the King's Bench, and the Record being now in that Court, the Plaintiff prayed he might be in Execution for his Debt, though it was after the Year, and without bringing a *Sci. fa.* which was granted. 2 Cro. 364. *Bellasis versus Hankford.* See 4 Leon. 24, 197. *Russell's* * Case. Where the Defendant was taken on a *Ca. fa.* after a Year and a Day, it was adjudged a void Execution, and the Party discharged.

* This Case denied to be Law. Salk. 261.

11. Debt against an Administrator, the Action was laid in *Cumberland*, and Judgment obtained, the Plaintiff brought a *Sci. fa.* in *Westmorland*, and upon two *nibils* had Judgment, which was reversed, because the *Sci. fa.* must be brought in the same County where the first Action was laid. Hob. 4. *Musgrave versus Wharton.* 2 Cro. 354. *S. C. Telv. 218. S. C.*

12. A Recognizance was taken before the Chief Justice Hobart, at *Serjeants Inn* in *Fleet-street*, and entered on the Roll in *Middlesex*; resolved, that the *Sci. fa.* shall be directed to the Sheriff of *London*, but if the Entry on Record had been that the Recognizance was taken before the Chief Justice generally, without saying where, then it shall be presumed to be done in Court, and the *Sci. fa.* shall be directed to the Sheriff of *Middlesex.* Hob. 195. *Hall versus Winkfield.* See Hob. 210. See *Timberley's Case.* Allen 12. *Andrews versus Harborn.* S. P.

13. Judgment against an Executor, and upon a *Fi. fa.* the Sheriff returned that he had wasted the Testator's Goods, and that he had *nulla bona* of his own, &c. the Plaintiff upon a *Testatum* that he had Goods in *Durham*, took out a *Sci. fa.* directed to the Sheriff of *Durham*, but the *Testatum* being not entered on the Roll, a *Superfedeas* was awarded. Hob. 63. *Leicester versus Read.*

14. Judgment against the Principal, and afterwards the Bail paid part of the Debt, being not able to pay any more, and thereupon the Creditor released to the Bail, the whole Debt, and also the Judgment and Execution, and acknowledged Satisfaction of the whole; then the Bail died, and after his Death the Creditor brought a *Sci. fa.* against the Principal, and had him in Execution; upon a Motion to the Court, the Creditor attended, and confessed the Release; but said he never intended to Release the whole Debt; adjudged, that the Release was good; and that if the Bail be taken in Execution, and pay the Debt, the Creditor shall not have Recourse to the Principal; nor if the Principal be taken in Execution, he shall not resort to the Bail. 2 Bulst. 68. *Higgins versus Somerland.* 2 Cro. 320. S. C.

15. Judgment for six Hundred Pounds, the Creditor acknowledged Satisfaction for four Hundred Pounds of the Debt and Damages, and afterwards an Agreement was made between him and the Debtor, that if he did not pay the Money by such a Day, that it should be lawful for him to take out Execution, without bringing a * *Sci. fa.* though it was after the Year, the Money was not paid, the Creditor took out Execution, and the Debtor being brought to the Bar by *Habeas Corpus*, prayed a *Superfedeas*, because the Writ *erronice emanavit*; adjudged, that the *Capias* ought to have issued for two Hundred Pounds only, and that notwithstanding the Agreement, the Creditor ought to have brought a *Scire facias*, because the Process was not continued; but it was discretionary in the Court, whether to grant a *Superfedeas* or not. Mich. 22 Jac. W'inch. 100. *Hickman versus Sir William Fish.*

* 4 Leon. 24. Hunt versus Gonwell.

16. *Scire facias*, to have Execution for Damages recovered, the Defendant pleaded, that the Plaintiff had assigned the Damages to the Queen, and thereupon by Process out of the Exchequer, the Sheriff had extended his Lands; and upon Demurrer, it was objected, that this Plea in Bar was ill, because the Defendant had not alledged that the Sheriff had returned the Writ of Extent; but adjudged that the Plea was good; and that if a Sheriff levy Money by a *fieri facias*, though he doth not return the Writ, the Defendant may alledge it in Bar. Moor 468. *Hoe versus Belton.* 5 Rep. 89. S. C.

17. Husband and Wife, as Administratrix to her former Husband, obtained a Judgment, and before Execution the Wife died; adjudged, that the Husband should not have a *Sci. fa.* upon this Judgment; but if he sueth a *Sci. fa.* and hath Judgment, though 'tis wrong, yet it shall stand good, till reversed by Writ of Error. Cro. Car. 334.

(G)

Against the Heir of the Debtor, and against those who have Reversions and Remainders.

1. **T**H^O neither the Body, or Lands of the Debtor on a Judgment, could be taken in Execution at Common Law, but only his Goods; yet in an Action of Debt against an Heir, upon the Bond of his Ancestor, his Land which he had by Descent was subject to be taken in Execution. 3 Rep. 11. in Sir William Herbert's Case.

2. In an Action of Debt against the Heir, upon the Bond of his Ancestor, there was Judgment by *nil dicit*; in such Case the Plaintiff shall have Execution of any of his own Lands, or Goods. Dyer 89, 149. S. P. Plowd. Com. 440. Davis versus Peps. Cro. Eliz. Barker versus Brown. S. P.

3. Judgment against the Heir, by *nil dicit*, and a *Sci. fa.* being brought against him to have Execution, he pleaded *Riens per descent*; adjudged, that this Plea is too late after a Judgment by *nil dicit*, and the Execution shall be by *Elegit* on his own Lands. Dyer 344. Luson's Case.

4. The Heir pleaded *Riens per descent*, except the Reversion of thirty Acres; the Judgment was, that the Plaintiff shall recover his Debt, and Damages of the said Reversion, to be levied when it shall happen. Dyer 273, or 373.

5. Tenant for Life, Remainder in Tail; he in Remainder acknowledged a Statute, and afterwards sold his Interest, the Tenant for Life died; adjudged, that a Statute is a Charge executory, and that Execution shall be taken of this Remainder, when it happeneth. Golds. 120. James versus Bull.

6. An Executor of an Executor, brought a *Sci. fa.* against the Heir of a Debtor, upon Judgment, who pleaded *Riens per descent*, and it was found that he had two Acres by Descent; adjudged, that though the Plea was false, yet Execution shall be awarded, only of a Moiety of the Lands which he had by Descent, and not to charge him of his own Lands; for there is a Difference between a *Sci. fa.* and an Action of Debt brought against an Heir, upon a Bond of his Ancestors, in which the Heirs are named. Poph. 193. Bowyer versus Rivett.

5 Bulst.
317.
Palm.
419.
W. Jones,
89.

(H)

On Statutes and Recognizances.

1. **U**PON an Execution on a Recognizance for Debt, if the Land extended is valued at too high a Rate, the Plaintiff may pray that the Extenders may retain it at that Rate; and this, as well upon an Extent on a Statute-Merchant, as Staple. 2 Cro. 12. Molineux versus Lacy. Antea elegit. (C) 1. contra. Telv. 55. S. C.

2. The Cognisor entered into a Recognizance of two Thousand Pounds to H. and into a Statute of one Thousand Pounds to D. who extended only the Manor of S. afterwards H. sued out Execution upon his Recognizance, and he likewise extended the same Manor, and had a Moiety delivered to him, when in Truth the Cognisor had several other Lands, at the Time of the Recognizance, and subject to the same, which were omitted out of this Extent; upon which D. brought an *Audita querela* and had Judgment, which was affirmed in Error, because D. being in Possession by a Judgment, and a good Title upon a Statute, ought not to have his Land liable to the Extent upon the Recognizance, but only *pro rata*; and therefore H. ought to have included all the Lands of the Cognisor in his Extent, and not the Lands of D. only. Telv. 12. Hinde versus Dean. Postea sci. fa. (A) 18.

(I)

Of Superfedeas, and Discharges.

1. **A**fter Judgment in Ejectment, and an *Habere facias possessionem*, a Writ of Error was brought, and a *Superfedeas* granted to the Sheriff to stay Execution, who notwithstanding proceeded; adjudged a great Contempt, and a Writ of Restitution was awarded. 2 Bulst. 194. Thomas versus Owen.

2. Judgment against the Defendant in Bristol, and his Goods attached there, and now the Court of B. was moved to stay the Execution until a Writ of Error there brought, should be determined; they granted an *Habeas Corpus*, but nothing to stay the Execution. Mich. 12 Jac. 1. Bulst. 268. Challoner versus Petworth.

3. If the Creditor, at whose Suit a Man is in Execution, will discharge him by Word, this is good both as to him, and to the Sheriff, or Gaoler; and so adjudged in *Baggett's Case*. *Trin. 1 Car. Popb. 206.*

4. Judgment against the Defendant in Debt in the Sheriff's Court, and he was taken in Execution; afterwards upon an *Habeas Corpus*, being sued in the King's Bench, the said Execution was returned, and he was committed to the Marshal in Execution; then the Judgment in *London* was discharged upon a Writ of Error brought in the *Hustings*, and the Question was, how he should be discharged of the Execution, for that the Court had no Record of it, but by the Return of the *Habeas Corpus*, neither had they any Record of the Reversal of the Judgment in *London*, and they could not award a *Certiorari* thither; adjudged, that he might be remitted to *London*, and there discharged. *Mich. 4 Car. Cro. Car. 90. Cusack's Case.*

5. The Attorney is not bound to view the Record, to see whether a Writ of Error be brought, but may take out Execution, if there is not a *Superfedeas*, or Notice given to the Party. *Stile 105. Winn versus Stebbins.*

6. A *Superfedeas* was denied to stay Execution where the Writ was taken forth, before the Judgment was entered, because it was only a Neglect of the Clerk, after the *Postea* was delivered to the Clerk of the Judgments. *Stile 229.*

7. If before Execution the Defendant bring a Writ of Error, though 'tis no *Superfedeas* to stay the Execution, yet if the Sheriff will proceed to execute the *Fi. fa.* and levy the Money, the Court will award a *Superfedeas, quia erronee emanavit*, and to have Restitution of the Money out of the Sheriff's Hands. *Stile 414. Wingfield versus Valence.*

(K)

Of those who die before Execution, or die, or escape in Execution.

Moor pl. 817. 1. **D**EBT against an Administrator, upon a Judgment had against the Intestate, the Defendant pleaded that the Intestate was outlawed upon that Judgment, and taken upon the *Capias utlegatum*, and died in Prison; and upon Demurrer it was adjudged, that he was not in Execution for the Plaintiff, unless he had * prayed it, and it had been so ordered by the Court; for though the *Capias* is sued out by the Party, yet 'tis a Writ for the King; but because the Plaintiff had chose this Execution, which is the highest in Law, and the Defendant died, therein the Law will adjudge it a Satisfaction, since there is but one who was taken; but if the Proceedings had been against two, and one had been taken and died in Execution, that shall not discharge the other. *Cro. Eliz. 850. Shaw versus Curtis.*

* Outlawry
(B) 6.
antea (A)
6. pl.

2. The Intestate was taken in Execution by a *Ca. fa.* and died in Prison, the Creditor brought a *Sci. fa.* against the Administratrix, who pleaded this Matter, and upon Demurrer to the Plea, she had Judgment, which is contrary to *Blundfield's Case*, 5 Rep. 86. where it was adjudged, that if the Defendant die in Execution, yet the Plaintiff may have a *Fi. fa.* or *Elegit*; for though the Taking the Body was an Execution, yet it was without Satisfaction; for 'tis only a Gage for the Debt, and the Taking was with an Intent that he should satisfy it. *Hob. 60. Williams versus Cattery. 2 Cro. 135. S. C. Hob. 52. Foster versus Jackson. S. P. Moor 857. S. C.*

3. Two were bound jointly and severally, and being severally sued, there was Judgment against each of them, one of them was taken in Execution and died, the other brought an *Audita querela*; adjudged, that it did not lie, for tho' a Man can have but one Execution, that must be intended an Execution with Satisfaction, and the Body is no Satisfaction, but only a Pledge for the Debt. 5 Rep. 86. *Blumfield's Case. Moor 459. S. C. Cro. Eliz. 478. S. C. 2 Cro. 531. Pendurvis versus Keyusham. S. P.*

4. Judgment against an Executor for Debt of the Testator, and Damages, and thereupon a *Fi. fa.* issued to have Execution *de bonis Testatoris*, and if he had none, then the Damages *de bonis propriis*; the Sheriff took the Goods of the Testator in Execution before the Return, and the Executor died after the *Tespe* of the Writ of *Fi. fa.* and adjudged, that the Execution was well executed. *Moor 352. Mosse versus Packe.*

5. Two recovered in Debt, and before Execution one of them died; and afterwards Execution was sued in both their Names, 'tis no Error, and the Survivor may have Execution without a *Sci. fa.* *Noy. 150.*

6. Two are jointly and severally bound, and Judgment was had against both, and one of them being in Execution escaped; the Creditor may take out Execution against the other, for Execution without Satisfaction is not good, though the Sheriff suffered him to escape voluntarily; but if he let him go by the License of the Creditor, then the other had been discharged. *Cro. Car. 53. Whitacre versus Hankinson.*

7. If a Man be taken by a *Ca. fa.* and before he is committed to Prison rescueth himself and escapeth, the Plaintiff may have a new Execution, for the Defendant shall not take any Advantage of his own wrongful Act. *Cro. Car. 174. Robinson versus Cleyton. 185. S. P.*

(L)

Of Sales made after Judgment, and before Execution.

1. **T**HE Sale of Goods for a valuable Consideration, after Judgment, and before Execution awarded, is good; so adjudged in *Sir Gerard Flectwood's Case*. 8 Rep. 171. *Antea* Baron and Feme. (F) 6. S. C.
2. So if Judgment be given against Lessee for Years, and afterwards he selleth the Term, if after the Year the Plaintiff bringeth a *Sci. fa.* the Term assigned *bona fide*, is not liable, and if he assign it by Fraud, and the Assignee sells it to another for a valuable Consideration, 'tis not liable in the Hands of the second Assignee. *Godb. 161. Wilson versus Wormall.*

Executor.

Where the Debtor, or Obligor is made Executor, by the Debtee, or Obligee, or administers to him; and where the Obligor makes an Executor, and dies. (A)	Where he hath no Interest, and of Actions brought against him. (F)
Where the Debtee is made Executor by the Debtor, or administers to him. (B)	What shall go to him, exclusive of the Heir. (G)
Where he shall commit a <i>Devastavit</i> in confessing of Judgment, and paying Debts, where not; and what Debts are first to be paid. (C)	Where he shall be charged <i>de bonis Testatoris</i> , where <i>de bonis propriis</i> . (H)
Of his Privilege to prefer one Creditor before another, in Payment of Debts. (D)	Of Judgments pleaded by Executors. (I)
What Interest he hath, and to what Actions and Things he is entituled, and to what not. (E)	Executor <i>de son Tort</i> , by what Acts, and how chargeable. (K)
	Where the <i>Tort</i> is purged by a subsequent Administration, and where not; and by what Name he is to be sued. (L)
	Where an Executor <i>de son Tort</i> may retain, and where not; and what Acts he may do, what not; and what Pleas he may plead. (M)
	Actions by him, and against him, good, and not good. (N)

(A)

Where the Debtor, or Obligor is made Executor, by the Debtee, or Obligee, or administers to him; and where the Obligor makes an Executor, and dies.

1. **I**N an Action of Debt brought by an Executor, the Defendant pleaded that the said Executor was cited before the Ordinary, to prove the Will of the Testator, and that he made Default; and thereupon Administration was granted to the Defendant, by virtue whereof he did administer, and so the Debt became extinct; but adjudged, that by a *Probate* of the Will, after the Administration was granted to the Defendant, that Administration was quite defeated; and that though the Executor did make Default after he was cited, yet he might prove the * Will at any Time when he would. 1 Leon. 90. *Baxter versus Bales*. * *Postea*.
2. The Father and Son were bound in a Bond to T. S. who devised all his Goods to the Wife of the Son, who was one of the Obligors, and made her sole Executrix, and died, then the Son died, and afterwards his Wife died intestate; adjudged, that the Obligee, by making the Wife of one of the Obligors Executrix, had suspended the Action so long as the Executorship continued, and that a personal Action being suspended by the Act of the Party himself, is quite extinguished; and tho' the Debt due on this Bond cannot be transferred by a Devise, because 'tis a *Chose in Action*, yet this Devise shall enure as a Declaration of his Mind, that the Debt should be extinct. *Moor 855. Fryer versus Gildridge. Hutt. 128. Alfion versus Andrew. S. P.* See *Sir John Neddham's Case*.
3. The

Hob. 10.

3. The *Debtor and another* were made joint Executors by the Debtee, who devised several Legacies to be paid by his said Executors, out of the Debt due to him by the said Debtor; adjudged, that these Legacies were recoverable in the Spiritual Court; for as to them the Debt is not extinguished, by making the *Debtor joint Executor with another*, but it shall be *Affets* in their Hands, as well to satisfy the Legatees, as for Payment of Debts. *Fludd versus Rumsey. Telv. 160.*

4. The Debtor died intestate, and the Debtee took out Letters of Administration; adjudged, that he might *retain* his Goods in Satisfaction of his Debt; but if two are jointly bound in a Bond, and one of them dies intestate, and the obligee administers to him, in such Case he cannot sue the other. *Hutt. 128. Trudgeon versus Heron*; but if the Ordinary grant Administration to the Debtor, the Debt is not extinct. So is the third Resolution in *Sir John Needham's Case. 8 Rep. 136.*

5. The Debtor was in Execution at the Suit of *T. S.* who died afterwards intestate, and the Right of Administration was in the Debtor, who moved for a *Habeas Corpus*, and to be brought into Court in order to be discharged; adjudged, if the Intestate did not owe Debts, then by granting Administration to his Debtor, his Debt was discharged; but the Court denied the *Habeas Corpus*, for if they should grant it, they could not discharge him, because he himself could not acknowledge Satisfaction on Record, for a Debt that he actually owed; therefore they advised him to renounce the Administration to some Friend, that it might be granted to him, and then such Administrator might make a Letter of Attorney to him, to acknowledge Satisfaction on Record, on that Judgment for which he was in Execution. *2 Mod. 315. Bailly's Case.*

6. *T. S.* was indebted to the Testator in four Hundred Pounds, who devised some Legacies, and after his Debts and those Legacies were paid, he devised the *Residue of his* personal Estate to *G. D.* and made the said *T. S.* who owed the four Hundred Pounds, Executor, and died; it was objected against this *residuary Legatee*, that he could have no Part of these four Hundred Pounds, because the Person who owed the Money was made Executor by him, to whom it was owing, and by that Means the Debt was discharged; and if so, then the four Hundred Pounds could be no Part of his personal Estate, and so no *Residuum*, and that there was sufficient besides to discharge both Debts and Legacies; but it was decreed against the Executor, that he should pay the Money to *G. D.* to whom the *Residuum* was devised. *1 Ch. Rep. 292. Philips and Philips.*

7. The Obligor took out Administration to the Obligee, and made *W. R.* Executor and died; one of the Creditors of the Obligee brought an Action of Debt against this Executor; and adjudged that it would lie. *Sid. 79. Lockier versus Smith.* See *Antea pl. 7.* See *Fryer versus Gildridge's Case*, and *Sir John Needham's Case.*

8. Upon a Writ of Error in *B. R.* upon a Judgment in *C. B.* in an Action of Debt on a Bond, the Case was, one *Shelley the Obligee* made his Son in Law *Robert Wangford*, (who was the Obligor) his Executor, and died; afterwards the said Executor administered several of the Goods, *but died before he proved the Will*, having made his Wife Executrix, who proved the Will of her Husband, and took out Administration to *Shelley the Obligee*, with his Will annexed, and brought an Action of Debt on this Bond, against the Heir of *Robert Wangford* the Obligor; the Question was, that the Obligee having made the Obligor Executor, and he having administered some of the Goods, *but dying before Probate of the Will*, whether that will amount to a Release; and adjudged that it will; the chief Objection against it was, that though the Executor doth administer, yet if *he dies before probate*, his Executor cannot be Executor to the first Testator, but Administration must be granted to such Executor with the *Will annexed*; which is true, and the Reason is, because his Executor cannot prove the Will of the first Testator, because he is not named in the Will, and no one can prove a Will, but he who is named Executor in the Will it self; but if the first Executor had *proved the Will*, then his Executor might have been Executor to the first Testator, because there needs no *new Probate*; but in the principal Case, though the *Executor died before Probate*, yet by his administering some of the Goods, he had taken upon himself the whole Administration, and is a complete Executor; for all Payments made to him are good, and shall not be defeated though he dies before Probate: he may maintain Trover for any of the Testator's Goods; he may avow for Rent, where a Reversion of a Term comes to him, and for Rent accrued after the Death of the Testator, because the Reversion is vested in him by the Will, but for Arrears in the Testator's Life-time, he cannot *avow before Probate*; he may bring an Action of Debt for a Debt due to his Testator before Probate, though he cannot proceed to declare, having all these Advantages, before Probate; the Law takes Notice of him as an *Executor*, and such he is till an actual Refusal, and if so, then his Administering some of the Goods, hath put it out of his Power to refuse, for by administering, he hath accepted the Executorship, and 'tis that which makes the Release; because by being Executor, he is the Person who is to receive the Money due on the Bond before Probate, and he is likewise the Person who is to pay it; and the Rule is, that where the same Hand is to receive and pay, that amounts to an Extinguishment, though this Rule doth not always hold;

hold; for if the Obligor administers to the Obligee, there he is the same Person, both to receive and pay, yet that will be no Extinguishment, because the Administration is the Act of the Ordinary; but an Executor is made by the Act of the Testator, and the not proving the Will, *but dying before Probate*, will make no Alteration in this Case, because the Executor did assent to the Executorship by intermeddling with the Testator's Goods; and in such Case, the *Probate*, which is the Act of the Ordinary, hath no Effect; for the Ordinary hath no Right where there is an Executor; upon the whole it was adjudged, that the Debt was extinct, and that the Administrator with the Will of the Obligee annexed, could have no Action for it. 1 Salk. 299. *Wankford versus Wankford*.

(B)

Where the Debtee, or Obligee is made Executor by the Debtor, or Obligor, or administers to him.

1. TWO Obligors were bound in a Bond jointly and severally to *Anne Rowe*, and one of them made the said *Anne Rowe*, and his own Wife Executrixes, and died; *Anne Rowe* the Obligee refused, and the Widow of the dead Obligor administered, afterward *Anne Rowe* made the said Widow Executrix, and died, so that she now was Executrix, of the Executrix of the Obligee, and she brought an Action of Debt against the other Obligor, upon the said Bond, and had Judgment; in which Case these Points were resolved, *ff.* where the Debtor makes the Debtee, and another, Executors, (as in the principal Case) and the Debtee refuses, the Debt is not released, but he may still sue for the Debt, unless he administers; for then if he sues, he must sue himself, which cannot be, but he may retain as much as will satisfy himself; but where the Debtee makes the Debtor Executor, there the Debt is discharged, because a personal Action once suspended by the Act of the Party himself, is gone for ever; and if the Debtee makes one of the Debtors Executor who administers, he cannot sue the other, though the Bond is joint and several; but he makes the Executor of one of the Debtors, his Executor, (which is this Case) there such Executor may sue the other Debtor, because he hath the Debt in Right of another. *W. Jones* 345. * *Dorchester versus Webb*.

Cro. Car. 372. See *Fryer versus Gildridge*, and *Pitt versus Pidgeon*.

* Administrator, (R) 4. Cro. Car. 372.

2. Where the Obligor makes the Obligee Executor, if he accepts the Executorship, and proves the Will, he can never put the Bond in Suit, because he cannot sue himself, but he may retain the Goods of the Obligor in Satisfaction of his Debt; but where two are bound in a Bond, and one of them makes *T. S.* his Executor, and dies, and afterwards *T. S.* made the Obligee his Executor and died, then the Obligee brought an Action of Debt against the surviving Obligor, who pleaded that the other Obligor who was dead, made an Executor, and that Executor made the Obligee his Executor, who had administered the Goods of the other Obligor who was dead, &c. upon a Demurrer to this Plea, the Plaintiff had Judgment, because the Bond being joint and several, though the Obligee had proved the Will, and thereby accepted the Executorship, and so had discharged the Action as to him, yet it lies against the other. 2 Lev. 73. *Cock versus Crosse*.

3. It was my Lord *Hobart's* Opinion in *Fryer* and *Gildridge's* Case, that where an Obligor makes the Executrix of the Obligee, or Debtee his Executrix, and leaves sufficient Assets, she may retain, *i. e.* the Debt is satisfied by Retainer, and for that Reason no Action can be brought for the Debt: So in *Dorchester* and *Webb's* Case, it was held, that if the Debtor, or Obligor makes the Debtee, or Obligee Executor, and joineth another with him in the Executorship, and the Debtee refuseth to prove the Will, the Debt is not released; but if he prove the Will, he may retain for his Debt. See Administration. (R) 4. S. C.

(C)

Where he shall commit a Devastavit in confessing Judgment, paying Debts, where not; and what Debts are first to be paid. See Administration. (S) per totum.

1. Judgment in Debt against the Testator, and upon a *Sci. fa.* against his Executor, to shew Cause why he should not have Execution upon the Judgment; he pleaded, that before he had any * Notice thereof, he had fully administered, by paying Debts on Bonds, &c. and upon a Demurrer to this Plea, it was adjudged ill, because an Executor ought to take Notice of Debts on Record at his Peril, and ought to pay such Debts in the first Place. Cro. Eliz. 793. *Littleton versus Hibbins*. 7 Ed. 6. Dyer 80. S. P. 6 Eliz. Dyer 8. S. P.

* Postea.

2. Though 'tis regularly true, that Judgments obtained in a Court of Record, must be paid before Recognizances; yet in some Cases, a Recognizance must be paid by the Executor,

Executor before such Judgments; as for Instance, a Man owed Money upon a Bond, and also upon a Recognizance, and Judgment was obtained against him upon the Bond, but before any Execution was taken out, he made his Wife Executrix and died; afterwards his Goods were taken in Execution upon the Recognizance, and upon a *Sci. fa.* brought against the Executrix, by the Bond-Creditor on the Judgment, which he had obtained against her Testator, she pleaded this Execution taken on the Recognizance; and upon a Demurrer it was adjudged a good Plea, because she, as Executrix, was chargeable with the just Debts owing by the Testator; now 'tis plain, that the Debt due on the Recognizance was a just Debt, and that the Execution was lawfully made, which she could not prevent, especially having no *Notice of the Judgment* * on the Bond. 2 *And.* 157.

* *Antea.* 3. 3. *Legacies* must be paid before a Bond, with a Condition to do any *collateral Act*; as for Instance, *T. S.* entered into a Bond to do such a Thing, and afterwards he made a Will, and thereby devised several Legacies, and died, leaving sufficient Assets to satisfy the Bond, if the Condition thereof should happen to be broken; adjudged, that this Bond should be no Bar to the Payment of the *Legacies*, because 'tis altogether incertain whether it would be forfeited or not. *Cro. Eliz.* 467. *Nelson versus Sharp.*

4. *Judgment upon a Bond* shall be paid before a *Statute for Performance of Covenants*; because the Breach, or Performance of Covenants, are Things in *Contingency*; such a Judgment shall be likewise paid before *Statutes, or Recognizances* for Debt, though the Judgment be had after the Acknowledgment of the Statute, &c. 5 *Rep.* 28. *Harrison's Case*; and the Reason is given in the 4th *Rep.* 54. *The Warden and Company of Saddlers Case*; viz. because a Judgment obtained in a Court of Record, upon judicial Proceedings, is of a higher Nature than a Statute acknowledged privately by Consent of the Parties. See *Administration.* (S) 6. *S. P.*

5. Judgment in Debt against *B. G.* afterwards he acknowledged a Statute to *W. L.* and died, his Wife administrated, and brought a Writ of Error to reverse the first Judgment, and pending the Writ, she paid the Debt on the Statute; afterwards the Judgment was affirmed, and upon a *Sci. fa.* against the Administratrix, to shew Cause why the Plaintiff should not have Execution, she pleaded the Payment of the Debt upon the Statute, *ultra* which she had not Assets; adjudged this was a good Plea, and no *Devastavit*, because when she paid the Money, it was a Doubt, whether the Judgment would be affirmed or not. *Telv.* 22. *Read versus Beerblock.* 2 *Brownl.* 39. *S. C.*

1 *Roll.*
Rep. 405. 6. So likewise a *Recognizance* ought to be paid before a Debt on Bond, and therefore the Executor may plead it to an Action of Debt brought on the Bond, though the Day of Payment of the Money due on the Recognizance is not yet come; because 'tis a certain and present Duty, though 'tis to be paid hereafter. *Bridgm.* 79, 80. *Robson versus Francis.*

7. The Cognisor entered into a Recognizance, for Payment of a certain Sum of Money, and the Cognisee gave a Defeazance, reciting, that whereas he and the Cognisor were bound in a Bond of one Hundred Pounds, Debt due to *T. S.* it being the proper Debt of the Cognisor, and for which the Cognisee was only a Surety; if therefore the Cognisor paid the one Hundred Pounds to the aforesaid *T. S.* the Recognizance should be void; the Cognisor died, and an Action of Debt on a Bond being brought against his Executor, it was adjudged, that he might plead this Recognizance against that Action; for though this one Hundred Pounds was not the Sum mentioned in the Recognizance, but a collateral Sum due to *T. S.* upon the Bond, to be paid to him, and not to the Cognisee, and so no Duty to him; and though 'tis probable that the Heir of the Cognisor might pay it, yet since the Recognizance was for the Payment of a Sum certain, for which the Executor might be charged, 'tis pleadable to the Action of Debt on this Bond. *Cro. Car.* 362. *Goldsmith versus Wydnor.*

8. *Legacies* are Gratuities, and no Duties; and therefore an Action will not lie at Common Law, for the Recovery of a Legacy; in like Manner, a *Covenant* is no Duty till 'tis broken, therefore since 'tis incertain whether it will be broken or not, it shall be presumed that it will not, and for that Reason the Legacies shall be paid, notwithstanding any Covenant not actually broken. *Allen* 38. *Eales versus Lambert.* *Stile* 37. *S. C.*

But *Mortuaries*, and *Reliefs* are to be paid before Legacies.

9. *Assumpsit* against an Executor, who pleaded a Bond of forty Pounds entered into by his Testator yet unpaid, and that he had not Assets, *ultra* five Pounds, *quæ non sufficient ad satisfaciend debitum prædict' & ad illud onerat' & obligat'*, &c. the Plaintiff replied, the Bond was upon Condition to pay twenty Pounds at a Day not yet come, and upon a Demurrer to this Replication, it was adjudged ill, because the Plaintiff did not alledge, that the Defendant had Assets *ultra* twenty Pounds; for if he hath not, he is not bound to pay the Plaintiff's Debt upon a simple Contract, before a Debt upon a Bond, payable at a Day to come. 3 *Lev.* 57. *Lemmon versus Fowke.*

10. *Scire facias* against the Defendant *Bathurst*, as Administrator of *Mary Sachwell*, against whom the Plaintiff had obtained a Judgment of one Thousand seven Hundred Pounds, &c. as Administratrix of her Husband *H. S. de bonis præd' H. S. si tant'*, &c. & *si non de bonis propriis*, and suggests that *Mary* had Goods sufficient from her Husband *H. S.* but had *wasted* them; the Defendant pleaded that *Mary* had fully administered the Goods of *H. S.* and traversed the *Devastavit*, &c. the Plaintiff in his Replication maintains the *Waste*, and Issue thereon, and the Jury found *quoad* three Hundred and fourteen Pounds, that she had *wasted*; and farther they find that before the Marriage between *H. S.* and *Mary*, viz. *May 2*, &c. the Husband covenanted with one *Norwood*, to leave *Mary* at his Death one Thousand Pounds, and gave a Bond to the said *Norwood* in two Thousand Pounds, conditioned to pay the same; that the Husband died indebted to the Plaintiff in one Thousand seven Hundred Pounds, and that Administration of his Goods was granted to *Mary*, who *Octob. 23*, &c. was sued by the Plaintiff, who got Judgment against her; that the one Thousand Pounds not being paid to *Mary*, the said *Norwood* on the same *Octob. 23*. brought an Action of Debt upon the said Bond, against her as Administratrix to her Husband, and obtained Judgment against her for two Thousand Pounds *de bonis*, of the Husband, *si tant'*, &c. and that she by the Consent of *Norwood*, had one Thousand Pounds left in her Hands, of her Husband's, to satisfy the one Thousand Pounds due to him; adjudged, that the Defendant *Bathurst* shall be charged with the Goods of *Mary*, for the one Thousand Pounds left to her for her own Use; for she by confessing a Judgment to the Plaintiff for one Thousand seven Hundred Pounds, hath made her self liable, because she might have pleaded the Bond of two Thousand Pounds, in Bar of the one Thousand seven Hundred Pounds, which was due to the Plaintiff by Contract only; and she having omitted so to do, shall be charged therewith as for her proper Debt, notwithstanding the other Judgment recovered against her by *Norwood*. 3 *Lev. 113. Britton versus Bathurst.*

(D)

Of his Privilege, to prefer one Creditor before another, in Payment of the Debt.

1. **B**UT though an Executor may prefer which of the Creditors he pleases, by confessing a Judgment to one, where he is sued by two of the Creditors of his Testator; yet if an Action is brought against him upon a Bond, and he afterwards pays another Bond without Suit, this will be a *Devastavit* in him. *Moor 678. Searl's Case.*

2. Where several Actions are brought against him, and all of an *equal Nature*, he may confess a Judgment to one of them, and pay his Debt first, unless 'tis in the Case of the King, who may be entitled to a Debt upon an Inquisition found, or to Fines, or Amerciaments in his Courts of Record, which Debts must be first paid; and if there are several Debts, due on several Bonds, from the Testator, his Executor may pay which Bond-Debt he pleases, except an Action of Debt is actually commenced against him upon one of those Bonds; but even in such Case, if pending that Action, another Bond-Creditor brings another Action against him, yet before Judgment obtained by either of them, he may prefer which he will, by confessing a Judgment to one and paying him, which Judgment he may plead in Bar to the other Action depending against him. *Vaughan 89. Edgcomb versus Dee.*

3. An Action was brought against an Executor, and pending that Action, he procured another to commence an Action against him for a *just Debt*, due and owing by his Testator; and the Executor gave way to the Plaintiff in the last Action, to obtain Judgment before the other, which Judgment he pleaded to the first Action, and adjudged good, because he hath Liberty to pay one Debt before another; for though in Conscience all his Testator's Debts ought to be paid, yet there may be some Circumstances, which may make it reasonable to prefer one Creditor before another, as if he is very poor, and in such Case where the Executor *consents* to pay him first, it shall never be intended to be by *Covin*. *Sid. 21. Blundevill versus Loverdale.*

(E)

What Interest he hath, and to what Actions, and Things he is entitled, and to what not. See *Probate (C)* per totum. *Sale. (E) 3.*

1. **A**N Executor of an Executor, is an Executor to the first Testator, but he may take upon him the Executorship of his own Testator, and refuse to intermeddle with the other, and if the first Executor refuse, or *dies before Probate*, in such Case his Executor shall not administer to the first Testator, unless his Executor was made *Residuary*, 1 And. 82.

Legatee, as well as Executor; as for Instance, an Executor before he proved the Will of his Testator, made his Executor, and and died; such an Executor cannot take upon him the Execution of the Will of the first Testator, because the first Executor died before he proved the Will, but he may take Administration of the Goods of the first Testator *cum Testamento annex*, neither can an Executor of an Administrator, take Administration of the Goods of his Intestate. *Dyer 372. Isted versus Stanley.*

2. The Testator devised that his Executors should receive the Rents and Issues of his Lands, till his Son came of Age, for and towards the Payment of his Debts, and Legacies, &c. and he made two Executors, and died; afterwards * one of those Executors died, and the Survivor of them made his Executor, and died likewise, during the Minority of the Son; adjudged, that such Executor of the surviving Executor may receive and dispose the Rents and Profits of the Estate till the Son comes of Age, because it was an Interest vested in the surviving Executor by the Will, and not only an Authority to receive the Profits. *Dyer 210.*

* Debt will not lie against that Executor and the Survivor, but it must be brought against the Survivor alone. 4 Leon. 192.

3. Two Executors, one of them proved the Will, and the other refused before the Ordinary, who thereupon granted the Administration to the other, who made his Executor, and died; and that Executor alone, without joining him who refused, brought an Action of Debt for Money due to the first Testator, and the better Opinion was, that the Action was well brought; for though he who refused might * administer at any Time, notwithstanding such Refusal, yet it must be in the Life-time of his Companion, but after his Death he cannot, for then his Election is gone. *Dyer 160.*

* Antea. (A) 1.

4. But it hath been adjudged, that such an Executor of an Executor cannot maintain an Action of Debt, for a Debt due to the first Testator. 1 Leon. 152. *Fray versus Allen.*

5. An Executor made an Infant his Executor and died, and then Administration was granted to the Plaintiff during the Minority of the Infant, which said Plaintiff, as Administrator to the first Executor, brought an Action of Debt against the Defendant, upon a Bond due to the first Testator, and had Judgment, but it was reversed in Error, because he ought to have brought the Action as Administrator to the first Testator; but he had brought it as Administrator to the first Executor, which is wrong. 4 Leon. 58. *Limver versus Evorie.*

6. An Executor of an Executor may avow in proprio jure, for Rent due to the first Testator, as where Lessee for Years made T. P. his Executor, and died afterwards, T. P. made W. C. his Executor, and likewise died; then W. C. distrained for Rent Arrear in the Life-time of the first Testator, and in Replevin brought he avowed in jure proprio; it was objected, that an Action of Debt had been the proper Remedy, for Rent Arrear in the Life-time of the first Testator; but adjudged, that the Executor might distrain at Common Law, by Reason of the Reversion which made the Privity, and that the Avowry was good, though made by an Executor of an Executor, in his own Right, and not in the Right of the first Testator. *Latch. 211. Wood versus Marlb. 1 Vent. 292.*

(F)

Where he hath no Interest, and of Actions brought against him.

1. AN Administrator durante minore etate got Judgment, and before Execution he made a Will, and appointed T. P. his Executor, and died; afterwards this Executor brought a Sci. fa. upon the Judgment against the Defendant, and Process continued till he was outlawed, then he brought a Writ of Error, and it was adjudged, that an Executor of an Administrator, cannot have Execution upon a Judgment obtained by the Administrator, because such Executor is not liable to pay the Debts of the first Intestate; and no Man shall have Execution in such Case, but he who is chargeable to those Debts. 5 Rep. 9. *Brudnell's Case. postea Sci. fa. (D) 1. S. C. Cro. Eliz. 435. Perkins versus Clerke. S. P.*

2. Judgment against an Executor, and a Fi. fa. awarded, but before it was executed, he died intestate; and Administration was granted to the Plaintiff, who brought an Action against the Defendant, for taking the Goods of the Executor, by virtue of a Warrant from the Sheriff; and it was insisted for the Plaintiff, that the Taking the Goods was illegal, for though they were in his Possession, yet the Judgment was not obtained against him but against the Executor; and therefore a new Process ought to have been awarded, viz. a Sci. fa. against him, to shew Cause why the Defendant should not have Execution; but adjudged, that the Property of the Goods was bound from the Time of the Teste of the Fi. fa. and that notwithstanding the Death of the Executor, the Sheriff might execute the Writ on the Goods, in the Hands of the Administrator. *Cro. Eliz. 181. Parkes versus*

versus *Mosse*. Postea *Sheriff* (G) 4. S. C. See *Snape* versus *Norgate*. Sci. fa. (D) 10. Cro. Car. 167. S. C. *Jones* 214. S. C.

3. An Executor is an *Assignee in Law*, and so is an Executor of an Executor; but where a Man gave Bond to pay a Sum of Money to such Person as the Obligee, by his last Will should assign, or appoint, and he did not appoint any Person by his Will to receive it; adjudged, that his Executor shall not have it, because these Words to pay carry a Property in them, and it must be an *Assignee in Fact*, and not in Law, which is intended in this Case. Therefore if the Executor himself hath no Title, his Executor cannot have any. *Hob. 9. Perse* versus *Mead*. *Vaugh. 182. S. P.*

4. An Administrator obtained a Judgment against the Defendant, and died before Execution; adjudged, that his Administrator shall not have Execution of that Judgment, because he is not privy to the Record. *Tore* versus *Gough* 33. Vel. 33.
Moor
680.

5. The same Case is reported by Justice *Croke*, viz. the Creditor died intestate, and Administration was granted to *T. P.* who brought an Action of Debt against the Defendant, and had Judgment, but died intestate before Execution; then Administration of the Goods of the Creditor was granted to the Plaintiff, who was now Administrator of an Administrator, and he brought a *Sci. fa.* upon the Judgment obtained by the first Administrator; and upon Demurrer it was adjudged, that it did not lay for want of Privy, but that he must begin again; though it was insisted for the Plaintiff, that the Debt due to the first Intestate was turned into a Judgment, and so the second Administrator might have special *Sci. fa.* to have it executed. *Pasf. 1 Jac. 2. Cro. 4. Tore* versus *Gough*.

6. An Executor obtained a Judgment, and afterwards brought an *Elegit*, but before the Debt was levied, he died intestate; adjudged, that his Administrator *de bonis non*, shall have the Advantage of this Judgment, because by taking out the *Elegit*, the Interest was vested, but had been otherwise, if the Writ had not been taken out. *Sid. 29. Harrison* versus *Bowden*. See *Cleev* versus *Veer*.

7. An Executor died intestate, *W. R.* administered to him; adjudged, that this Administrator of the Executor shall be entitled to the Goods of the first Testator, especially if the Executor was made *residuary Legatee*. See *Dyer 372. a.* but 'tis otherwise of an Administrator of an Administrator. *Sid. 79. In Lockier* and *Smith's* Case.

8. It was with Difficulty obtained, that an Action of Debt would lie, even against an Executor himself, upon a Suggestion of a *Devastavit* made by his Testator, because 'tis a personal Wrong and dies with him; but the Courts of Common Law would never yet allow, that such an Action should be extended to an *Executor of an Executor*, unless where the first Executor came by the Goods in a wrongful Manner; but yet the Court of Chancery have thought it equitable, to make an *Executor of an Executor* liable to answer the Value of the Waste to the Creditors, so far as he had Assets from the first Executor, and also liable for so much of the Estate of the first Testator as came to his Hands; as for Instance, the Testator bequeathed a Legacy to *T. P.* and afterwards he made a *Man and his Wife* Executors, and died, the Husband made the *Wife and his Son* his Executors, and then he died; afterwards *T. P.* the Legatee, exhibited a Bill in Chancery against the Widow and her Son, wherein he charged that the first Testator's Estate, which was liable to satisfy his Legacy, was now come to the Hands of the said Defendants, whereof one was the surviving Executrix of the first Testator, and the other was an Executor of the other Executor deceased; and upon his Demurrer to this Bill, for that he was not privy in Law, nor accountable for any Part of the Estate of the first Testator, but that the surviving Executrix was chargeable alone, it was decreed, that the Estate was liable, into whose Hands soever it came. *1 Ch. Rep. 57. Nicholson* versus *Sherman*. *Raim. 23. S. C. Sid. 45. S. C.* See *Antea Devastavit*. (C) pl. 3, 10, 11.

9. But now by the Statute 30 Car. 2. cap. 7. an *Executor of an Executor* is made liable, as his Testator would have been, if living, where the Goods are wasted, or converted.

(G)

What shall go to him exclusive of the Heir. See *Emblements*, per totum, *Rent* (C) per totum.

1. **T**HOSE are Things either in Possession, or Action; the possessory Things which go to him, and not to the Heir, are all *Chattles real*; as for Instance, all *Leases* determinable upon Lives, all *Leases* for a certain Term of Years; 'tis true, such Leases are not in Possession till an actual Entry is made on the Lands, except Leases of Tithes, in which Case 'tis impossible to make an Entry; so are all Arrears of Rents issuing out of Lands, or Houses; so is a Lease made to a Bishop, and to his Successors; so where the Grantee of the next Presentation dies before the Church becomes; void in all these Cases the Executor hath a Right, and in some Cases, the *Rent it self* shall go to the Executor. *Dyer 283.*

2. As for Instance, Lessee for one Hundred Years died intestate, *his Wife administrated*, and made a Lease for five Years to *T. P.* rendering Rent to her, or to her *Executors*, &c. afterwards she made the Plaintiff her *Executor*, and died; the Question was, whether the Plaintiff who was *Executor to an Administratrix*, or the *Administrator de bonis non*, &c. of the Intestate should have this Rent; it was insisted for the Administrator that he should have it, because the Rent was incident to the Reversion, and that the Covenant to pay the Rent, shall go with the Rent it self; but it was adjudged, that the Executor of the Administratrix shall have it, because *she made the Lease*, and he comes in and is intitled under that Lease; and therefore he may maintain an Action of Covenant, on the personal Contract made between her and the Lessee, which the Administrator *de bonis non*, &c. cannot, because he must come in paramount this Lease upon which the Rent was reserved. 1 Vent. 259, 275. Norton versus Harvey. 2 Lev. 100. Drew versus Baily. S. P.

3. The Testator devised the *Rents and Profits* of his Estate to *T. P.* for fifteen Years, in Trust to pay his Debts, and made the said *T. P.* *residuary Legatee and Executor*, and died; the Trust was afterwards performed within the fifteen Years, and it was insisted in Equity for the Heir, that so much of the said Term as remained after the Trust was performed, should sink into the Inheritance, out of which it was raised, and this for the Benefit of the Heir; but it was decreed, that by the Devise of the *Rents and Profits*, an *Interest* passed to the Legatee, and that he as Executor shall have the Residue of the Term. Ch. Rep. 98. Gore versus Blake.

4. Two Persons had Goods in Common, one of them died, his Executor is entituled to the Share of a Moiety of those Goods. 1 Inst. 182.

5. A Lease for Years was made thus, *ff.* This Indenture between *Tercarram* of the one Part, and *Friendship*, his Wife, and Children of the other Part, *at the Assignment* of the said *Friendship*: The Question was, if *Lucy* the Daughter which the Husband and Wife had at that Time, was a Party to this Indenture, and so took the Term; or if another Son of *Friendship*, whom he afterwards made Executor, should have it; and adjudged for the Executor, because by those Words, *at the Assignment of Friendship*, he had reserved a Liberty to make his Son a Party. 4 Leon. 64. Tercarram versus Friendship.

6. The Executor is intitled to all personal Goods and Chattels of the Testator, of what Nature, Kind, or Quality the same are, and these are always accounted to be in his Possession, though they are not actually so; for he may maintain an Action of Trespass, against one who detains them from him; he is also entituled to Things *in Action*; as for Instance, he is entituled to the Right of Execution on a Judgment, Bond, Statute, or other Specialty whatsoever; he is also entituled to the Money due on a forfeited Mortgage, after the Death of the Mortgagee, unless 'tis reserved to be paid to the Mortgagee, and his Heirs; but if 'tis to be paid to him, his Heirs, or Executors, the Mortgagor may pay it to which he will. 1 Inst. 209. b.

(H)

Where he shall be charged *de bonis Testatoris*, and where *de bonis propriis*, &c.

1. DEBT against two Executors, one of them confessed the Action, and there was Judgment against the other by Default, and the Judgment was to recover the Goods of the Testator in both their Hands, for which a *Sci. fa.* issued against both, and the Sheriff returned *nihil*; but that he who had made Default, had wasted the Goods, and thereupon another *Sci. fa.* issued against him alone, and there was Judgment against him again by Default, and Execution *de bonis propriis*. 4 Eliz. Dyer 210.

2. Debt against an *Executor of an Executor*, upon the Bond of the first Testator; the Defendant pleaded, that the first Testator did owe one Hundred Pounds to his Testator, after whose Death, Goods of the Value of one Hundred Pounds came to his Testator, as Executor of the first Testator, which he retained, and *ultra* the said Goods; his Testator *in vita sua plene administravit*, the Plaintiff replied Assets *in London tempore mortis* of the said Testator, and it was found for him; and he had Judgment *de bonis* of the first Testator, in the Hands of the Defendant, and Damages *de bonis propriis*; and thereupon a *Sci. fa.* was brought against the Defendant, upon which the Sheriff returned a *Devasiavit*, and the Plaintiff had Judgment and Execution *de bonis propriis* of the Defendant; and if *nulla bona*, then he might have either a *Ca. fa.* or an *Elegit*. 3 Eliz. Dyer 185. Sir John Chicken's Case.

3. Lessee for Years covenanted to repair the House, and died, afterwards it was burnt down by the Negligence of his Executors; adjudged, that an Action of Covenant did lie against them, and that the Plaintiff should recover Damages *de bonis Testatoris*. Pasf. 15 Eliz. Dyer 324.

4. Error of a Judgment, the Error assigned was, for that Debt was brought against Husband and Wife, as Administratrix, and the Defendant pleaded Payment by the Wife, after the Death of the Intestate her first Husband, and issue being joined upon it, and found for the Plaintiff, the Judgment was *quod recuperet debitum*, against them *de bonis Testatoris*, & *si non*, &c. the Damages *de bonis propriis*, when the Judgment ought to have been *de bonis propriis*, because the Plea was false; besides the Damages ought to have been of the Goods of the Husband, and not *de bonis propriis*, for that includes both Husband and Wife, and a *Feme covert* can have no Goods; but adjudged, that though the Plea is false, yet the Defendant by marrying the Widow, is not altogether a Stranger to the Intestate, who was her first Husband; and though she can have no Goods during the Coverture, yet because the Husband is charged in Respect of his Wife only, and because she might have Goods if she should survive him, and Execution might be then taken against her, therefore the Judgment was held good, and affirmed. 2 Cro. 191. *Jobus versus Adams*.

5. Debt against an Executor, who pleaded *plene administravit*, and the Plaintiff replied Affets; thereupon the Defendant *relieta verificatione* confessed the Action, and Judgment was entered against him *de bonis Testatoris*; but it was moved that this Confession did import that he had Affets sufficient, and that it might be so added to the Entry; but adjudged, that the Confession naturally extends no farther than the Declaration, which was in the *Debet*, and not that he had Affets sufficient. Hob. 178. *Bird versus Culme*.

6. Debt against an Administrator, who pleaded that before the Action brought, the Administration was revoked and granted to another, and that he had then Affets to the Value of two Hundred Pounds, but had paid it to the new Administrator; the Plaintiff replied, that the Revocation was by *Covin*, between the Defendant, and the new Administrator, upon which they were at Issue, and a Verdict that it was by *Covin*, and Judgment *quod* the Plaintiff *recuperet de bonis Testatoris*; and upon this Error was brought, and it was assigned for Error, that the Judgment should have been conditional, that is, if he had not Goods of the Intestate, then *de bonis propriis*; but the Judgment was affirmed. 1 Bulst. 187. *Morgan versus Sokes*. Administration. (Z) 2. Telv. 219. S. C.

7. Debt against the Executors, upon a Bond of the Testator, conditioned that he, or his Executors, should every Year, during the Life of the Obligee, deliver to him *one Load of Hay on Michaelmas Day*, &c. then they plead, *that they*, and their Testator had every Year, performed this Condition, and shewed how; the Plaintiff replied, that at *Michaelmas* in such a Year, after the Death of the Testator, the Defendants had not delivered to him a Load of Hay, &c. upon which they were at issue, and a Verdict for the Plaintiff, who had Judgment against the Defendants *de bonis propriis*, for this false Plea. Moor 69, 70.

8. The Plaintiff made a Lease to T. S. &c. who covenanted to keep the House in Repair, T. S. died, and made T. B. his Executor, who died and made R. B. his Executor, against whom the Plaintiff brought an Action of Covenant, and assigned a Breach, for that he himself had suffered the House to be out of Repair: The Defendant pleaded Performance, &c. by the Testator, by T. B. and by himself, upon which they were at Issue, and the Plaintiff had a Verdict and Judgment in C. B. *quod recuperet damna de bonis Testatoris*, and upon a Writ of Error in B. R. it was assigned for Error, that this Judgment ought to have been general *de donis propriis*, and not *de bonis Testatoris*; because the Action is founded on a Wrong done by the Executor himself, for otherwise it would be in his Power by the Non-performance of Covenants, to waste the Estate of the Testator, without being subject to a *Devastavit*; but adjudged, that the Judgment was well given * *de bonis Testatoris*, and so in all Cases, but where the Executor makes himself a Stranger to the Will; as by pleading a false Plea, &c. Palm. 314. *Bull versus Winter*. 2 Cro. 647. * Dyer 324.

(I)

Judgments pleaded by him. See Administration. (T) (V) (W) (X) per totum.

1. DEBT against an Administratrix upon a Bond of six Hundred Pounds, made by her Testator, &c. she pleaded in Bar, that he acknowledged a Recognizance to the King of one Hundred Pounds, and another to B. G. of eight Hundred Pounds, and another to W. R. of one Thousand Pounds *pro veris & justis debitis*, and pleaded several other Recognizances; and that she had no Goods, or Chattels of the Intestate, besides Goods *ad valentiam* of the said Recognizances, and averred the same were in Force, and that she had no other, or more Goods, &c. besides Goods *not sufficient* to satisfy the said several Debts; the Plaintiff replied, that the Recognizance to B. G. for eight Hundred Pounds, was paid by the Testator in his Life-time, &c. and the other Recognizances were for Performance of Covenants, none of which were broken; and that they were kept on

Foot by Fraud, and that the Defendant had Goods in her Hands, &c. *præterquam bona ad valentiam* of one Hundred Pounds due to the King, &c. adjudged, that the Plea in Bar was ill, because it was repugnant, for she pleaded that she had no Goods, &c. besides such which were *to the Value* of the Recognizances, and immediately after she pleads that she had no Goods, &c. besides those which *were not sufficient* to satisfy the said Debts; likewise the Pleading that she had *not sufficient*, is too general, for she ought to confess how much she had, because 'tis a Thing properly in her Knowledge; then as to the Replication of the Plaintiff, *viz.* that the Recognizances were for Performance of Covenants, this is good without any further Certainty, because he is a Stranger to the Deeds, and the general Allegation of Covin is good, without shewing that the Defendant refused to sign a Release, &c. The Bar is likewise ill, because the Intestate was bound in the Recognizances with another, and the Defendant doth not say, that the other did not satisfy the same. 9 Rep. 108. *Tresham's Case. Administration.* (W) 6. S. C.

2. Debt against an Executor, who pleaded a Judgment obtained against him by *W. R. ultra quod* he had not Assets, which Judgment was then in Force; and this was held a good Plea, though the Defendant did not set forth in what Action, or for what the Judgment was obtained. Sid. 230. *Brown versus Purchase.*

3. Error in *B. R.* to reverse a Judgment against an Executor, where he pleaded several Judgments against him, and the last was thus pleaded, *viz.* That one *F. H. in eadem curia implacitasset*, &c. and recovered in *Trinity-Term*, but did not set forth *in what Year*; and upon a general Demurrer the Executor had Judgment, and now the Error assigned, was the Incertainty in Point of Time, when the Judgment was obtained; for if such Pleading should be allowed, it would be very difficult for the Plaintiff to find the Record, and it would bar him of the Plea, that it was kept on Foot by Fraud. 1 Vent. 76. *Jordan versus Fosssett.*

4. *Indebitatus assumpsit* against an Executor, &c. for Goods sold to the Testator; the Defendant pleaded several Judgments confessed by him in Debt on simple Contracts, *prout patet per separalia Recorda inde*, which are yet in Force, and that he hath not Assets beyond such a Sum, which is not sufficient to satisfy them, &c. and upon Demurrer it was objected to this Plea, that the Conclusion thereof is ill, because 'tis *prout patet per separalia Recorda*, when he ought to have concluded so to each Judgment, 'tis not said that the Judgments were *pro veris & iustis debitis*, which is usual, especially where the Judgments are by Confession in *Actions of Debt*, which do not lie against Executors on a simple Contract of the Testator; but adjudged, that *prout patet per separalia Recorda*, doth not make a complicated Issue, for it shall be taken to relate to each severally, and the Plaintiff might have replied *null tiel Record*, to each severally; 'tis true, 'tis not said *pro veris & iustis debitis*, but that is to be objected on the other Side in the Replication, and put the Defendant to prove it; 'tis true likewise, that *an Action of Debt* will not lie against an Executor upon a simple Contract of the Testator; so are the old Books, where 'tis likewise held, that there was no other Remedy, but the Law is now altered; for though a Debt upon simple Contract of the Testator, cannot be recovered of the Executor by an *Action of Debt*, yet it may by *Assumpsit*; Judgment for the Defendant. 1 Lev. 200. *Palmer versus Lawson.*

5. Debt upon Bond against an Executor, who pleaded several Judgments obtained against him upon Bonds made by the Testator, and that he had not Assets *ultra*, &c. The Plaintiff replied, as to one Bond of two Hundred Pounds, the Condition was to pay only one Hundred Pounds, and so to the Rest severally; and that the Defendant had Assets to pay the Plaintiff, and *ultra*, to satisfy the lesser Sums in the Conditions, &c. *viz.* at such a Place. The Defendant rejoins, that he had not Assets *ultra*, to satisfy the Debts and Judgments set forth in his Plea, and upon a special Demurrer to this Rejoinder, for that it did not answer the Replication, but ambiguously; for he should have rejoined, that he had not Assets *ultra* to satisfy the lesser Sums, and not to make the penal Sums Parcel of the Issue; for if he had not Assets *ultra* the lesser Sums, he ought to pay the Plaintiff; but adjudged, that the Penalties are due Debts, till the Obligees are satisfied; for though in Equity and Conscience the lesser Sums are only due, yet the Obligees might not accept them, without being compelled by Decrees in Chancery; or if they would accept them, and the Defendant would not pay them, in such a Case, the Plaintiff might have helped himself by pleading specially, that they would, and offered to accept the lesser Sums, but that the Defendant would not pay them, but kept the Judgments on Foot by Fraud and Covin; but he cannot aid himself by such a general Pleading, as he hath done in the principal Case; therefore without such special Pleading, the Defendant shall protect himself by the Penalties in those Bonds against other Actions. 3 Lev. 368. *Thompson versus Hunt.*

6. Debt against an Executrix, who pleaded several Actions of Debt brought against her, *pro eo videli' quod cum* the Testator, &c. *per quoddam Scriptum suum obligatorium*, became bound, &c. and Judgments obtained on those Bonds against her, &c. and that she had fully administred, &c. and upon Demurrer to this Plea, it was objected that *quod cum*

cum, (the Testator in his Life-time) *per quoddam scriptum* became bound, is no more than a bare Recital; she ought expressly to aver that the Testator did, (in his Life) enter into such Bonds, and then the Plaintiff might have replied *non sunt facta Testatoris*, which would have made a proper Issue; but adjudged, that the Defendant need not make such Averment, because the Plaintiff cannot reply *non sunt facta*, &c. for none can have that Plea but the Heir, or the Executor, or the Administrator; another Objection was, that the Defendant did not set forth that the Testator entered into these Bonds *pro veris & justis debitis*; but adjudged, that shall be presumed, and that if the Plaintiff will reply to this Plea, he must insist that the Judgments were obtained by Fraud. 1 *Lutw. Rep. Robinson versus Corbett*.

(K)

By what Acts, and how chargeable. See *Joint Executors*. (B) 2. *Deceasavit*. (C) 3, 10.

1. **A**N Executor of his Wrong, is one who takes upon himself the Office of Executor without any lawful Authority; he is chargeable to the rightful Executor, and to all the Creditors of the Testator, and likewise to the Legatees, so far as the Goods amount which he wrongfully possessed; and such an Executor is made by any *Act of Acquisition, transferring, or possessing himself* of any of the Estate, or Goods of the Deceased, but not by Acts of Piety, Charity, or Necessity; and by the Statute 43 *Eliz. cap. 8*. 'tis enacted, *That if any Person shall obtain any Goods, or Debts of the Intestate, or by Fraud release, or discharge any Debts due to him, or by procuring Administration to be granted to a Stranger who is poor and not to be found, with an Intent to obtain the Estate of the Intestate, and not upon any valuable Consideration, or in Satisfaction of just Debts answerable to the Value of Goods, or Debts so obtained, he is charged as Executor of his own Wrong*.

2. It hath been a Question, that if a Stranger possesses himself of the Intestate's Goods, without doing any farther Act as an Executor, either by paying, or receiving Debts, or Legacies, or by disposing those Goods which he had in his Possession, whether in such Case he was an Executor *de son tort*; and my Lord Rolle in abridging this Case in *Dyer*, tells us, that it did not; but this must be understood, where there is a rightful Executor made, or where Administration is duly granted to another, for in such Case the Creditors of him who is dead, have a proper Person to sue; but where there is neither an Executor, or lawful Administrator, there the Creditors have no Person against whom they may bring the Action, but him who hath possessed himself of the Goods, and claims them as his own, or who useth, or selleth them. *Dyer* 105. 1 *Roll. Abr.* 918. *Floyer versus Southcot.* 5 *Rep.* 33. *Read's Case.* *Hob.* 49. *S. P.* *Stile* 384. *S. P.*

3. Administration was granted to a *Feme covert* who died, and in an Action of Debt brought against the Husband, he pleaded *ne unques Executor*, the Jury found that he detained *bonam partem* of the Goods, and sold them; it was objected against this Judgment, that *bona pars* was very uncertain; this was admitted to be true, but that he ought not to detain any Part, for if he doth, he is an Executor *de son tort*, and may be charged as such. *Cro. Eliz.* 472. Moor 396.

4. *Feme Covert* Executrix made a fraudulent Gift of the Goods, but still kept the Possession; afterwards she married, and died, and in an Action brought against the Husband, he pleaded *plene administravit*; it was adjudged against him, because the Gift being fraudulent, the Property of the Goods still remained in the Wife, and her Husband having paid Legacies since her Death, is become Executor *de son tort*, and chargeable in this Action. *Cro. Eliz.* 405. *Wilcocks versus Watson*.

5. It hath been a Question, where a subsequent Administration is granted to an Executor *de son tort*, by what Name he shall be sued; and there are some Opinions, that he shall be sued as Administrator; but the better Opinion is, that since he had given the Plaintiff Advantage to sue him as Executor *de son tort*, he shall not by his own Act purge that *tort*, and cause the Plaintiff to sue him by another Name; but that he hath his Election to sue him by either name. *Godb.* 217. *Bond versus Green.* 3 *Leon.* 198. *Cro. Eliz.* 104. *Stubbs versus Rightwife.* *Cro. Eliz.* 810. *Bethell versus Stanhope.* *Owen* 131. *S. C.* 2 *And.* 172. *S. C.*

6. A Man took Possession of the Intestate's Goods wrongfully, and then sold them to another, and afterwards he took out Administration; and adjudged, that the Sale was good by Relation; but if the Intestate had been entituled to a *Lease for Years in Reversion*, and an Administration had been taken out by an Executor *de son tort*, after he sold such a reversionary Interest, and afterwards he sells it again to another; there the second Vendee shall enjoy it, because there cannot be an Executor *de son tort* of a Reversion. *Moor* 126. *Kenrick versus Burges*.

7. Judgment was obtained against the Testator, and upon a *Devastavit* returned against his Executor, he pleaded, and a special Verdict was found to this Effect, That the Defendant was made *Executor by the Will* of the Testator, and that he dwelt in the same House with him; and that before Probate he possessed himself of the Testator's Goods, and had them appraised, and put into an Inventory; and then sold Part, and paid a Debt owing by the Testator, and converted the Value of the Rest to his own Use; that afterwards he refused, before the Ordinary, to prove the Will; whereupon Administration was granted to the Widow of the Deceased; and the Question was, whether he should be charged for the whole personal Estate, or only for so much as he converted; it was insisted, that he should be chargeable only for what he converted to his own Use, because all being done *before Probate*, he is *Executor de son tort*, and therefore shall not be charged for more than he converted; but adjudged, he shall be charged for the whole, because he was made Executor by the Will, and in such Case is complete Executor *before Probate*, as to every Thing, but bringing of Actions; he had Possession of all the Goods, some he sold, and the Rest he converted, which is a sufficient Administration; 'tis true, the Jury have found that Administration was granted to another, upon his Refusal to prove the Will, and that he delivered the Goods over to the Administratrix; but these Things will not discharge him, because the Refusal was so long after he had intermeddled with the Estate, and the Granting Administration to another, is void, because the Defendant is rightful Executor, and had administered; and having Possession of all the Goods, shall not be discharged by delivering over Part to another, who was not rightful Administratrix.

1 Mod. 213. *Paxton versus Baselden*.

8. In the Exchequer-Chamber the Case was, the Plaintiff declared against the Defendant, as Executor of *E. N.* who was Executor to the Debtor, The Defendant pleaded, that the Debtor died intestate, and that Administration was granted to *R. R.* and traversed, that *E. N.* was ever Executor to the Debtor; but did not say, or ever administered as Executor, the Plaintiff replies, that before Administration was granted to *R. R.* the said *E. N.* possessed himself of divers Goods of the Debtor, and made the Defendant his Executor and died, &c. and upon a Demurrer to this Replication, Judgment was given for the Plaintiff, but reversed in the Exchequer-Chamber, because the Defendant was an *Executor of an Executor de son tort*, who is not liable at Law, though he may in Equity:

2 Mod. 293. *Anonimus*.

3 Mod.
190.

9. *Waste* against the Defendant, as Executor of *Cook*, in which the Plaintiff declared on a *Lease of twenty Years to come of Cook*, and that after his Death the Defendant entered and committed waste; the Defendant pleaded that *Cook* died intestate, and that Administration was not granted to him, (the Defendant) nor the Term of twenty Years assigned to him, &c. the Plaintiff replied, that after the Death of *Cook*, the Defendant entered and committed Waste; and upon Demurrer it was insisted for the Defendant, that there could not be an *Administrator de son tort* of a Term for Years, because a Man cannot apportion his own Wrong; therefore he who enters tortiously, is a Disseisor, and not a Termor; but adjudged, that here being a lawful Term in Being, and by Consequence he in Reversion cannot bring an Action of Trespass, whilst the Term is in Being; therefore 'tis reasonable that he should have Remedy upon the Contract against him, who claims to be in Possession by the Contract. 3 Lev. 35. *The Mayor of Norwich versus Johnson*.

(L)

Where the Tort is purged by a subsequent Administration, where not; and by what Name it is to be sued. See *Antea*. (K) 7.

1. **I**N Debt against the Defendant as Executor of *W. R.* he pleaded that *W. R.* died intestate, and that certain of the said Intestate's Goods came to the Hands of this Defendant, and that afterwards Administration was granted to *L. R.* to whom he delivered the said Goods; adjudged, that if the Administration had been granted to the Defendant himself, it would not have purged the Tort, much less where 'tis granted to another; for he having once made himself liable to an Action, as *Executor de son tort*, he shall never afterwards discharge himself by Matter *ex post facto*. Hob. 49. *Keeble versus Osbaston*. 1 Roll. Abr. 919. S. C. 2 Vent. 179. *Pyne versus Woollard*. S. P. Cro. Eliz. 365. *Bradbury versus Reynell*.

2. In Debt against an Executor, who pleaded that the supposed Testator died Intestate, and that before the Action brought, Administration was granted to *E. K.* &c. the Plaintiff replied, that *W. K.* died intestate, and that before Administration was granted to the said *E. K.* several Goods of the said Intestate came to the Defendant's Hands, which he administered, *seu aliter ad usum suum proprium convertit*; adjudged, that since the Defendant was an *Executor de son tort*, before the Administration granted to *E. K.* that the Plaintiff had a Cause of Action vested in him, which shall not be devested in a subsequent Administration,

Administration, though granted before the Action brought; and the rather, because the Goods wrongfully taken are not Assets in the Hands of the Administrator, till they are converted by him. *Hob. 49.*

3. The Mother possessed her self of the Goods of the Intestate, as *Executor de son tort*, the Son afterwards took out Administration, and paid the Debts as far as the personal Estate did amount unto, being to the Value of what his Mother received, and of all which the Intestate died possessed of; then one of the Creditors sued the Mother, as *Executor de son tort*, and upon *plene administravit* pleaded, all this Matter was found specially; and adjudged, that she was not liable to the Suit of the Creditor, because it was brought after Administration granted to her Son, and in such Case she is chargeable to him, and not to the Creditor; for if she should, she might be doubly charged, which is unreasonable, especially since the Administrator had paid to the Value of the Estate. *Cro. Car. 88. Whitmore versus Porter. 1 Vent. 349. Contra* that he is chargeable to the Creditor.

4. The Son, who was an *Executor de son tort*, died intestate, and his Mother took out Administration, and afterwards married; then the Husband paid the Debts of the first Intestate, to the Value of what the Son was possessed as *Executor de son tort*; adjudged, that by this Administration of the Mother, the *Tort* was purged, and that her Husband might plead *plene administravit* to any Action brought by the Creditors of the first Intestate; for though the *Executor de son tort* could not pay himself, yet he might other Creditors of the said Intestate. *Sid. 76. Baker versus Berisford. Raym. 58. S. C. 1 Lev. 154. S. C. Retainer (A) 6. (B) 6. S. C.*

(M)

Where he may retain, where not; and what Acts he may do, and what not; and what Pleas he may plead.

1. **A**N *Executor de son tort* possessed himself of the Goods of the Intestate, and afterwards Administration was granted to him; adjudged, that in such Case, he may retain, but without such an Administration he cannot, because he did not come to the Possession by due Course of Law, but by his own wrongful Act. *Cro. Eliz. 630. Iceland versus Conlter. 5 Rep. 30. S. P. Moor 527. S. P. 1 Brownl. 103. Alexander versus Lamb. S. P. Telv. 137. S. C.*

2. Debt against an *Executor de son tort*, upon a Contract of the Intestate, the Defendant pending the Action administered, and then pleaded that the Intestate owed him fifty Pounds on Bond, and that he had administered, and by Virtue thereof did retain his Goods to the Value of that Debt; besides which he had *nulla bona* of the Intestate, and upon a Demurrer to this Plea, it was adjudged, that the Plea was good; because the Administration, though granted (*pendente lite*) purged the *Tort*, and the Defendant shall retain, to satisfy a Debt on a Bond, before he shall be obliged to pay a Debt on a Contract. *Stile 127. Williamson versus Norwich. 1 Roll. Abr. 923. S. C.*

3. An *Executor de son tort* cannot maintain any Action, because he cannot produce any Will to justify it, and he will be severely punished for a false Plea, as if he pleads *ne unques Executor*, and 'tis found against him; for in such Case the Execution shall be awarded for the whole Debt, tho' he medled but with a Thing of very small Value; as for Instance, he was charged with a Debt of one Hundred Pounds, when he possessed himself of no more of the Intestate's Goods than a Bible. *Noy 69. Kitchen versus Dixon.*

4. An *Executor de son tort* may pay any of the Creditors of the Intestate, but cannot * retain for a Debt due to himself; and he shall be allowed all such Payments which a rightful Executor ought to have paid, if there had been one appointed; 'tis true, there can be no *Executor de son tort*, where a rightful Executor is made; but in such Case, if the Widow, or any other Person payeth those Debts, which the Executor must have paid, it shall be allowed in Equity. *2 Ch. Rep. 33. Ayres versus Ayres. * Moor 527. Colter versus Ireland. S. P.*

5. The Plaintiff declared against the Defendant as *Executor*, who pleaded that *W. R.* made his Will, and that he, (the Defendant) *suscepto super se onere Testamenti præd.*, did pay several Sums due on Specialties, and that there was so much owing by the Testator to his (the Defendant's) Wife, and that he retained so much of the Testator's Goods to satisfy that Debt, and that he had no other Assets; and upon Demurrer to this Plea, it was adjudged ill, because it did not appear, but that the Defendant was *Executor de son tort*, and if so he cannot retain; he should have entituled himself to the Executorship; 'tis true, the Plaintiff declared against him as *Executor*, but that will not make him so. *1 Mod. 208. Atkinson versus Rawson.*

6. Debt upon Bond against the Defendant as *Executrix* of her Husband, she pleaded that he died *Intestate*, and that *Administration* was granted to her, *cujus prætextu* she administered the Goods, and concluded the Plea in Bar to the Action; and upon Demurrer, it was insisted for the Plaintiff, that the Defendant should have * *traversed*, that she intermeddled with the Goods before *Administration* was granted to her; but adjudged, that such a * *Traverse* had been ill, because the Plaintiff had not alledged that she did intermeddle, and therefore the Defendant ought not to traverse, what the Plaintiff had not alledged; 'tis true, if he had replied, that she had administered of her own Wrong, and the Defendant had demurred, she had confessed it to be true by her Demurrer, and then the Action had been well brought against her, as *Executrix de son tort*, or as *Administratrix*, tho' she was neither at that Time, but had obtained *Administration* afterwards; but by this Plea the Defendant allowed that she was chargeable as to the *Right*, but that the Plaintiff had charged her by a wrong Name, and shews how, *viz.* as *Executrix*, when he should have charged her as *Administratrix*. 5 Mod. 136, 145. *Bowers versus Cook*. 1 Silk. 298. S. C. by the Name of *Powers versus Clerke*.

(N)

Actions by and against him, good, and not good.

1. CASE against the Defendant as Executor to R. B. who was indebted to the Plaintiff, and that in Consideration he would not sue, but defer the Payment till *Michaelmas*, he would pay the Debt; the Plaintiff had Judgment, and upon a Writ of Error brought, it was assigned for Error, that the Plaintiff had not averred the Defendant had *Assets*; but adjudged, that shall be presumed. 9 Rep. *Banc's Case*.

2. The Testator was *Tenant for Life*, Remainder to one *Scarles* in Fee, the Testator made a Lease for fifteen Years to *Swann*, (the Plaintiff) and afterwards made the said *Scarles*, and another his Executors, and died; after the Death of the Testator, *Scarles* entered, and avoided this Lease as he might do lawfully; the Testator who made it, having only an Estate for Life; whereupon *Swann*, (the Lessee) brought an Action of Covenant against the Executors; and adjudged, that it would not lie. Moor 74. *Swann versus Scarles & al'*.

3. The Widow, who was *Executrix* to her Husband, brought an *Indebitatus Assumpsit* against the Defendant as Executor, upon a Promise of his Testator, and had a Verdict, and Judgment in B. R. which was reversed upon a Writ of Error in the Exchequer-Chamber, and afterwards the Widow exhibited a Bill in Chancery suggesting all this Matter, and prayed to be relieved; the Defendant demurred to the Bill, but the Demurrer was over-ruled; for the Lord Keeper made no Difference, where the Party seeks for Relief, either after, or before a Judgment given against him at Law; and said, that by Advice of all the Judges, he had allowed Bills for Debts, without Speciality brought against Executors, with an Averment that they had *Assets*. Moor 556. *Masters versus Burde, & al'*.

2 Cro.
612.

4. *Assumpsit* against an Executor, wherein the Plaintiff declared, that the Testator, in Consideration of three Pounds paid to him by the Plaintiff, had promised to deliver up such a Bond, in which the Plaintiff was bound to him, &c. and averred that he paid the three Pounds, and that the Bond was not delivered up, &c. after a Verdict for the Plaintiff, it was objected in Arrest of Judgment, that an *Assumpsit* would not lie against an Executor upon a collateral Promise of the Testator; but adjudged, that it would; whereupon a Writ of Error was brought in the Exchequer-Chamber, and there the Judgment was affirmed; it was agreed on all Sides, that it would upon a Contract of the Testator, and the Reason is the same upon a Promise, where he had received a valuable Consideration. Palm. 329. *Carter versus Foffet*.

Executory Devise.

Of a Fee-simple upon a Fee. (A)
Of a Term for Years to one, after a

Term limited to another, upon a
Contingency. (B)

(A)

Of a Fee-simple upon a Fee. See Remainder. (F) 16.

1. **A** Remainder of a Fee cannot be limited by the Rules of Law after a Fee-simple, because when a Man hath parted with his whole Estate, there cannot remain any Thing for him to dispose; and therefore, *Anno 28 H. 8.* where the Devise was to the Prior and Convent of St. Bartholomew, and his Successors, paying a certain Rent to the Dean and Chapter of St. Paul's, and if they fail in Payment thereof, then their Estate shall cease, and the Dean and Chapter, and their Successors shall have it; this was adjudged void by Baldwin and Fitzherbert, who were reputed the best Lawyers of that Age, because nothing could remain to the Dean and Chapter, and their Successors, when the whole Estate in the Lands was given before to the Prior, &c. and his Successors. *Dyer 33.*

2. But though this was a Rule in Law at that Time, and all Ages past, yet that Rule hath of late been evaded, by distinguishing between an *absolute Fee-simple*, and a Fee-simple which depends upon a *Contingency*; for though 'tis absurd, and impossible to limit any Remainder, or Residue of an Estate after an absolute Fee; yet a Fee may remain, and arise out of a Fee conditionally limited, that is, where a Man deviseth a Fee-simple to one, but to be vested in another upon a Contingency; especially where such a Contingency may happen in the Course of a few Years, or in the Course of one or two Lives; and where such a Remainder is limited by a Will, 'tis called an Executory Devise.

3. And 'tis with great Reason that Remainders arising upon such a Contingency, are now allowed, even after a Devise of the Fee-simple it self; for it stands upon the Reason of the old Law, which allows favourable Distinctions to supply the Intent of the Testator, that being always to be observed in Wills; and where there is such an executory Devise, there needs not any particular Estate to support it, because the Testator did not part with his whole Estate in the first Limitation, for something still remained in him to give, which accordingly he did give to another, but upon a Contingency which might happen upon the first Limitation; therefore, because the Person who is to take upon such a Contingency, hath not a present, but a future Interest, his Estate cannot be barred by a common Recovery; and that which remained in the Testator to give, after the first Fee thus limited upon a Contingency, shall descend after his Death to his Heir, till the Contingency happens.

4. The first Remainder which was allowed to be good by a Devise, after a conditional Fee-simple limited before in the same Will, was *Anno 20 Eliz.* where the Devise was to the Son and his Heirs, and if he die before twenty-four, and without Heirs of his Body, Remainder over: Now this was a plain Remainder limited after a Fee-simple to the Son, but not upon his Dying without Heirs of his Body generally, for that had been too remote an Expectancy, but it was upon his Dying without Heirs of his Body, before he was twenty-four Years old; so that it being a Remainder to arise upon a Contingency, which might happen in a few Years, it was adjudged good, but the Son living many Years after he was twenty-four Years old, this Contingency never happened; and therefore it was adjudged, he had an Estate in Fee, and not in Tail. *Dyer 124. Hind versus Lion. 1 Roll Abr. 839. S. C. Cro. Car. 575. London Lord Mayor versus Alford. S. P. Jones 452. S. C.*

5. For there can be no executory Devise of a Fee-simple, after an Estate-Tail, because that would tend to a Perpetuity; therefore the first Limitation must always be in Fee; as for Instance, the Father having two Daughters, devised a House to the eldest and her Heirs, and another House to the Youngest and her Heirs, and if the Youngest died before sixteen, living the Eldest, then that House to the Eldest and her Heirs; and if both his Daughters died without Issue, then both the Houses to his Granddaughters and their Heirs; adjudged, that this last Clause, viz. If both his Daughters died without Issue, did not make cross Remainders to them in Tail by Implication; but that each of them had a Fee-simple conditionally,

conditionally, immediately, *viz.* the Eldest if she survived, her Sister dying before sixteen, and the Youngest if she out-lived that Age; that the Estate-Tail was not to vest in the Eldest, but upon a Contingency, *viz.* If the Youngest Daughter had died before sixteen, which Contingency never happened, because the Youngest Daughter out-lived that Age, and then this Case was no more than a Devise of a House to the youngest Daughter and *her Heirs*, and *if she die before sixteen, living the Eldest*, then to her and *her Heirs*, which is a Remainder in Fee limited, after a conditional Fee, and good by Way of executory Devise. *Dier* 330. *Clatche's Case*. See *Postea* p^r 10, and 18.

2 Roll.
Rep. 251.
S. C.

6. And so it was adjudged many Years afterwards, *viz.* The Father having three Sons, devised one House to his eldest Son and *his Heirs*; another House to the next Son and *his Heirs*, and another to the youngest Son and *his Heirs*; provided if all my Children die *without Issue of their Bodies*, then all my Houses shall be to *Margery and her Heirs*; the two eldest Sons died *without Issue*; adjudged, that *Margery* shall have their Houses immediately, because that Clause, *viz.* *If all my Children die without Issue of their Bodies*, did not make cross Remainders *in Tail* to them by Implication, so as to entitle them to the Houses of each other; because there was an express *Devise in Fee* given to each of them in the first Part of the Will, and the Devise to *Margery in Fee* was adjudged to be good, because though it was limited after a Fee to the Sons, yet it was not to arise to her, but upon the Contingency of their dying without Issue of their Bodies. 2 *Cro.* 655. *Gilbert versus Witty*. *Postea* Implication. (A) 10. S. C. See *Cro. Eliz.* 204. *Wellock versus Hammond*. See Tail by Devise. (C) 3. *Hanchett versus Thelwell*.

Moor
422. S. C.

7. But this Point was not yet settled, for between the two last Cases there was a contrary Judgment, *viz.* the Father devised his Lands to his Son and *his Heirs*, and if he die *within Age, and without Issue*, Remainder over; in this Case they rejected the Words, *if he die within Age*, because they would not allow any Remainder to depend on a Fee-simple, though it was to arise upon the Contingency of the Son's Dying *within Age*; and those Words being rejected, then it was no more than a *Devise to his Son and his Heirs, and if he die without Issue*, Remainder over, which is a plain Estate-tail in the Son; for the Word *Issue* shews what Heirs were intended, *viz.* Heirs of his Body issuing. *Cro. Eliz.* 225. *Saul versus Gerrard*. Tail in Wills. (B) 3. S. C.

Noy 51.
S. C.

8. Since the last mentioned Case, the Devise of a Fee-simple in Remainder, to arise after a Fee-simple limited to another upon a Contingency, hath been adjudged good by many solemn Resolutions; as for Instance, the Testator having two Sons, and one Daughter, devised several Legacies to his youngest Son, and to his Daughter, to be paid to them respectively by his eldest Son; and he devised his Lands to his said eldest Son and *his Heirs, upon Condition, that if he did not pay the Legacies* within such a Time, that then the Lands should remain to the said Legatees and *their Heirs*; now here was a plain Remainder in Fee limited to the youngest Son and Daughter, after a Fee limited to the eldest Son; but it being upon the Contingency of the eldest Son's failing in Payment of the Legacies, it was adjudged good, by Way of executory Devise to them. *Cro. Eliz.* 833. *Hainfworth versus Pretty*.

2 Roll.
Rep. 196,
216.
Bridg. 1.
Palm.
131.
2 Cro.
390.

9. But in the following Case, the Law was settled in this Point, *viz.* the Father devised his Lands to his youngest Son and *his Heirs, and if he died without Issue, living the eldest Son, then to him and his Heirs*; afterwards the youngest Son imagining that he had an Estate-tail, by these Words, *if he died without Issue*, suffered a common Recovery, and sold the Lands, and died without Issue, his eldest Brother being still living; and the Question was, whether he had a good Title or not, against the Purchaser; and adjudged for him, that he had a good Title, because the youngest Son had neither an Estate-tail, nor an absolute Fee-simple, but a conditional Fee; for the Devise to him and *his Heirs, and if he die without Issue*, is not absolute, and indefinite, but 'tis tied up to a Contingency of his dying whilst his eldest Brother was *living*; now he being *living* when the youngest Brother died, the Fee-simple determined by his Death without Issue, and immediately arised in the eldest Brother, who had the Remainder in Fee, depending upon the Possibility that he might be alive when his youngest Brother died without Issue, which Remainder did not depend upon any particular Limitation, but upon a collateral Determination of the Estate of the youngest Son dying without Issue whilst he was living; and because it was a Remainder not in Being when the Recovery was suffered, nor until the said Contingency did happen, therefore it could not be barred by that Recovery. *Godb.* 282. *Pell versus Brown*. See Release. (A) 7. *Postea* Recovery. (B) 4. S. C.

10. Devise to *T. P.* and *his Heirs*, and if he die *without Issue, living W. C.* or if he die before he is of the Age of *twenty-one Years*, Remainder over to another in Fee; adjudged, that this was a conditional Fee in *T. P.* immediately, and that the Words *if he die without Issue*, make an Estate-tail, if he had gone no farther; but 'tis *Dying without Issue, living W. C.* so that though it was an Estate-tail, it was not to vest in *T. P.* but upon that Contingency; so that there is plain Difference, where the Limitation is upon a *Dying without Issue generally*, and a *Dying without Issue in the Life-time of another*; for in the first Case there

there can be no *executory Devise* after an Estate-tail, because that would tend to a *Perpetuity*; for that Contingency is too remote, where a Man must expect a Fee upon another's Dying without *Issue generally*; but Dying without *Issue, living another*, may happen in a little Time, because it depends but upon *one Life*; and therefore a Devise of a Fee-simple to one, but to remain to another upon such a Contingency, is now held good, by Way of executory Devise, but not upon a Dying without *Issue generally*; as for Instance, the Father devised Lands to his eldest Son and *his Heirs*, and other Lands to his youngest Son and his Heirs, and that if either of them *died without Issue*, the Survivor should be *Heir* to the other; adjudged, this was an Estate-tail in them, because 'tis limited to them upon their Dying without *Issue generally*. 2 Cro. 695. *Chadock versus Cowley*. See *Antea pl. 5.* and *postea pl. 18.*

11. But I must leave it to the Reader to distinguish between the three following Cases, viz. the Father devised some Lands to *John* his eldest Son, and other Lands to his second, and third Sons severally, (but did not limit for what Estate) and if any of them died, (but did not say without Issue) * *the surviving shall be his Heir*, *John* the eldest Son had Issue and died; adjudged, that the Lands devised to him shall not vest in the other Sons surviving, by Way of executory Devise, because tho' he had an Estate for Life by Implication, yet that Estate was drowned by the Descent of the Fee to him, for he was the eldest Son and Heir of the Testator; so that he being seized of an absolute Fee by Descent, the Remainder in Fee, which was to vest in the younger Sons, upon the Contingency of his Dying without Issue, was destroyed; 'tis true, this was contrary to the Opinion of the Chief Justice *Flemming*, who held, that the Freehold for Life was not so absolutely drowned in the Inheritance descending upon *John* the eldest Son; but that it might revive upon his Death, and so his Part remain to his surviving Brothers, by Way of executory Devise, and so it was adjudged in the following Case. 2 Cro. 260. *Wood versus Ingersole*.

1 Bullf.
61. S.C.

* In
1 Bullf.
61. 'Tis
the one to
be the o-
ther's Heir
T. Jones
So.
Which
Words do
not import
any Cer-
tainity,
whether
one, or both

of his surviving Sons, should have the Share of him who died.

12. ff. The Father devised Lands to his eldest Son, and other Lands to his other Children respectively, (but did not limit for what Estate) and if either of my Children die, then his Part shall be equally divided amongst them; afterwards the eldest Son died, &c. and the Question was, whether his Part should go to his Heir, or to his surviving Brothers; it was insisted for his Heir at Law, that it should go to him; for though there was no express Estate devised to the eldest Son, nor to any of the Children, yet they had all an Estate for Life by Implication, which Estate being drowned in the Descent of the Fee-simple to him as his Heir at Law to the Testator, he then became seized of an absolute Estate in Fee, and so his Part shall descend to his Heir, and not remain to his surviving Brothers, because the Estate devised to them was not to arise, but upon the Contingency of their eldest Brother's Dying without Issue, which Estate was now destroyed by the Descent of a pure and absolute Estate in Fee-simple, in him; but adjudged, that the eldest Son had a Freehold for Life by Implication, which Freehold was not so absolutely drowned in the Descent of the Inheritance to him, but that it might revive upon his Death, and so his Part remain to be equally divided amongst the younger Children for their Lives, by Way of executory Devise. T. Jones 79. *Portefene versus Abbot*. Contra *Wood versus Ingersole*; but agreeable to the Opinion of *Flemming* in that Case.

2 Lev.
212.

13. The Father devised Lands to *Thomas* his eldest Son for Life, and if he die without Issue living at the Time of his Decease, then to *Leonard* and his Heirs, but if *Thomas* have Issue living at the Time of his Death, then to him and his Heirs; *Thomas* suffered a common Recovery, and died without Issue; it was then insisted on the Behalf of *Leonard*, that his eldest Brother had a Fee-simple descended on him, as Heir at Law to the Testator their Father, by which his Estate for Life was drowned; and if so, then though he had the whole Fee vested in him, yet it being limited to *Leonard*, upon his eldest Brother's Dying without Issue living at the Time of his Death, this must be an executory Devise to *Leonard*, and by Consequence his Estate in Remainder not barred by this Recovery; but adjudged, that *Thomas* the eldest Son had an express Estate for Life, by this Will; and though the Reversion in Fee descended on him as Heir at Law, yet that did not destroy the express Estate for Life, against the very Words and Intent of the Testator, but that the Estate for Life was destroyed by the Recovery, and a Fee was thereby immediately vested in him, so that all the Remainders were destroyed by this Recovery. Sid. 47. *Plunkett versus Holmes*.

1 Lev. 11.
S.C.
Raym.
29. S.C.

14. The Case last mentioned differs from that of *Pell* and *Brown*, *antea pl. 9.* only in this, viz. there the Devise was to the youngest Brother and his Heirs, which is an Estate in Fee; here the Devise was to the eldest for Life, but in both Cases the Devise of the Fee over to the other Brother, was upon the Contingency, that the first Devisee must be dead, without Issue living at the Time of his Death; and yet in the one Case it was adjudged, that the Estate over was not barred by a common Recovery, and in the other Case that it was. It differs likewise from the Case of *Wood* and *Ingersole*, *antea pl. 11.* for their

their the Devise was to the eldest Son, without limiting for what Estate; and so it was in *Fortescue* and *Abbot's Case*, *antea* pl. 12. in both which Cases, the Devise over to the younger Sons was upon the *Dying only* of the eldest, not saying *without Issue* generally, or without Issue, *living the youngest*, or *living any other Person* particularly named in the Will, and in both those Cases it was likewise held, that the eldest Son had an *Estate for Life by Implication*, and that each of them had a *Fee-simple by Descent*; and that in the one Case, the *Estate for Life was drowned by the Descent of the Inheritance*, and in the other Case, that it was *not so absolutely drowned*, but that it might revive again, upon the Death of the eldest; but in this Case of *Plunkett and Holmes*, the first Devise to the eldest Son was *expressly for Life*, and the Devise of the Fee over to the youngest, was upon this Contingency, that the eldest must die *without Issue living at the Time of his Decease*; 'tis true, it was held, that in this Case likewise the eldest Son had a *Fee-simple by Descent*, but that the express Estate for Life devised to him, was not destroyed by the Reversion in Fee descending upon him as Heir at Law, which is contrary to *Wood and Ingersole's Case*, but it agrees with *Fortescue* and *Abbot's Case* last mentioned.

15. But notwithstanding the Resolutions in the Cases before mentioned, it was not without Difficulty that the Law was settled in this Point, that a *Fee-simple* might arise to one, after the Determination of a conditional Fee limited to another; for in *Jay's Case*, there was a Devise to one and *his Heirs*, and if he die, *living his Mother*, then the Lands should remain to *T. P.* and *his Heirs*; the Court inclined this Remainder was void, because it was a Limitation of a Fee upon a Fee; so that in this Case, they did not allow the Distinction between an absolute, and a conditional Fee. *Stile* 258. *Jay* versus *Jay*.

Raym.
262. S.C.
1 Lev.
135.

16. However there being no Judgment given in this last Case, the succeeding Judges gave no Regard to it, for afterwards this Case happened, *viz.* the Testator devised Lands to the *Heirs of the Body of a Woman*, if they attain the *Age of fourteen Years*, &c. Remainder over; this was adjudged an executory Devise to her Child, to arise to him in Remainder upon a double Contingency, *viz.* If the Woman had no Issue, or if she had Issue, and they did not attain the Age of fourteen Years, it did not vest as a Remainder in Tail in the Woman, though in Truth she had an Estate for Life before; for it was not a Remainder joined to that Estate, and so to vest in her Life, but it was a new Devise, to take Effect after her Death. *Sid.* 153. *Snow* versus *Cutler*. *Postea* *Infant*. (K) 8. S. C.

17. The Testator devised the *Rents and Profits* of his Lands to one, to raise Portions for his *Daughters*, and afterwards to his Son *George*, and if it happen that *George and the Daughters die without Issue of their Bodies*, then to remain to *William Rose and his Heirs*; adjudged, that this was not a Devise of the Lands to *George* and the *Daughters* for their Lives by Implication, with the respective Inheritance to them in Tail; but by a very plain, and grammatical Construction of the Words, they import a Designation only of the Time, when the Lands shall come to *William Rose and his Heirs*, i. e. when *George* and the *Daughters* die without Issue, and not before; so that the Intention of the Testator collected out of the Words, is thus, *viz.* I leave my Lands to my Son *George* and his Heirs, so long as he and his Sisters, or any Heirs of their Bodies are living; or thus, until he, and his Sisters shall be all dead, and without Issue, and for want of such Heirs, I devise the same to *William Rose* and his Heirs. *Vaugh.* 159. *Gardner* versus *Sheldon*.

18. The Father devised his Lands to his Son and Heir, and if he die before *twenty-one*, and without Issue of his Body then living, Remainder over to another; afterwards he being above the Age of *twenty-one Years*, sold the Lands, and died; adjudged, that the Sale thereof was good, because he had a *Fee-simple* immediately, and the Estate-tail was never in Being; for it was to arise upon a Contingency, which, (as this Case is) could never happen, *viz.* It was to arise upon the Death of the Son, before he was *twenty-one Years* old, and without Issue; now he could never die before he was *twenty-one*, because he survived that Age. *Sid.* 148. *Collenfon* versus *Wright*. See *antea* pl. 5, and 10.

(B)

Of a Term for Years to one, after a Term limited to another, upon a Contingency.

1. NOT long after a *Fee-simple* was adjudged to arise to one, after a Contingent Fee limited to another, it became a Question, whether a Term for Years might be limited in the same Manner, and it was objected, that it could not, because it being no more than a Chattel, it was so poor and mean an Interest, that it could not be limited over in Remainder; for by the Rules of Law, the Devise of a Chattel for an Hour, is a Devise of it for ever.

Now in Answer to the Poverty and Meaness of a chatte^d Interest, 'tis certain, there is no material Difference between it and an Inheritance, in Respect to the Owner of the Lands himself, but only in Respect of the Duration of his Estate; for the Proprietor of a Lease for Years, hath as absolute a Power over it, as the Owner of an Inheritance hath over that Estate; and since great Part of the Lands in this Nation is held under Leases, it seems very absurd, for any one to affirm that such Lessees cannot provide for the Contingencies of their Families, because their Estates and Interests in such Lands, are accounted poor and mean in Law, being compared to those, who hold in Fee-simple absolutely:

2. 'Tis true, this Reason hath prevailed, for formerly, wherever there was a Devise of a *Term of Years to one*, and that if he die, *living another Person*, (particularly named in the Will) that it should *remain* to the other Person, *during the Residue of the Term*, such a Remainder was held void. *Dyer 74.*

3. But about the Beginning of the Reign of Queen *Eliz.* the Judges were of another Opinion for there being a Devise of a Term for Years to one, for so long Time as *he should live*, Remainder over to another; this was adjudged good, but because of the different Opinions, the Lord Chief Justice *Dyer*, who hath reported both these Cases, puts a *Quære* to the last. *Dyer 277. b.*

4. Not long afterwards the Father devised a Term for Years to his Son, (then an Infant) *when he should be of Age*, and he devised the *Occupation and Profits* of the Lands to his Wife in the mean Time, and made her sole Executrix, and died; the Widow proved the Will, and sold the Term, and afterwards the Son came of Age. *Dyer*, who likewise reports this Case, puts another *Quære* to it, *viz.* What Remedy had the Son? by which it seems doubtful, whether he had any Remedy; for though the Term was devised to him, yet it was upon this Contingency, that he should first be of Age, and the Devise over of the *Occupation and Profits* to the Wife, was then held to be a Devise of the Land it self, especially since she was made sole Executrix. *Dyer 328. b.*

5. But soon after the last Case, it was adjudged, that a *Remainder* of a Term to one, after it was limited to another *for Life*, was good, *viz.* the Testator being possessed of a Term for sixty Years, devised that his Wife should have all his Lands in Lease, for so many Years as she should live, and that after her Death, the *Residue thereof* should be to his Son, and *his Assignes*, and made her sole Executrix, and died; this Remainder was adjudged good upon this Distinction, *viz.* That there was *jus possessionis*, and *jus proprietatis* of a Term for Years, that it might be collected out of the Words of this Will, that the Testator did not intend the *absolute Property* of it to his Wife, but only the *Possession* for so many Years as she should live, though 'tis true, there was a Possibility she might survive the whole Term, but that 'tis plain he intended the Right and Property of the Residue of the Term to his Son; and this my Lord *Finch* tells us, in the Duke of *Norfolk's* Case, was the first Time that an *executory Remainder* of a Term for Years was adjudged good. *Dyer 358. b. 8 Eliz. Dyer 253. See 4 Leon. 192.*

6. Afterwards some Distinctions were made, where the Devise was of the *Occupation and Profits of the Land*, &c. in Lease, and where the Devise was of the *Lease, or Term it self*; as for Instance, The Husband being possessed of a Lease for Years, devised the *Occupation of the Lands* to his Wife, for so many Years as she should live, the *Residue to his Son*, and made her sole Executrix, and died; the Widow *sold the Lease*, and died; adjudged, this was not a Devise of the whole Term to the Wife, for she had it only conditionally, *if she lived so long as the Term continued*, and her Interest was to determine upon her Death, so that her Sale thereof was void against her Son, because the Remainder was to vest in him, upon the Contingency of her Dying before the Term expired; therefore the Devise to him shall be expounded to *precede* the Devise to her, that both may stand, and the rather, because there was no express *Estate for Life* devised to her; for if it had, then she would have a Title to the whole Term, because an *Estate for Life, is in Judgment of Law more valuable than an Estate for Years.* *Plow. Com. 519. Welkden versus Elkington. See postea pl. 22.*

7. Lessee for Years devised *all his Term* to his Son, and his Will was, that his Wife should have the *Occupation and Profits of the Lands*, during the Minority of his Son, &c. and he made her sole Executrix, and died; afterwards she proved the Will, then she sold the Term, and died; adjudged, that this Sale was void against her Son, because it shall be intended that the Devise to the Wife, shall *precede* the Devise to the Son, though it followed in Words, and then she will not have the whole Term, but only so much thereof for so long Time as she should live, before her Son came of Age; and that the Remainder was to vest in him, upon the Contingency of his living till he came of full Age. *Plow. Com. 53. Paramour versus Tardley. See postea pl. 22.*

8. The Husband being possessed of a Term for Years, devised the *Lease it self* to his Wife for *her Life*, and after her Death *to her Children unpreferred*; it was insisted for the Wife, that she had the whole Term, for this was not like either of the Cases last mentioned; it was not like the first, for that was a Devise of *the Lands* to the Wife, for so many Years as she should live; and it was not like the second, for that was a Devise of the *Profits of the Lands* unto the Wife, until her Son came of Age; but here the Devise is of *the Lease it self*, and the *Lands* are not mentioned throughout the Will; but adjudged,

that the Wife had only an Estate for so many Years of the Lease as she should live, and that so much as remained unexpired at her Death, was to vest in the Children upon the Contingency of their Living at that Time. 1 *And. 61. Amner versus Ladington.* 2 *Leon. 92. S. C.* 3 *Leon. 89. S. C. Gobd. 26. S. C.*

9. Devise of a Term of Years to his Wife, and to his Cousin for their Lives, and afterwards that the Term should be to such Persons as should remain in his House in Normington at the Time of his Decease; the Cousin died, and the Wife survived and sold the Term, Justice Crook tells us, that the Court was divided in Opinion, whether this Remainder of a Term for Years was well limited or not after an Estate for Life, because it was contingent whether any Part of it might remain after the Death of the Wife, for she might survive the whole Term, and therefore such a Contingency could not be limited in Remainder; but Serjeant Rolle, who reports the same Case, tells us, That though the Wife, and the Cousin had the whole Term by virtue of this Devise, and so nothing was left to support any Remainder by the Rules of the common Law, yet this Remainder of the Term was well limited by Way of executory Devise. 2 *Cro. 198. 1 Roll. Abr. 610. S. C. Moor 158. Foster versus Brown. S. P.*

10. Lessee for Years of a Farm devised, the Use and Occupation thereof to his Wife for Life, and after her Decease to his Son Matthew Manning, for the Residue of the Term, and made her sole Executrix, and died; 'tis true, one Judge was of Opinion, that the Residue of the Term thus devised to the Son was void, because his Mother had the whole by the Devise to her for Life, and there being only a Possibility that she might die before the Term expired, the Residue could not be devised over to another, to vest in him upon such a Possibility; but adjudged, that Matthew Manning the Son did not take this Term by Way of Remainder, but by Way of an executory Devise to him, viz. upon the Contingency of his Mother's Death within the Term; and that there was no Difference where the Devise is of the Lease it self, or of the Land, or Farm in Lease, or of the Use, Occupation, or Profits of the Land, for the Law will make such Construction of those Words, as may consist with the Intent of the Testator. 8 *Rep. 94. Matthew Manning's Case. 10 Lampett's Case. S. P.*

In 2 *Cro.* 'tis said this Point had been often controverted, and that if it was *res integra*, it would be hard to maintain it, but being often adjudged, the Court would not alter it. *Raym. 160.*

11. So where the Testator was possessed of a long Term for Years, and devised the same to his Wife for eighteen Years, then to his eldest Son for Life, and afterwards to the eldest Issue Male of such eldest Son for Life; the Son had no Issue, either at that Time, or at the Death of the Testator; adjudged, that if he had left any issue Male, such Issue should have the Residue of this Term, after the Expiration of the eighteen Years, and the Death of the eldest Son by Way of executory Devise; for though the Devise to such Issue depended upon a double Contingency, the one that he must be living when the eighteen Years were expired, the other that he must be likewise living at the Death of the eldest Son; yet because those were Contingencies which might happen in the Course of a few Years, and in the Course of one Life then in Being, therefore the Remainder limited to such Issue Male is good. 1 *Roll. Abr. 612. Cotton versus Heath. See postea pl. 14. Child versus Bailie, contra.*

12. But though in *Matthew Munnings* it was held, that there was no Difference between the Devise of the Lease it self, and the Lands in Lease; yet *Anno 9 Jac.* it was otherwise adjudged, for the Testator devised a Term for Years to his Wife for Life, and afterwards that John should have the Occupation of it as long as he had any Issue, and if he died without Issue unmarried, then Jasper should have the Occupation of it, as long as he had any Issue of his Body, and if he died without Issue unmarried, Remainder over, &c. they both died without Issue and unmarried; adjudged, that this Devise of the Remainder of the Term over was good, because it was of the Occupation of the Term, and not of the Term it self. 2 *Bull. 28. Rhetorick versus Chappell. 1 Roll. Rep. 356. S. C.*

13. The Testator being possessed of an House for a long Term of Years, devised the House to his Father for Life, Remainder to his Sister, and the Heirs of her Body, and made his Father Executor, and died; the Father entered, and the Sister released unto him all her Right, &c. it was insisted that this Release was void, because the Sister had neither any Right in Possession, or Reversion; 'tis plain she had no present Right, because it was limited to the Father for Life, and she could have none in Reversion, because in Judgment of Law, that Estate for Life is more valuable than any Estate for Years, and by Consequence, by the Devise of the House to him for Life, he had the whole Term vested in him; but upon the most favourable Construction of the Words, she could have a Title to it only for so many Years, which might happen to be in Being after the Death of the Father, which being only a bare Contingency, cannot be released; but adjudged, that a Right, which was to vest not only upon a necessary, but a common Contingency, and in so short a Time, as after one Life might be released, now in this Case, the Right of the Sister was to arise upon a necessary Contingency, because 'tis certain that the Father must die, and as it is certain, so it is common for Men to die; therefore in Point of Law, the

Sister

Sister had an immediate and present Right to such a contingent Estate, though it was not to take Effect in Possession till the Contingency happened: for it cannot be denied, but contingent Titlee are good Titles in Law. 10 Rep. 46. *Lampett's Case*, *postea* Release. (A) 1. S. C.

14. But this next Case is contrary to many of the former, and almost to all the latter Resolutions, viz. The Testator being possessed of a Term for seventy-six Years, devised it to his Wife for Life, and after her Decease to *William and his Assigns*, for all the rest of the Term, provided if *William die without Issue then living*, that *Thomas Heath* should have it; the Testator died, and afterwards *William* died without Issue, and *Thomas Heath* survived; adjudged, that this Devise of the Remainder of the Term to him was void, because the whole Term was vested in *William* the first Devisee, for it was devised to him and *his Assigns*, which Word gave him a Power over the whole: Besides, this Remainder of the Term to *Thomas Heath*, depended upon two Contingencies, or Possibilities; for the Term was not to vest in *William*, till after the Death of the Wife of the Testator, she having an express Estate for Life by the Will; and it was possible that she might have survived the whole Term, and it was not to vest in *Thomas Heath*, till after the Death of *William* without Issue then living; which is so remote a Possibility, that the Law will not allow it should be expected, because an Estate-tail may continue for ever; for which Reason a Reversion in Fee, expectant upon an Estate-tail, is of so little Value, that it is not Assets in the Hands of the Heir at Law, and much less a Reversion, or Remainder of a Term for Years, which is no more than a Chattel after an Estate-tail; so that here being one Contingency limited upon another, and the last so very remote; this Remainder to *Thomas Heath* must be void for that Reason; 'tis true, if the Devise had been to *William* for Life, and if he die without Issue living *Thomas*, Remainder to the said *Thomas*, this Remainder even of a Term for Years had been good, because the Words, *if he die without Issue*, do not make an absolute Estate-tail, for they are tied up to a Contingency of his dying, &c. in the Life-time of *Thomas*, which might possibly be, and within the Term; and a Possibility which is so near as the Death of one Man, may reasonably be expected; but where the Devise is of a Term for Years to one, and the Heirs of his Body, and if he die without Issue generally, without saying living another Remainder over, this Remainder is void, because the first Limitation to the Heirs of the Body, is a Disposition of the whole Term, for in Probability it may be for ever; and 'tis the same Thing as where the Limitation is (as in this Case) to a Man and his Assigns, and if he die without Issue then living, Remainder over; for this is to entail a Term for Years, which Entail may endure for ever, and in the same Manner as this Remainder is limited to *Thomas Heath*, it may be limited over in Remainder to twenty more, none of which can be barred by a common Recovery, because they are not vested immediately in Possession, but are to arise upon Contingencies, and this would tend to a Perpetuity which the Law will not endure. 2 Cro. 459. * *Child* versus *Bailie*, where the Case of † *Johnson* and *Lewknor* is mentioned. See *antea* pl. 11. *Cotton* versus *Heath* contra. See *postea* pl. 16.

2 Roll. Rep. 129. Palm. 48, 535. W. Jones 15. S. C. *This Case denied to be Law in Lambard Archer's Case.* 1 Salk. 222. See *Estate for Life.* (A) 3.

* *This Case denied to be Law, in* 356. S. C.

1 Salk. 225.

† 1 Roll. Rep.

15. In the following Case there was a contrary Resolution to the last Case, viz. The Testator being possessed of a long Term for Years, devised the Trust thereof to his Father for 60 Years if he lived so long; the like Devise to the Mother, and after the Death of the Survivor of them, then to *John* their eldest Son, and his Executors, if he survived his Father and Mother; and if he died in their Life-time leaving Issue, then to such Issue; but if without issue, then to *Edward*, and the Heirs of his Body, Remainder over to another in Tail; *John* died intestate and without Issue, in the Life-time both of his Father and Mother; and *Edward* likewise died intestate, and without Issue, afterwards his Wife administered to him, and *Nicholas* administered to *John*, and which of these Administrators had the better Title, was the Question in Chancery; it was decreed against the Administrator of *John*, because the Remainder to him depended upon the Contingency of his surviving his Father and Mother, but he dying in their Life-time, that Contingency never happened, and so nothing was vested in him, and by Consequence his Administratrix could have no Right; but that the Remainder over to *Edward* was good, for though it depended on a double Contingency, of his surviving both his Father and Mother, yet since that might happen in the Course of two Lives then in Being, and both wearing together, these were such short Contingencies, that they might be very well expected; and it afterwards happening that *Edward* survived both his Father and Mother, this Remainder vested in him, and therefore his Administrator had a good Title: My Lord Chancellor *Finch*, who made this Decree, tells us, that he had seen the Record of *Child* and *Baily's* Case, by which it appeared, that after the Limitation of the Remainder to *Thomas Heath*, upon the Death of *William* without Issue then living, the Testator had farther devised the Remainder to a Daughter, upon the Death of *Thomas* without Issue then living, which is a very plain Affirmation of a Perpetuity; besides the Will was made Anno 10 Eliz. and the Wife to whom the Term was devised for her Life, enjoyed it fourteen Years, and then she assigned her

Interest to *William*, who was the next in Remainder, and he enjoyed it seven Years; and then he re-assigned it to the *Wife*, who enjoyed it fifteen Years longer, then she died, and her Assigns held it fourteen Years after her Death; by which it appeared that *Thomas*, or any Claiming under him, had not made any Demand in the Space of fifty Years, and the Term being renewed within that Time, upon a valuable Fine paid to him who had the Inheritance; and there having been several Alienations made of it for other valuable Considerations, 'tis probable that for some, or all of these Reasons, the Court inclined against the Title of *Thomas*, who had suffered so many Alienations without making an Claim. *Wood versus Sanders. 1 Ch. Rep.*

16. The Testator being possessed of a long Lease, devised that his Brother *Christopher* should have the Use and Occupation of it for Life, &c. afterwards to the eldest Son of *Christopher* for Life; and after such Son dying without Heir Male of his Body, then to *Simon* for Life, afterwards to his eldest Son for Life, and after such Son dying without Heir Male of his Body, Remainder over, &c. and he made *Christopher* and *Simon* his Executors, and died; afterwards *Christopher* died without Heir Male, and *Simon* survived, who had Issue *Edward* and *John*, and he devised all his Goods and Chattels to *Edward*, and made him sole Executor, and died; afterwards *Edward* made *Francis* his Executor, and died without Issue Male; and it was held, that he had a good Title to the Residue of this Term, against the Title of *John*, the youngest Son of *Simon*, because neither he, or *Simon* his Father, could have any Title till after the Death of *Christopher*, and his Son dying without Issue Male of his Body, which by Intendment of Law, is a Limitation of a Perpetuity; neither could he have any Title till after the Death of *Edward* his elder Brother, dying without Heir Male of his Body, which is another Limitation of a Perpetuity; and 'tis plainly against the Law, to limit a Term for Years in Remainder, which was not to vest till after a double Contingency, and both so very remote, as after the Death of the eldest Sons of *Christopher* and *Simon*, both dying without Heirs Males of their respective Bodies; for even to limit a Term after one Man dying without Issue, is against Law; 'tis true, this Case was not solemnly adjudged, but Serjeant *Rolls*, who was of Counsel for the Defendant, who was the Executor of *Edward* the elder Brother, tells us, that there was a Rule for Judgment for his Client, but that at the Importunity of the Plaintiff's Counsel, there was another Day appointed to argue this Case in the following Term, but before that Time the Parties agreed, and so there is no Judgment entered; and this may be the Reason, why the Lord Chancellor *Finch* tells us, that *Child* and *Bailie* stood single, and there was the like Judgment as in that Case. *Cro. Car. 230. Sanders versus Cornith. 1 Roll. Abr. 612. S. C. See antea pl. 14.*

W. Jones
15. cited.

17. So where the Testator being possessed of a long Term for Years, devised it to his Executor for seven Years, part of the said Term, and afterwards to *Thomas*, and the Heirs Males of his Body, and if he dies without Heirs Males, Remainder over, &c. adjudged, that the Limitation of this Term in Remainder over was void, because it was not to vest in the Remainder Man, till after the Death of *Thomas* without Heirs Males, which is too remote an Expectation, and therefore *Thomas* is entituled to the Residue of the Term, and by Consequence may dispose it to whom he pleases; and if he die making any Disposition, it shall go to his Executor, or Administrator; for those subsequent Words, *If he die without Heirs Males*, do not make an Estate-tail of a Term for Years, because the first Limitation was to him, and the Heirs Males of his Body, though the first Limitation in most of the Cases before mentioned was for Life. *1 Roll. Abr. 611. Leventhorp versus Ashby.*

18. So a Devise of a Term to *H.* for ninety Years, if he lived so long, Remainder to the Heirs Males of his Body, Remainder to *G.* the Brother of *H.* for ninety Years, if he lived so long, Remainder to the Heirs Males of his Body, Remainder over, &c. adjudged, that these Remainders were all void, and that the whole Term was vested in *H.* the first Devisee, because in this Case, the Word *Heirs* was a Word of Limitation, and not of Purchase; for it was of a Term of Years which doth not descend to the Heirs. *Sid. 37. Grigg versus Hopkins.*

Sid. 459.

19. So where the Testator devised a Term for Years to his Wife for Life, and after her Decease to *Nicholas* for Life, and if he die without Issue of his Body, Remainder to *Barnaby*, &c. now her being an express Estate devised to *Nicholas* for Life, it was insisted that the Remainder over to *Barnaby* was good, by Way of executory Devise, and that it should vest in him upon the Contingency of the Death of *Nicholas* without Issue of his Body at the Time of his Death; but adjudged, that this Remainder to *Barnaby* was void, because the Limitation to *Nicholas* was in Effect, as if it had been to him and the Heirs of his Body at any Time, Remainder over, which had been utterly void, because the Law will not presume, that any Term for Years can subsist so long as a Man may have Heirs of his Body, which possibly may be for ever. *1 Mod. 50. Love versus Windham.* 'Tis reported likewise, *1 Vent. 79. 1 Lev. 290.* But they leave out the Word *Body*.

20. So where the Testator was possessed of a long Term for Years, which he devised to his Wife for Life, Remainder to certain Trustees for his Son for Life, Remainder in Trust

Trust for the *Heirs of the Body of the Son*, Remainder to the *Right Heirs of the Son*, and made his Wife *sole Executrix*, and died; adjudged, that the Wife shall have the whole Term as Executrix, and the Remainders were all void. 1 *Lev. 25. Garret versus Lister.*

21. The Father devised a Term for Years to his Son *John*, and if he died unmarried and *without Issue*, then to his Daughters, &c. and that if *John* be married and have *no Issue*, then after the Death of the Wife of the Testator, to his Daughters, &c. afterwards *John* died *without Issue*; adjudged, that this Remainder of the Term to the Daughters was void, because it was not to vest in them till after the Death of their Brother *John* *without Issue*; 'tis true, such a Remainder hath prevailed in the Case of an *Inheritance*, for so is the Case of *Pell versus Brown*, but never yet in the Case of a Term for Years. 3 *Lev. 22. Gibbons versus Somers. See Remainder. (A) 7.*

22. The Husband devised a *Lease for Years* to his Wife *for Life*, and after her Decease to her Children *unpreferred*; those who argued for the Title of the Wife to the *whole Term*, distinguished this Case from that of *Welken* and *Elkington*, where the Devise was, that the Wife should have the *Land it self in Lease*, for so many Years as she should live, and from the Case of *Paramour* and *Tardley*, where the Devise was, that the Wife should have the *Profits of the Land* till her Son came of Age; but in this Case the *Lands* are not mentioned, but only the *Lease* was devised; yet it was adjudged, that the Wife had only an Estate for so many Years as she should live; 'tis true, she might have survived the Term, but it being contingent whether she lived so long or not, therefore so much of the Lease as was unexpired at her Death, shall remain to her Children *unpreferred* upon that Contingency. 1 *And. 61. Amner versus Lodington. Cro. Eliz. S. C. antea Description. (C) 4. S. C. See antea pl. 6, 7.*

23. 'Tis true, there was a contrary Resolution formerly, as where the Devise was of a Term for Years to his Wife *for Life*, and after her Death to *John*, and the *Heirs of his Body*, the Wife entered and enjoyed the Lands, and afterwards *John* died in her Life-time; it was adjudged, that his Executor had no Title to the Residue of this Term, after the Death of the Wife, because *John* himself had only a *contingent Interest* in so much thereof, as might happen to remain at her Death; for possibly she might have survived the whole Term, and he dying before that Contingency happened, his Executor can have no Title, because he had none himself. *Moor 831. Price versus Almory. See postea pl. 26.*

24. But soon afterwards it was adjudged, as before in the Case of *Amner* and *Lodington*, viz. The Husband being possessed of a Term for Years, devised it to his Wife *for Life*, Remainder to *Thomas* and *Lucy*, if they have no Issue Male, and if they have any Issue Male, then to be reserved for their Benefit; they afterwards had Issue Male, then *Thomas* died; adjudged, that the Remainder of this Term was well limited to the *Issue Male*; for by the Devise of it to the Wife *for Life*, she had not the whole Term vested in her, but only if she lived so long, and the Possibility of so much thereof as might remain at her Death, was well limited to *Thomas* and *Lucy*; and likewise another Possibility after that, viz. to their *Issue Male*, if they should have any. *Moor 846. Blandford versus Blandford. Postea Implication. 5. S. C.*

25. And in the very next Year after the Judgment in the Case last mentioned, that Case of *Price* and *Almory* was denied to be Law, viz. the Testator being possessed of a long Term for Years, devised the Benefit thereof to his Wife *for six Years*, the Residue to *John* if he comes home, but if he did not come within six Years, then *William* should have it till *John* came home; the Testator died, then *William* devised the Term to *Hester*, and made her sole Executrix, and died within the six Years; adjudged, that there being an express Devise to the Wife for six Years certain, the Residue to *William* was not contingent, but an *Interest* after the six Years expired; but if it should be admitted to be a contingent Interest in him, yet 'tis such a Contingency, that the Term might have vested in him, if he had lived after the Expiration of the six Years, and if so, it shall go to his Executrix; 'tis thus reported by Justice *Croke*, and by Serjeant *Rolle*, in the first Part of his Abridgment; 'tis true, in the second Part he reports it otherwise, for there he tells us, that it was a mere Contingency in *William*, and he could not have the Term, unless he had out-lived the six Years, and *John* had not come home within that Time; for nothing could be vested in him 'till then, and by Consequence nothing in his Executrix. 2 *Cro. 509. Sheriff versus Wrotham. 1 Roll. Abr. 916. S. C. 2 Roll. Abr. 48. S. C. See 3 Leon. 195.*

26. The Testator being possessed of a Term for two Thousand Years, devised it to his Wife *for Life*, Remainder to *W. R.* in Tail, and made his Wife Executrix, and died; he in Remainder granted the Lands to *B. B.* for the Term of one Thousand five Hundred Years; the Widow Executrix married the Defendant and assented to the Legacy; the Question was, whether he in Remainder could dispose this Estate, during the Life of the Tenant for Life; and adjudged he could not, because it was but a Possibility. *Sid. 188. Cookes versus Bellamy. See Price versus Almory.*

27. In a special Verdict in Ejectment, the Case was, the Testator had a Sister formerly married to one *Smith*, by whom she had Issue *Augustin Smith*, (the Lessor of the Plaintiff) and by a second Husband she had Issue *Benjamin*, and *Mary Wharton* the now Defendant; the Testator devised his Lands to his Sister, until her Son *Benjamin* should be twenty-one Years of Age, and afterwards to *Benjamin* and his Heirs, and if he die before twenty-one, then to the Heirs of the Body of *Robert Wharton*, and to their Heirs for ever. The Testator died, and *Benjamin* died before twenty-one, his Father *Robert* being living, then *Robert* died; and the Question was, whether *Augustin Smith*, as Heir to the Sister, who was Heir to the Testator, shall have the Lands, or *Mary Wharton*, as Heir to her Brother *Benjamin*, or as Heir of the Body of *Robert Wharton*; it was insisted, that *Augustin Smith* should have the Lands, because no Estate in Fee vested in *Benjamin*, he dying before twenty-one, and by Consequence the Fee-simple shall descend to the Heir of the Testator, *sed per Cur'*, a Fee did vest in *Benjamin* presently, and he dying without Issue, *Mary* his Sister is his Heir at Law, and the Fee shall descend to her; but if not as Heir at Law, yet she may take by Way of executory Devise, as Heir of the Body of her Father; 'tis true, this she could not do whilst he was living, because *nemo est hæres viventis*, but she may after his Death, as Heir of his Body; and the Sister of the Testator who was the general Heir, had only an Estate for Years, till *Benjamin* should or might be of Age. 2 *Mod.* 290. *Taylor* versus *Biddall*. See *Boraston's Case*.

28. In a special Verdict in Ejectment, the Case was, *Robert Edge* being seized in Fee, devised to Trustees for *eleven Years*, then to the first Son of *W. R.* and the Heirs Males of his Body, so to the second, and third Son in Tail, *provided they take on them his Surname*, which if they refuse, or die without Issue, then he devised his Lands to the first Son of *T. S.* in Tail, with the like Proviso; and if they refuse, &c. then to the Right Heirs of the Testator; *W. R.* had no Son at the Time of the Devise, and died without Issue; *T. S.* had a Son at the Time of the Devise, who took upon him the Surname of the Testator; adjudged, that the Devise to the first Son of *W. R.* was not a contingent Remainder, but an executory Devise, because the Precedent Estate was for Years, which cannot support a Remainder; neither can it be limited after a Fee, because after such a Disposition, nothing remains to dispose; then admitting it to be an executory Devise, 'tis void, for all such Devises are either present, or future; if present, the Party must be in Being, and capable to take at the Time of the Devise, which was not this Case, because *W. R.* had no Son living at that Time, so that this is a present Devise, and not like the Case of an Infant *in ventre sa mere*, because there the Testator takes Notice that the Devisee is in his Mother's Womb, and therefore he must intend a future Devise to him, or her, and being a present Devise, and no Body capable to take it, must therefore be void; but admitting it to be a future executory Devise, 'tis likewise void, because it must arise within the Compass of one Life: there are three Sorts of executory Estates, one is where the Testator Parts with the whole Fee-simple, but qualifies it upon some Contingency, and limits another Fee upon that Contingency, which is altogether new in Law; as in *Pell* and *Brown's Case*; the second is, where the Testator devises a future Estate to arise upon a Contingency, but retains the Fee-simple at present; a third Sort is of a Term for Years, which is well settled in *Matthew Manning's Case*, and the Boundary of these executory Devises, is not extended beyond one Life, or Lives. 1 *Salk.* 229. *Scatterwood* versus *Edge*.

Exposition of Words.

Of Exposition of Words. (A)

| Of Exposition of Sentences, and Statutes. (C)

(A)

Of Exposition of Words.

1. **T**HE King made a Lease of the Site of an Abby in these Words, *Necnon omnes Terras, prata & pasturas infra script' cum pertinent'*, viz. such a Close, and so named several Closes; adjudged, that the *Viz.* shall relate only to the Closes, and not to *omnes Terras*, belonging to the Abby; for by the *Viz.* nothing shall pass but the particular Closes named after it. 6 *Ed.* 6. *Dyer* 77.

2. Demise and Grant of a Farm, and all Timber-Trees, *excepting all great Oakes* growing in a certain Close, *habendum* for twenty-one Years rendring Rent; the Chief Justice Dyer held, that by the Force of the Word *Grant*, the Lessee might fell all the Timber Trees not excepted; but the other three Judges were against him, because by that Word they were not severed from the Inheritance. *Hill. 23. Eliz. Dyer 374. 11 Rep. 43. Lifford's Case. S. P.*

3. The Word *Grant*, where 'tis placed amongst other Words of Demise, or give, &c. shall not enure to pass a Property, or Interest in the Thing demised, but the Grantee shall have it only by Way of Demise. *35. H. 8. Dyer 56.*

4. Three Jointenants in Fee, and by Indenture tripartite they covenanted and granted to three others *utrique eorum*, to make an Assurance; it was adjudged, that the Word *utrique* is the same as *cuilibet*. *Dyer 327. and 'tis the same as alter. 16 Eliz. Dyer 338. Cook's Case.*

5. Three were indicted upon the Statute, *23 Eliz. of Recusancy*, for not coming to Church, and the Words were thus, *illi nec eorum uterque* came to any Parish Church; it was objected, that the Word *uterque* refers only to one, and for that Reason the Indictment must be uncertain, the Grammarians were of that Opinion, but the Court adjudged otherwise; viz. that *uterque* signified the same as *cuilibet*. *1 Leon. 244. Sheldon's Case. See Cro. Eliz. 443.*

6. Debt upon a Bond for Performance of an Award, so as it may be made and delivered *utrique partium*, &c. the Defendant pleaded the Award was delivered to one only; adjudged, that the Word *utrique* shall be taken *collective* in this Case, because all the Parties are within the Danger of the Bond, and therefore 'tis Reason that the Award should be delivered to all; but sometimes the Word *uterque* is taken *discretive*, according to the subject Matter. *5 Rep. 103. Hungate's Case.*

Cro. Eliz.
885. S. C.
Moor
642. S. C.

7. The Lessor demised one Acre to *A.* another Acre to *B.* and another Acre to *C.* and covenanted with them *ut quolibet eorum*, that he is Owner of the Land; adjudged, that the Covenant is *several*, but if he had leased the three Acres to them *jointly*, then the Words *cum quolibet eorum* had been void, because a Thing cannot be made first, joint, and afterwards several; likewise adjudged, that an *Interest* cannot be granted jointly and *severally*, as if a Man make a Lease for Years to two jointly and *severally*, the Word *severally* is void, but a Power or Authority may be made to two jointly and *severally*. *5 Rep. 19. Slingsby's Case.*

8. The Master and Owners of a Ship made an Indenture on the one Part, and several Merchants on the other Part, in which the Merchants covenanted *separatim*, that one should pay three Pounds, another five Pounds, &c. and for the Performance thereof *quilibet mercator* obliged himself, &c. adjudged, that the Word *separatim* made the Covenants several. *5 Rep. 23. Matthewson's Case.*

9. There was a Lease of an House by the Words *Demise and Grant*, which Words imply a Covenant in Law, for quiet Enjoyment; and there was an *express Covenant*, that the Lessee should quietly enjoy without Eviction by the Lessor, or any claiming under him, and a Bond for Performance of Covenants, &c. the Lessee assigned his Term, and a Stranger entered on the Assignee, and recovered; and the Lessee brought an Action of Debt on the Bond against the Lessor, who pleaded Performance of all Covenants, &c. but that must be intended of all *express Covenants in the Lease*, and not of the *Covenant in Law*, for that implied quiet Enjoyment against all Men; but here the *express Covenant*, being made by the mutual Assent of the Parties, did qualify the Generality of the *Covenant in Law*, and restrained it, so as not to extend any farther than the *express Covenant*, but it is not so in the Case of an *express Warranty*, and a *Warranty in Law*; as for Instance, if a Man make a Feoffment by the Word *Dedi*, that Word implies a *Warranty in Law*, and if there is likewise an *express Warranty* in the Deed, the Feoffee may make Use of either at his Election, but if he assign his Estate, the Assignee shall not vouch, &c. *4 Rep. 80. Nokes's Case. 5 Rep. 16. in Spencer's Case. 9 Eliz. Dyer 257. S. P.*

Cro. Eliz.
885. S. C.
Moor
642. S. C.

10. My Lord Hobart hath left us a learned Exposition upon the Word *Scilicet*, he tells us, that 'tis not a direct and separate Clause, nor a direct and entire Clause, but *inter media*; neither is it a substantive Clause of it self, for one cannot begin a Sentence with it, 'tis rather *clausula ancillaris*, a Kind of Handmaid to usher in a Sentence of another, and to particularize that which was too general before, or to distribute that which was in gross, or to explain what was doubtful and obscure, and it must either increase, or diminish, for it gives nothing of it self; as for Instance, *B. G. having White, Black, and Green Acre in Reading, granted all his Lands in Reading, viz. White Acre, and Black Acre, in this Case Green Acre passes likewise, and yet a Viz. will make a Restriction, where the precedent Words are not very express, but so indifferent that they may be restrained,*

restrained, though they might be taken in a larger Sense, if the *Viz.* had not been; as where one granted ten Pounds Rent out of his Manor of *R. viz.* for the Grantee to receive forty Shillings of one Tenant, thirty Shillings of another, and so until he receive the ten Pounds; adjudged, that the *Viz.* made these several Grants of several Rents, which would have been an entire Grant of one Rent of ten Pounds out of the Manor, if it had not been for the *Viz.* but if the particular Rents granted, and to be paid by the several Tenants had not amounted to ten Pounds, then the *Viz.* should be rejected as void, and the Grant preceding it should take Place, so that the Grantee should have ten Pounds Rent issuing out of the Demesnes of the whole Manor. *Hob. 168, 174. Stukely versus Boteler. Moor 880. S. C.*

11. The Word *Scilicet* in a Declaration shall not make any Alteration of that which went before, as in *Trover* the Plaintiff declared that he was possessed of the Goods, *1 Jan. 15 Jac.* and that he *postea scilicet, 1 May,* in the Year *aforsaid* lost them, now 'tis impossible that those two Words should stand together and be true, for though he might lose them after the first Day of January, *Anno 15 Jac.* yet it could not be on the first Day of May in that Year; and therefore the *Postea* shall stand, and the *Viz.* which ushers in that Clause shall be rejected. *Poph. 201, 204. Desmond versus Johnson,* vouched in *Dickar versus Morland's Case. Latob. 205. Palm. 508. S. C. 2 Cro. 96. Adams versus Goose. S. P. See Ejecment. (C) 6. Hardres 3. Jones versus Williams. S. P.*

12. Three Plaintiffs joined in an Action and had Judgment, the Defendant brought a Writ of Error, and assigned for Error, that one of them was dead *tempore judicii reddit;* the other two said that their Companion was alive *tempore judicii reddit;* viz. *Nov. 24;* adjudged, that the *Viz.* was void, and that the Issue should stand, whether he be alive at the Time of the Judgment given. *Baskerville versus Henshaw. 2 Bulst. 26.*

13. A Prior being seized of several Houses, with the Assent of his Convent made a Lease of them for Years, rendring the yearly Rent for the whole *5 l. 10 s. 11 d. viz.* for one House *3 l. 11 d.* for another House *1 l.* and for the other Houses several Rents, amounting to the Residue of the said Sum, upon Condition that if the said Sum of *5 l. 10 s. 11 d.* should be Arrear in Part, or in all, &c. that then the Prior and his Successors might re-enter; afterwards the Priory came to the King by Surrender, who by Letters Patents granted one of the Houses to *W. R.* for Years, the Reversion to another in Fee, and it was found by Inquisition, that Parcel of the said Rent of *5 l. 10 s. 11 d.* was Arrear; adjudged this was one intire Lease, one intire Rent, and one intire Reservation, and that the *Viz.* made no Severance. *5 Rep. 55. Knight's Case.*

14. Two were bound in a Bond *vel uterque eorum,* the Action was brought against one, it was objected, that tho' the Bond was executed by both, yet by the subsequent Words in the Disjunctive, one of them was to be discharged, but it not appearing which of them it should be, therefore the Bond must be void; but adjudged, that the Obligee might sue either of them, and the Words *vel* and *&* are all one. *2 Cro. 322. Hawkinson versus Sandilands.*

15. And yet in some Cases the *Scilicet*, which introduces a Subsequent, shall not be rejected, as in *Trespas* for beating his Servant, the Action was brought in *Hilary-Term, 18 Jac.* and the Battery was supposed to be *20 Martii, 17 Jac.* and the Loss of the Service was alledged to be *per magnum tempus, viz. a præd' 20 Martii, 17 Jac. usque 1 Martii* following, which must be to the first of *March, 18 Jac.* and that was after the Action brought, for the Action was commenced in *Hilary-Term* before; and therefore Damages being given for what appeared to be done after the Declaration, it was held ill, and that the *Scilicet* was material for what came after it. *2 Cro. 618. Haubury versus Ireland.*

16. The Obligor was bound, that if *B. G.* an Apprentice should waste, or consume any of his Master's Goods, and that being duly proved by the Confession of the Apprentice, or otherwise, that he would make Satisfaction; the Defendant pleaded that no Proof was made, the Plaintiff replied that *3000 l.* came to the Hands of the Apprentice, and that he had wasted *430 l.* which he confessed by a Writing under his Hand, the Plaintiff had Judgment, which was affirmed on a Writ of Error in the Exchequer-Chamber; for though the Word *Proof*, when 'tis put generally, must be understood such Proof as is legal, and that is by *Jury*, yet when the Party himself expresseth another Form of Proof, as in this Case he doth, viz. by the Confession of the Apprentice, that shall prevail against what is commonly understood to be Proof by Construction of Law. *Hob. 92. Gold versus Death.*

17. There are several Words which are equivocal; as for Instance, the Word *Puer* may signify, either Male or Female, and yet if 'tis not explained by some other Words, which of them is intended, it shall signify a Son. *Hob. 32. in Couden versus Clerke.*

18. *Covenant, &c.* against the Defendant, for ploughing Lands which were not *lately* laid down to Pasture; the Question was, what Time shall be comprehended by the Word *lately*? adjudged, that twenty Years may be said to be *nuper*, but the Plaintiff ought to have shewed a certain Breach, (*viz.* that the Defendant had ploughed up Lands, and shewed what Lands, which were not *lately* arable. 2 *Bulst.* 258. *Genner versus Larking.*

19. In an Action of Assault and Beating his Servant, by Reason whereof he lost his Service, and declared, that the Battery was done 19th Jan. Anno 16 Jac. and that he lost his Service, (*viz.*) for the Space of six Months *then next following*; it was objected against this Declaration, that the Original did bear Date *before the End of the six Months*, and therefore the Writ was to be abated; but adjudged, that it should not, for that the (*Viz.*) was superfluous. *Trin.* 17 Jac. *Hob.* 284. *Hunt versus Lawring.* See *Postea* pl. 27.

20. *Quare Impedit*, in which the Plaintiff declared, that he was seised of a Manor to which there was an Advowson appendant, (*viz.*) to present every first Turn; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the (*viz.*) was void, and made the Declaration ill, because it crossed what immediately went before; but adjudged good. *Moor* 867. *Windham versus Kemp.* 5 *Rep.* *Winfor's Case.* S. P. 10 *Rep.* *Smith's Case.* S. P. *Dyer* 229. S. P.

21. A Lease was made for *octoginta & terdecem Annos*; it was insisted, that *terdecem* in this Case shall be taken for *thirty*, that being the strongest Construction against the Lessor; but adjudged it shall be taken according to the Common Intendment and way of Speaking, (*viz.*) for 13 Years, especially, it being written in one entire Word; for in such Case *terdecem* and *tresdecem* are both as one. *Cro. Car.* 281. *Hopewell versus Searle.*

22. The Defendant was bound to accept a Lease upon Request to him made by the Plaintiff for that Purpose, and in Pleading he alledged, that he caused a Lease to be drawn and engrossed, and a Label to be affixed to it, *cum fera Labello annexa*; after Judgment for the Plaintiff, a Writ of Error was brought, and it was assigned for Error, that *fera* was not a Latin Word for *Wax*, but that it signified a *Lock*; but adjudged, that it should be intended for *Wax secundum subjectam materiam.* *Cro. Car.* 405. *Lea versus Russell.*

23. A Lease was made of a Messuage, &c. and *Sheep-Walk*, and the Plaintiff declared upon a Demise *de uno Messuagio, &c. & Ovile*, which is not Latin for a *Sheep-Walk*, but *Sheep-Fold*, and by the Opinion of *Doderidge*, the Declaration was ill, because by a *Sheep-Walk* the Land passes, but not by a *Sheep-Fold.* *Godb.* 273. *Hurlstone versus Woodroffe.*

24. *Assumpsit*, for that the Defendant was seised of Lands in *C. in Kent.* and in Consideration of so much Money *adunc & ibidem (viz.) apud London' in Parochia, &c.* he promised, &c. Upon *Non Assumpsit* pleaded, the Trial was in *London*, when it ought to have been in *Kent*; for the Words *adunc & ibidem* relate to *Kent*, and the (*Viz.*) is idle, and shall be rejected. *Cro. Car.* 207. *Delves versus Clerke.*

25. *Bargain and Sale* of Lands in Fee, by those Words only, the Deed was never enrolled, but the Bargainor made Livery; this Deed may be pleaded by the Bargainee, in Defence of his Title; for a *Bargain* includes a *Grant.* *Noy* 66. *Osmand's Case.*

Lands will pass by the Word Dedi without the

Words *Bargain'd and Sold*, where Money is the Consideration, and the Deed duly enrolled. 4 *Leon.* 110. *Grey v. Edwards.*

26. *Trespas, &c.* for taking *quinque instrumenta ferrea, Anglice Fetters*; it was objected, that there was a proper Latin Word for *Fetters*, (*viz.*) *Compes*, and therefore it was not well expressed by *Instrumenta ferrea*; and the Court was of that Opinion. *Style* 37. *Parker versus Martin.*

27. In *Trespas, &c.* the Plaintiff declared, that 15 July, 14 Car. a Proclamation was made, by Colour whereof the Defendant *Postea scilt. 7 January*, 20 Car. caused the Plaintiff to be imprisoned, and that *Postea scilt. 14 Julii Anno 20 supradicto*, so threatned him, that he could not go about his Business, &c. after a Verdict for the Plaintiff, it was objected, that the Declaration was repugnant; for the Imprisonment was laid on the 7th of January, 20 Car. and the Threatning was laid *postea scilt. 14th July*, 20 Car. which was before the Imprisonment, because the King's Reign began on the 27th of March; so that the 14th of July, 20 Car. which comes after the *Postea scilicet*, must be the July before the 7th of January, when the Imprisonment was; and if so, then the Jury have given Damages for the whole Time, when the Declaration is ill as to great Part of it; but adjudged, that the Plaintiff need not set forth the Order or Time in which the *Trespas* was, but may alledge, that to be done first, which was done last; that the Word *Postea* must relate to the Time immediately precedent, and 'tis not void in this Case; and so to make the Time brought in by the *scilicet* to stand absolute, because the *scilicet* is Explanatory, and cannot contradict any Thing precedent; 'tis true, if that Word had been left out, then the Word *Postea* would have been void, because repugnant; but here the Time brought in by the *scilicet* is repugnant and void, and then the Declaration is, that the Defendant *postea* so threatned the Plaintiff, that he could not go about his Business; now, tho' this is uncertain, because no Time certain is alledged, yet 'tis not the Substance of the Action, but only an Aggravation of the Damages. *Allen* 22. *Simms versus Gregory.* See pl. 19.

28. Debt upon Bond, for Performance of an Award, *so as it be made on or before the 16th of March*; the Defendant pleaded no Award made; the Plaintiff replied, that two of the Arbitrators, after the making the said Bond, and before the Action brought, *scilicet* on the 16th Day of March, made an Award, &c. which he set forth, and assigned a Breach; and upon Demurrer to the Replication, it was objected, that the Plaintiff had not positively alledged, that the Award

Sid. 368, 370. 1 *Lev.* 243.

was made *on or before the 16th Day of March*, but only by a *scilicet*, which is not traversable and which in this Case ought to have been omitted; and 'tis plain, that a *Scilicet* is not traversable; for if 'tis repugnant to the Matter precedent, 'tis void, but if not repugnant, then it never enlarges, but only explains the Matter going before; and here it being Matter of Substance, whether the Award was made *on or before the 16th Day of March or not*, it ought to have been precisely alledged, and 'tis traversable, because it might be made before the Action brought, and yet not on the *16th of March*; but it was adjudged, that where the *scilicet* is not repugnant, but agreeable to the Matter precedent, there 'tis a direct Affirmation. 1 Saund. 169. *Skinner versus Andrews. See Studley versus Butler, and Treswellam versus Keen.*

29. *Trespass, &c. Quare clausum fregit, &c.* the Defendant pleads, that *before the Time* in which the *Trespass* is supposed, *scilicet* on such a Day, which was a Day *after the Trespass*, as laid in the Declaration, the Plaintiff gave Licence to the Defendant to enter, and to hold it till such a Day; and upon a general Demurrer to this Plea, it was held ill in Substance, and the rather, because there was no Traverse, tho' the Counsel for the Defendant insisted, that the *scilicet* was void and idle, and did not make the Bar ill. Sid. 428. *Hall versus Seabright.*

30. The Defendant was indicted for making, writing, composing, and collecting several Libels, in one whereof was contained amongst other Things, *juxta tenorem, Et ad effectum sequen'*; upon Not guilty pleaded, there was a Verdict against the Defendant, and he moved in Arrest of Judgment; it was adjudged, that if it had been only *ad effectum sequen'*, it had been ill, because that would not import the same Words, but the same in Sense; but *juxta tenorem* imports the same Words; for *Tenor* is a Transcript or true Copy. 1 Salk. 324. *The King versus*

1 Mod.
42.
2 Saund.
96.

31. Action *Qui tam, &c.* by an Informer against one *Aland*, for taking more than Statute Interest, in which the Plaintiff declared, that *Aland* the Defendant had lent 200 l. to one *Nicholson* for so long Time, and when the Day of Payment came, it was corruptly agreed between them, that *Nicholson* should give *Aland* 40 l. *pro dando* a farther Day *Solutionis*, (*viz.*) such a Day *prædicto Aland*, whereas *Aland* was the Lender; it was objected, that this was Nonsense, and that an Information upon a Penal Statute by a Common Informer, was not within the Statute of *Jeofails*; which *Holt Ch. Just.* agreed; but it was adjudged, that where Words are capable of different Expositions, that shall be taken which supports the Declaration or Agreement, and not that which defeats it; now in this Case the Word *Dando* is applicable to the Borrower, and *Solutionis* to the Lender; so the Construction of the Sentence may be (*viz.*) *For giving a farther Day to Nicholson to pay, &c. to Aland.* 1 Salk. 324. *Wiatt versus Aland. See 2 Cro. 549. Hall versus Bonithan. S. P.*

(C)

Exposition of Sentences and Statutes.

1. **T**HE Grant of the King, or a Common Person, by these Words, (*viz.*) *Omnia illa Mesuagia in tenura Johannis Brown*, situate in *Wells*, tho' they were in the Tenure of *John Brown*, not in *Wells*, but in *R.* is void at Common Law, because 'tis general, and restrained to a particular Village; so that the Grantee can have nothing elsewhere, for the Pronoun *illa* hath Reference as well to the Village, as to the Tenure, and if either fail, the Grant is void. 2 Rep. 32. *Doddington's Case.*

2. So where a *Portion* of Tithes in *L.* belonged to the Rectory of *R.* of which Rectory the Queen was seised *jure Corona*, and she granted *totam illam portionem decimarum* in *L. cum omnibus aliis decimis suis in L. &c. tunc vel nuper in occupatione B. G.* when in Truth *B. G.* had no Tithes there; adjudged, that by this Grant nothing passed, because the Pronoun *illam* demonstrates, that there must be some subsequent Words to explain what *Portion* of Tithes the Queen intended to pass, (*viz.*) that the *Portion* which was in the Occupation of *B. G.* 'tis true, it had passed by the Words, *cum omnibus aliis decimis suis in R.* if that Clause had not been added; but now, if it should pass by those Words, then the Clause is added in vain, which the Court would not allow; it was likewise adjudged, that by the Grant *portionem decimarum*, the Tithes did not pass, because *Portio* signifies a Part in Gross divided from the Rectory, and the Queen had not a *Portion* in Gross, nor any Thing but what was Parcel of the Rectory; and *ex gratia speciali* shall not extend by any strained Construction, to make a Thing pass against the Intention of the Queen; and when the Word *ex vi Termini* is not sufficient to pass the Thing intended to be granted, there a *non obstante* will not help it. 4 Rep. 34. *Bozoun's Case. Godb. 39. S. C. Futter versus Bozoun.*

3. Devise to his Son, and to the Heirs Males of his Body, Remainder to *Tho. Cheyney* of *R.* and the Heirs Males of his Body, upon Condition, that *he, or they, or any of them*, shall not discontinue; adjudged, that those Words, *he, or they, or any of them*, shall relate to the Sentence immediately foregoing, and not to the Son and his Heirs Males. 5 Rep. 68. *in the Lord Cheyney's Case.*

4. The Plaintiff was maimed in his *Wrist*, and he brought an Appeal of *Maimem*, in which he declared, that the Defendant struck him *super* his Right Hand, (*viz.*) *inter* his Right Hand and Right Arm;

Arm ; it was objected, that this was repugnant, because *super* could not be *inter* ; but it was adjudged well enough, for being on the Wrist, 'tis upon the Rising of the Hand. *Godb.* 76.

5. The Husband made a Feoffment in Fee to the Use of himself and his Wife, for Life, Remainder to the Use of his Son for Life ; and farther *vult & concedit*, that he and the Feoffees should be seised, &c. to the Use of the Right Heirs of the Body of the Son, &c. adjudged, that the Words *vult & concedit*, were not apt and proper Words to raise an Use ; so where a Man hath a Reversion in Fee expectant upon an Estate for Life, and he *bargains and sells* the Reversion, it will not pass by these Words, because they are not proper Words to make a Grant. *Godb.* 7. *Pasch.* 23. *Eliz.*

6. Lease to one of *White-acre* for ten Years, and a Lease to another of *Black-acre* for twenty Years ; and afterwards by another Deed, reciting these two Leases, he made a Lease to another of both those Acres for forty Years, to commence *after the End of the several Leases*, made to those former Lessees ; the Lease of *White-acre* expired ; adjudged, that he who had the Lease for forty Years, should enter and enjoy both the Acres, and not wait for the Death of him who had a Lease of *Black-acre*, for those joint Words which appoint when the Lease for forty Years shall begin, (*after the End of the several Leases* then in Being, shall be taken *respective*, and it shall commence severally upon the several Determinations of the said Leases. 5 *Rep.* 7. *Justice Windham's Case.* 32 *Eliz.* *Pollard versus Alcock.* S. P.

7. Devise of Lands to B. G. &c. until 800 l. shall be levied and paid by him out of the Profits, &c. the Son and Heir of the Testator concealed the Will, and entered on the Lands, and received the Profits, and died ; afterwards the Will was found, and the Devisee entered and levied 640 l. and employed it as directed by the Will ; and whether the Profits received by the Heir, and which the Devisee might have received, shall be accounted Parcel of the 800 l. was the Question ; adjudged, that the Words *until 800 l. shall be levied*, shall be construed, *until 800 l. shall or might be levied* ; otherwise, he who is to levy it, may exclude him in Reversion for ever, by deferring to levy it ; and therefore the Profits taken by the Heir, shall be Parcel of the 800 l. otherwise he would take Advantage of his own Wrong. 3 *Rep.* 81. *Sir Andrew Corbet's Case.*

8. Tenant for Life, Reversion in Fee, he in Reversion sold it to B. G. by Words of *Bargain and Sale* only ; the Deed was not enrolled within six Months, and tho' the Tenant for Life did afterwards attorn, yet the Reversion shall not pass, because *Bargain and Sale* are not apt Words to make a Grant. *Pasch.* 23. *Eliz.* *Godb.* 7.

9. Queen Elizabeth seised in Fee of a Reversion expectant upon an Estate-Tail, granted the Lands to another in Tail, upon Condition to have *predictam Reversionem* in Fee ; adjudged, that those Words, *predictam Reversionem* shall not be construed to extend to the Estate-Tail made to the Grantee, but to the Reversion in Fee which the Queen had before. 8 *Rep.* 77. in *Lord Stafford's Case*

10. Trespass, &c. in which the Plaintiff declared, that the Defendant had cut down *twenty Perches of Hedging*, when it should have been a Hedge containing *twenty Perches* ; for a Man cannot cut a Mathematical Hedge ; but adjudged good, for 'tis commonly called so many Perch of Hedge, a Pint of Wine, an Acre of Corn, &c. *Godb.* 286. *White versus Edwards.*

11. A Fine was levied of two Manors, *inter alia per nomina* of the Manors of A. and B. fifty Messuages, &c. with the Appurtenances, &c. with a *Rendel* of 50 l. *per Ann.*, &c. and with a Clause of Distress in the said Manors ; the Question was, whether the Rent should issue out of the Manors alone, or out of them and the other Lands ; one Judge was of Opinion, that the *per nomen* should go to the Manors only, and not to extend to the *Inter alia* ; but two other Judges held, that it shall extend as well to the other Lands in the Fine, as to the Manors, and so the Rent shall go out of the Whole. *Trin.* 31 *Eliz.* 1 *Leon.* 254. *Weston versus Garnon.*

12. Two Jointenants for Years of a Mill, one of them sold his Part, and died ; the other reciting the Lease made to both, and the Death of his Companion, and that he had the Whole by Survivorship, granted the Mill to the Plaintiff, and *all his Estate therein*, and covenanted, that he should quietly enjoy, without any Act done or to be done by him ; it was objected, that tho' the Word Grant implied a General Warranty of a good Title to the Whole, against all Acts whatsoever, yet the subsequent Words shewed what was intended by the Grantor, (*viz.*) that the Grantee should quietly enjoy against the Acts of the Grantor ; but adjudged, that he having recited, that he had the Whole, and then granting *Molendinum præd.*, it shall be intended the whole Mill, and the Word Grant imports a general Warranty against all Men, and it shall not be qualified by the last Clause of the Sentence, by which he covenants only against his own Acts. 2 *Cro.* 233. *Procter versus Johnson.* *Postea* Grants of a Common Person, (A) 6.

13. In Trespass, for felling and carrying away Trees ; the Defendant justified under a Lease for Life, in which the Lessor covenanted, that *Licetum foret* for the Lessee to take Timber, &c. for the Repairs of the House ; it was objected, that this being only, that the Lessor covenanted, without saying, that he granted, that it was not good, but the Court was of another Opinion, it being in the same Deed. 2 *Cro.* 221. *Purfrey versus Grimes.*

14. By the Statute 39 *Eliz.* Lands converted into Pasture shall be restored to Tillage before 1 May 1559. and so shall continue for ever ; an Information was brought against the Defendant, who was only a Tenant of the Land for one Year, which Land had been converted into Pasture many Years before ; adjudged, that tho' he was not within the Letter of the Statute as a Con-

verter, yet he was within the Intent of it as an *Occupier* and a *Continuer* in Pasture. 2 Cro. 419. *Parker versus Sanders*.

15. In Trespafs for cutting down and carrying away 300 Oaks, *apud Cowdam, &c.* the Defendant pleaded, that the Lands, &c. were the Freehold of *Mary*, and so he (the Defendant) as her Servant, took the Oaks; the Plaintiff replied, that the said *Mary* by Deed, dated 22 Octob. &c. bargained and sold all those Woods and Underwoods, *standing, growing and being in, upon and within the Manor of Cowdam*, to have and to hold to him (the Plaintiff) during the Life of the said *Mary*, by Virtue whereof he was possessed till the Defendant entered and cut down the Timber, &c. the Defendant rejoined, that the Plaintiff before that Time, &c. *cut down all the Trees, Wood, and Under-wood by Virtue of the said Bargain and Sale, which were growing on the Lands at the Time of the making of the said Deed*; and that the Trees and Wood mentioned in the Declaration, were such as grew on the Land, after the first Felling; and upon a Demurrer to to this Rejoinder, it was adjudged, that the Vendee should fell the Wood but once, and no more. *Moor 15. Gower versus Andrews*.

16. Debt, &c. upon this Bill, (*viz.*) *Be it known, that I owe to Parry 14l. to be paid at the Feasts, together with six Pounds which I owe him upon Bonds, Bill and Reckonings, subscribed with my Hand*; the Action was brought for 20 l. but adjudged against the Plaintiff, because by the Bill he was only Debtor for 14 l. and the subsequent Words, (*viz.*) together with six Pounds, &c. are only an Explanation of the precedent Debt. *Moor 537. Parry versus Woodward*.

17. A Fine was levied to the Use of the Cognisor for Life, Remainder to *J. R.* and *J. M.* his Executors, *until they shall have levied 300 l. for the Performance of his Will*; the Executors permitted the next in Remainder, after the Death of the Cognisor to enter, which he did, and received more of the Profits than would satisfy 300 l. one of the Executors died, the Survivor made a Lease, &c. to the Plaintiff, who brought an Ejectment; adjudged, that the Estate of the Executors was determined by their own Negligence, because they might have received the Money by Perception of the Profits, and suffered another to enter; and the Words to them, *until they shall have levied, &c.* that must be intended, *until they might conveniently have levied, &c.* *Moor 556. Rolfe's Case*.

18. The Case was, Sir *H. P.* was seised in Fee of a Garden-Plot, and made a Lease thereof to one *Ireland*, and afterwards built three Houses on Part thereof, so that it remained a Garden-Plot still, and then he demised *totam illum peciam fundi*, or Garden-Plot, late in the Tenure of *Juxon*, and now in the Tenure of *Ireland*, for 40 Years; and the Question was, whether the Reversion of those Houses passed, or not; it was insisted, that they shou'd not, because, tho' the whole was a Garden-Plot in the Tenure of *Ireland*, yet at the Time when the Lease was made, Part was a Garden-Plot still, which is sufficient to supply the Words of the Lease, and the rest was Houses at that Time, and not a Garden-Plot. *Sed per Curiam*, the Houses will pass; for by those Words, *totam illum peciam fundi* the Land passes, which is permanent, and draweth the Houses to it. 2 Roll. Rep. 261, 265. *Burton versus Brown*.

W. Jones
403.

19. Adjudged, that a particular Covenant in Fact may restrain a general Covenant in Law, as in *Noke's Case*; but in *Gainsford and Griffith's Case*, there was an exprefs and general Covenant in Fact, which could not be restrained by the subsequent Covenant, because it had no Manor of Relation to it in Sense; 'tis true, if a restrictive Clause be either in the first or last Part of an entire Sentence, or in the Beginning of one Sentence, or at the latter End of another, which may sensibly be applied to either, there it shall extend to both; but where a restrictive Clause is placed in the Middle of one or two Sentences, there 'tis otherwise; as for Instance, *T. P.* covenanted, that he was seised in Fee, *notwithstanding any Act done, &c.* and that the Lands were of the yearly Value of 200 l. there the Words *notwithstanding* cannot be applied to the yearly Value, because they were placed in the Middle of the Sentence; and this was *Crayford versus Crayford*. Cro. Car. 106. and 495. *Hughes versus Bennet*. See *Winch* 74, 87, 93. *Napper's Case*. *Latch* 105. *S. P.*

20. Mortgage of Lands in *Bedfordshire*, in which the Mortgagee covenanted, that if he took any Advantage by Entry, that then he or his Heirs should pay to the Mortgagor, his Executors or Administrators, the Sum of 1000 l. within three Months at the Parish of *St. Christopher's* within the Ward of *Cheap* London; afterwards the Mortgagee entered, and the Administrator of the Mortgagor brought an Action of Covenant, in which he set forth the Covenant to pay the 1000 l. within three Months after the Entry, &c. at the Parish of *St. Christopher*, in the Ward of *Cheap*, &c. then he sets forth, that the Mortgagor did then and there enter, and was seised and possessed, &c. but had not paid the Money; the Defendant pleaded, that Administration was not granted to the Plaintiff; and upon Demurrer to this Plea, it was objected, that the Declaration was ill in Substance; and if so, then this being upon a Demurrer, 'tis wholly ill: Now the Error was, that speaking of the Ward of *Cheap*, the Plaintiff alledges, that the Defendant did then and there enter; now 'tis impossible, that he could be seised and possessed of Lands in *Bedfordshire*, by an Entry made in the Ward of *Cheap*; but adjudged, that the Words then and there are only circumstantial. 2 Sid. 70. *Austly versus Brian*.

Lev. 102.

21. The Defendant covenanted upon the Marriage of his Daughter, to pay his Son in Law and Daughter 20 l. annually, and did not say for how long, and in an Action of Covenant brought, and upon a Demurrer to the Declaration, the Question was, whether this shall be 20 l. for one Year, or for their Lives? and adjudged, that it should be for their Joint Lives, for the Payment shall continue as long as the Marriage. Sid. 151. *Hookes versus Swaine*.

22. Debt upon Bond, the Condition was, that if the Obligor pay so much Money, *then the Obligation to be void*; otherwise it shall be lawful for the Obligee quietly to enjoy such Lands; the Defendant pleaded, that the Plaintiff did quietly enjoy the Lands; upon Demurrer to this Plea, it was adjudged, that tho' Conditions should be taken according to the Intent of the Parties, if it might consist, yet as those Words, *then to be void*, are placed in this Sentence, they must relate *ad proximum antecedens*, and that is to the Payment of the Money; for the Rule is, that Words in the Beginning or End of the Sentence shall relate to the Whole, but Words in the Middle, *ad media tantum*. *Sid. 312. Ferrars versus Newton.*

23. Debt upon Bond, conditioned, that the Obligor should bring in the Son and Daughter of *T. S.* at their full Age, to give such Releases as *L. D.* should require; the Defendant pleaded, that the Son was living at *D.* and under Age; and upon Demurrer it was adjudged, that the Plea was ill, for it shall be taken at their respective Ages. *1 Vent. 58. Boswell versus Coates. See Justice Windham's Case. S. P.*

24. In a Special Verdict in Ejectment, the Case was, one Brown being seised in Fee, devised the Lands to *Dr. Voscius* during his Exile; and if it shall please God to restore him to his Country, or if he die, then to the Plaintiff; *Voscius* was a Dutchman, and had a Pension from the States, of which he was deprived by them upon some Displeasure against him, whereupon he voluntarily left the Countrey, and came into England, and whilst he was here a War was between us and the Dutch, and afterwards a Peace ensued; this Case depended upon the Word *Exile*, which is either by Restraint, or voluntary; now if *Brown* the Testator meant a voluntary Exile, then the Estate of *Voscius* is determined, for he may return into his Country when he will; but adjudged, that was not the Exile intended by the Testator, because of those Words, *If it shall please God to restore him to his Countrey*; so that the Exile was the Leaving his Countrey, because of the Displeasure of the States; and the Withdrawing his Pension upon that Displeasure, which still continued, so doth his Estate here. *2 Lev. 191. Paget versus Voscius.*

25. In a Special Verdict in Ejectment, the Case was, the Father, upon the Marriage of his Son *William* with *Mercy Parker*, made a Lease for 200 Years, to commence from the Death of the Son, without Issue Male, or from the Time of his Death before his Daughter or Daughters shall or may respectively attain to sixteen Years of Age; the Son dying without Issue Male by *Mercy*, and leaving one or more Daughter or Daughters by her; *William* the Son had Issue by *Mercy*, *Thomas* and *Barbara*, and died, his Daughter *Barbara* being then under the Age of sixteen Years, then *Thomas* died without Issue Male; but at the Time of his Death *Barbara* was more than 16 Years old; and then the Question was, whether this Lease should commence, or not? adjudged, that it should upon the Death of *William* without Issue Male; 'tis true, this was not in the first Part of the Disjunctive, (*viz.*) or from the Time of the Death of *William*, before his Daughter shall attain the Age of sixteen Years, he dying without Issue Male; but it being a Provision to raise Portions for his Daughters, such Construction shall be made upon the whole Deed, that the Father intended his Grandaughters should be provided for, &c. *3 Lev. 99. Watts versus Guyban.*

26. The Testator devised a Legacy to *A.* and another to *B.* who were then Infants, and the Executor put both the Legacies, being so much Money, in the Hands of *W. R.* and took his Bond, conditioned, that he at the Request of the Obligee, shall bring in both the Legatees, when they shall come to their Age of twenty-one Years, to give a Release, &c. one of the Legatees came of Age, and during the Minority of the other, the Bond was put out in Suit, and this appearing on the Pleadings, the Question was, whether the Obligor was bound to bring him to give a Release before the other came of Age; and adjudged, that he was; for the Words must be taken respectively; especially since the Legacies were given respectively, and they cannot come both of Age at the same Time; Judgment for the Plaintiff, upon the Authority of Justice *Windham's Case.* *1 Mod. 33. Boswell versus Coates.*

27. Information brought, for the Forfeiture of a Quantity of Brandy upon the Statute 13, 14 *Car. 2. cap. 23, 24*, of Excise, and the Additional Act 15 *Car. 2. cap. 11*, by which 'tis enacted, that no foreign Excisable Liquors shall be landed before due Entry made, or before the Duty of Excise paid, or not in the Presence of an Officer of Excise, shall be forfeited, one Moiety to the King, the other to him who seises, and avers, that the Brandy was landed, the Duty not paid, and not in the Presence of an Officer, but did not aver, that no due Entry was made thereof; and for that Reason, after a Verdict for the Informer, it was moved, that the Judgment might be arrested; for since the Statute required three Things to be done, and all in the disjunctive, due Entry made, or the Duty of Excise paid, or landed in the Presence of an Officer, if one of them is done, the Statute is satisfied, and the Word *Or*, shall never be taken in the conjunctive; unless the Words to be joined are of the same Signification as maliciously, or contemptuously; but adjudged, that the disjunctive *or* shall be here taken for a conjunctive; for the Statute intended, that all three Things should be done, and that an Entry should not be sufficient without the Duty paid, or an Agreement made with the Officer. *1 Vent. 62. Hall versus Phillips.*

28. Debt upon Bond conditioned to perform Covenants in an Assignment of a Lease for twenty-one Years, in which the now Defendant covenanted, that the Original Lease, at the Time of the Assignment thereof, was a good and indefeasible Lease in the Law, and should so remain during the Term; and that the Plaintiff and his Assigns should quietly enjoy the same, without the Disturbance of the Defendant, &c. The Defendant pleaded Performance, &c. the Plaintiff replied, that before the Lease made, one *Townly* was seised, &c. in Fee, and being so seised was dis-

1 Vent. 58. Antea 23.

Sid. 323.

disseised by one *Pagitt*, who made the said Original Lease to the Defendant, who assigned it to the now Plaintiff; and that *Townly* entered, and turned the Plaintiff out of Possession, he being seised *in priori statu*; and upon Demurrer to this Replication, it was insisted for the Defendant, that the Breach was not well assigned, because the Plaintiff was not disturbed by him, or by any claiming under him, but by *Townly* a Stranger; and tho' in the first Part of the Covenant he had covenanted, that the Original Lease was *indefeasible*, yet the subsequent Words restrain the Generality of that Expression, (*viz.*) that the Plaintiff shall quietly enjoy *without the Disturbance of the Defendant*, which shews, that he covenanted only against his own Acts, and against those who should claim under him; as in *Dyer* 240. *b.* Lessee for Years assigned the Term, and covenanted, that he had done nothing by which the Assignment should be impeached; but that the Assignee might enjoy the same without any Disturbance of any Person; there these last Words which were *general*, were restrained by an Exposition of the former Words, which were particular, and related only to the Lessee himself; so likewise in *Dyer* 255. the Condition of a Bond was, that if *the Obligor* suffer the Obligee quietly to enjoy, &c. without the Disturbance of any Body; adjudged, that the last Words were restrained by the former; so in *Winch* 91. *Trenchard* versus *Hoskins*, where a Man covenanted, that he was seised in Fee, and had Power to sell, and that there was no Reversion in the Crown, notwithstanding any Act done by the Covenantor, here the last Words restrain the general Sense of both the preceding Covenants; but adjudged, that in both these Cases in *Dyer*, there was one entire Covenant and Sentence, and therefore a Construction was made in those Cases upon the whole Sentence, and in the Case in *Winch*, the restrictive Clause coming at the End of the last Sentence, might indifferently be applied to both the preceding Sentences; but here the Words in the last Covenant cannot be sensibly applied to the first; Judgment for the Plaintiff. 1 *Saund.* 58. *Gainsford* versus *Griffith.* 1 *Salk.* 58. *Dyer* 240. *b.* 255. *a.* 3 *Cro.* 131.

29. Action upon the Statute R. 2. for prosecuting in the Admiralty, when the Cause did arise upon the Land, in which the Plaintiff declared, that the Defendant, *prosecutus fuit & adhuc prosequitur*; now the Action being brought by Original; after a Verdict for the Plaintiff, it was objected, that *adhuc prosequitur* is subsequent to the Original, and so Damages were given for what was done after the Action brought. *Sed per Curiam*, *Adhuc prosequitur* must relate to the Time of suing out the Original, like Covenant for Quiet Enjoyment; and the Breach assigned, that the Defendant built a Shed, by which the Plaintiff was hindered from quietly enjoying, &c. *hucusque*, which Word relates to the Time of the Action brought. 3 *Mod.* 103. *Joyner* versus *Pritchard.*

Exposition of Sentences and Words in Wills.

(A)

See *Intention*, per totum.

1. **W**HERE Sentences in Wills are doubtful, they ought to be expounded according to the *Intention* of the Testator, to be collected out of the Words, and which consist with the Law; and this in a very favourable Manner; but in Deeds, the Exposition ought to be made more strongly against the Parties; as for Instance, in the Case of Wills, the Testator had an *House and Lands* in one County, and another *House and Lands* in another County, and he devised his *House and Lands* in one County, &c. and all other his *Lands, Meadows and Pastures, &c.* in the other County; adjudged, that by the Word *Lands*, the House which was in this last County did not pass; 'tis true, that where *Lands* are granted by a *Deed*, the Houses which stand thereon will pass; but 'tis not so in Wills, for there the *Intention* of the Testator is to be considered, and accordingly expounded; now in this Case it shall not be presumed, that the Testator intended to give more than what he had expressed in the Words of his Will, which were the *Lands* in a restrained Sense, for he couples those with *Meadows and Pastures*; therefore the Word *Lands* shall not be taken in the general Acceptation: 'tis thus reported by the Lord Ch. Just. *Anderson*, and others; but Sir *Francis Moor*, who reports the same Case, tells us, that even in this Will the *House* did pass by the Word *Lands*; for it comprehends both. 2 *And.* 123. *Ewer* versus *Heydon.* *Owen* 74. *S. C.* *Moor* 359. *S. C.* *Cro. Eliz.* 674. *S. C.* *Dyer* 261. *S. C.*

2. In the next Case, the Mistake of the Testator in the Manner of conveying his Lands, was rectified by his *Intention*; as where he devised, that *T. P. and W. C. his Feoffees* should stand

seised

seised of Lands, to and for *John Collins* for Life, Remainder over, when in Truth he had *no Feoffees*; yet this was adjudged a good Devise to him, because it plainly appears the Testator intended the Lands for him. *Poph. 188. Buffleild versus Byboro. Bursfeild versus Kingsborough.* See 1 *Leon. 313. Hob. 32, and 1 Lutw. 735. S. P.*

3. So where the Testator devised, that *T. P. and W. C.* and their Heirs, should stand seised of his Lands to the Use of *W. N. &c.* adjudged, that tho' those Persons had nothing in the Lands, yet this amounts as a Devise thereof to *W. N.* because the Intention of the Testator is apparent, that he should have them. *Ibid.*

4. In some Cases Sentences in Wills are to be taken distributively, and sometimes they are to be taken conjunctively, the better to explain the Intention of the Testator, to give Instances in each Case, (*viz.*) The Testator being seised of a *Manor*, devised the *Demefnes* thereof to his *Wife for Life*, and the *Services* to her for *eighteen Years*, and after the Death of his *Wife* he devised the *whole Manor* to *T. P.* adjudged, that tho' the *Services* were devised to the *Wife* only for *eighteen Years*, yet *T. P.* shall take nothing by this Devise till after her Death; for after the Expiration of the *eighteen Years*, if the *Wife* be then living, the Heir of the Testator shall have the *Services* during her Life, for *T. P.* was to have nothing by the express Words of the Will till after her Death; but if the Testator had devised, that he should have the *whole Manor* after the Expiration of the *eighteen Years*, and after the Death of the *Wife*, there that Sentence should be taken distributively, (*viz.*) that he should have the *Services* after the *eighteen Years*, and the *Demefne Lands* after her Death; adjudged likewise, that by the Devise of a *Manor* the *Rents* and *Services* will pass. 2 *Leon. 41. Inchley versus Robinson.*

5. In this next Case, the Sentences which were divided in the Will, were taken conjunctive, (*viz.*) the Testator being seised of Lands in Fee, devised *12 l. per Annum* out of them to his *Sister Anne* for Life, whilst she remained sole; and if she should marry, then his Executors should pay her *100 l.* and the Rent should cease, and return to his Executors; she married, the *100 l.* was not paid, and her Husband distrained for all the Rent arrear after the Marriage; and in Replevin the Question was, whether the Rent of *12 l. per Annum* should actually cease upon her Marriage, or not until the *100 l.* was paid: Justice *Twisden* was of Opinion, that the Rent actually ceased upon the Marriage; for tho' the Payment of the *100 l.* was placed between her Marriage and the Ceasing of the Rent; yet the Sense of the entire Sentence is, that it shall cease upon her Marriage; for if she had married in the Life-time of the Testator, she should not have the Rent, tho' the *100 l.* had not been paid; 'tis true, she might have recovered it in the Spiritual Court as a Legacy; but two other Judges were of a contrary Opinion, that the Payment of the Rent, and the Ceasing it, ought to be taken and joined together; for if it should be separated, then this Legatee might have nothing by the Will, because if the Rent should cease upon the Marriage, it might happen, that the Executors might have no Assets, and if so, then they would have the Lands and pay nothing for it; 'tis true, that she would not have the Rent if she had married in the Life-time of the Testator; the Reason is, because the Rent was never vested in her, for it was prevented by her Marriage, which was her own Act, and it was her own Folly to destroy that Security which she had for it; but here, upon the Death of the Testator, the Rent was actually vested in her, and 'tis very unreasonable that it should be divested out of her without an actual Payment of the *100 l.* as directed by the Will. 2 *Saund. 197. Osborne versus Wickens.*

6. As to grammatical Expositions of Words, sometimes the *præter Tense* hath been taken for the *present Tense*, as where the Words of the Will were thus, (*viz.*) *I have made a Lease to T. P.* for twenty-one Years, paying *10 s. &c.* this was held to be a good Lease to him for twenty-one Years. *Moor 31.*

7. But this last Case hath since been denied to be Law, as for Instance in Ejectment for Lands in *Wigginton*, the Words of the Will were, As for my personal Estate, I bequeath *600 l.* to my *Wife*, to be paid by her to *W. W.* which is in full Payment for the Lands I purchased of him, and are already stated in Part of her Jointure for Life, at *67 l. per Annum*, the Lands in *Wiskow*, &c. at *63 l. per Annum*, in all *130 l. per Annum*, which being also stated upon my said *Wife*, is in full for her Jointure, when in Truth the Lands in *Wigginton* were not settled on her; the Question was, whether those Lands should pass by the Will; and adjudged, they should not, for there are no Words of Devise to pass them, nor any Intention of the Testator, that his *Wife* should have them, but only a Mistake, that he had settled them on her for Life; besides, the Testator took Notice, that the *Wife* was stated in these Lands before he made his Will, for which Reason it could not be an implicate Devise to her; for where a Devisee takes an Estate by Implication, there must not be any Reference to an Act by which 'tis conveyed to her before the Making the Will: But Justice *Powell* held, that the *Wife* ought to have the Lands, for it plainly appeared, that her Husband intended she should have them, tho' he was mistaken in the Manner by which she should take, therefore she shall have them by that Way which she may, and that is by the Will, rather than the Intent of the Testator should be frustrated; and he denied the Case in *Moor 37*, to be Law. 2 *Vent. 56. Wright versus Wivell.* 3 *Lev. 259. S. C.*

8. The Testator being indebted in *20 l.* and no more, and having Goods to the Value of *100 l.* devised a *Moiety of all his Goods* to his *Wife*, and to his Executor, equally to be divided between them; the Executor paid the Debt of *20 l.* yet it was adjudged, that the *Wife* should have her full *Moiety of 100 l.* because the Executor had sufficient Assets beside. *Goulds. 149.*

9. The Testator having three Sons, devised the Lands in Question to his eldest Son, and the *Heirs of his Body*, after the Death of his Wife; and *if he died in the Life-time of his Wife*, then the youngest Son of the Testator should be Heir to the Eldest; he likewise devised other Lands to his second Son, and the *Heirs of his Body*; and if he died without Issue, that then the eldest Son should be his Heir; he also devised other Lands to the youngest Son, and to the *Heirs of his Body*; and *if all his Sons die without Heirs of their Bodies, then their Lands shall be his Nephews*; the eldest Son died in the Life-time of the Wife of the Testator, leaving Issue a Son, then the Wife died; the Question was, whether the Son of the eldest Son, or his Uncle, who was the youngest Son of the Testator, should have the Lands; and it was adjudged for the Son of the eldest Son, for tho' such eldest Son was not to have it, unless he survived the Wife of the Testator, which he did not, yet by this Limitation he never intended to disinherit any of his Grandchildren, because, by that subsequent Clause in his Will, he appoints, that *if all his Sons die without Issue*, then his Nephews shall have their Lands, by which Words his Intention must be, that whilst the eldest Son hath any Issue of his Body, his youngest Son shall not have those Lands. *Pasch. 6 Car. Cro. Car. 166. Spalding versus Spalding.*

10. The Testator had two Houses adjoining, one was known by the Name of the *Swan*, and the other was called the *Red Lion*; the House called the *Swan* was in his own Possession, and so was *one Room of the Red Lion*; afterwards he made a Lease of the *Red-Lion House* to *T. P.* and he devised the *Swan* to *W. R.* and died; adjudged, that the Room in the *Red-Lion House* passed by this Devise. *Trin. 21 Jac. Godb. 352. Knight's Case.*

11. Devise of Lands to his Wife for Life, Remainder to his Son in Fee, upon Condition, that after the Death of the Wife he grant to *T. P.* a Rent-charge in Fee; and if his Son should die *without Heirs of his Body*, then the Lands to remain to the said *T. P.* and the *Heirs of his Body*; the Wife died, the Son granted a Rent-charge to *T. P.* in Fee, and afterwards the said *T. P.* granted over this Rent to another, then the Son died without Issue; adjudged, that this Grant of the Rent enures from the Testator, who had Power to charge his own Lands in what Manner he would; and his Intent was, that inasmuch as the Lands were limited in Tail, and the Rent in Fee, that the Grantee of the Rent should have Power to dispose it in what Manner he pleased. *Mich. 15 Jac. Poph. 131. Gouldwell's Case.*

3 Bulst. 121. S. C. 121. S. C. 50. S. C. See Plowd. Com. 541. 1. 12. In a Special Verdict in Rescous, the Case was, the Testator being possessed of a Term for twenty-eight Years in several Houses, devised all the said Term to his Wife, if she so long lived unmarried; and if she married, then, *I Devise and Will* one of the Houses to her, during the Residue of the Term which shall be then to come; and then also, *I Will and Devise* to her *20 l. per Annum* Rent out of other Houses (but doth not say how long it shall continue) with a Clause of Distress, that if 'tis in arrear, it shall be lawful for her *and her Assigns*, to distrain, and devised the Residue to one *Butler, &c.* and made his Wife Executrix, and died; afterwards she married *Goffe*, the Plaintiff, who distrained for this Rent after her Death; and the Question was, whether it determined by her Death, or continued during the whole Term; two Judges were of Opinion, that it determined by her Death, because that Clause by which the Rent is devised, hath no Dependence or Relation to the precedent Clause, by which the House is devised to her during the Term, but 'tis a distinct Clause by it self, (*viz.*) *Also I Will and Devise* to her *20 l. per Annum* Rent, &c. and in the first Clause, his Will is express, that she shall have the House during the Term; and in the second Clause, 'tis not expressed how long the Rent shall continue, so that is left to the Construction of Law: But *Coke Ch. Just.* and *Haughton Just.* held, that she had the same Estate in the Rent that she had in the House; for those Words, *If she marry, then I Will and Devise one of the Houses to her during the Term*, shall go to all which follows, (*viz.*) And then also *I Will and Devise* the Rent; now, if those Words, *I Will and Devise*, had been left out, it had been clear, that the first Words had governed the Whole; but as it is, the second Clause, by which the Rent is devised, is coupled to the precedent Clause, by which the House is devised; for 'tis, after she is married she shall have *one House* during the whole Term, and also a Rent of *20 l. per Annum* out of the other Houses, so that the Rent is coupled to the House, and if so, she shall have the Rent as long as she had the House; but they all agreed, that the Clause for her and her Assigns to distrain for the Rent arrear, did not enlarge her Estate in the Rent. *1 Roll. Rep. 247, 368. Goffe versus Heywood.*

13. Devise to *W.* in Fee, in Trust for *K.* and the Heirs of her Body; and if she die without Issue, then to *Jane* for Life, and if *K.* die without Issue, and *Jane* be then dead, then, and not otherwise, to *T. P.* and his Heirs; *K.* died without Issue; but *Jane* was then living; and upon a Bill in Chancery brought by the said *T. P.* against *W.* the Trustee, and against the Heir at Law of the Testator, to have the Trust executed, it was decreed for *T. P.* tho' *Jane* was living when *K.* died without Issue; for notwithstanding the negative Words, that Clause, (*viz.*) *If Jane be then dead, and not otherwise*, seems to be put in the Will only to shew, that the Testator intended *Jane* should certainly have it for Life; and also to shew when *T. P.* should have the Lands in his actual Possession. *2 Vent. 363.*

14. The Testator being seised in Fee of some Lands in Possession, and of the Reversion in Fee of other Lands, expectant upon the Determination of an Estate for Life then in Being, devised, that his Wife should have the Use of his *Demesne Lands* for one Year after his Death; and then he devised both his *Demesne* and reversionary Lands to *Thomas Kemp* for Life, to hold from and after the Expiration of one Year next after his Decease, and the Decease of the Tenant for Life then

in Being: The Question was, whether *Thomas Kemp* should have the Demesne Lands, a Year next after the Decease of the Testator, or should stay till a Year likewise after the Death of the Tenant for Life; and it was adjudged, that those Words, (*viz.*) *One Year after my Decease, and the Decease of the Tenant for Life*, tho' they make the Clause in the Copulative, yet shall be taken distributively *reddendo singula singulis* (i. e.) *Thomas Kemp* shall have the Demesne Lands a Year next after the Decease of the Testator, and the reversionary Lands a Year next after the Decease of the Tenant for Life then in Being. 1 Saund. 170, 180. *Cook* versus *Gerard*. 1 Lev. 212. S. C.

15. The Testator devised *his Lands in H.* to his Wife for Life, and also *his Lands in B.* to his Wife for Life, and likewise *his Lands which he purchased of T. P.* to his Wife for Life, and after her Decease he devised *the said Lands* to his Son and his Heirs; the Question was, whether *All the Lands* as well those in *H.* and in *B.* or whether only those last mentioned, which he purchased of *T. P.* shall pass to the Son; there was no Judgment given, but it was insisted, that the Words, *said Lands*, shall not refer *ad proximam antecedens*; but to *all the Lands* before-mentioned, and that *indefinitum aequipollet universale*. 1 Vent. 368. *Garage's Case*.

16. The Testator being seised of Lands in Fee, and having other Lands mortgaged to him in Fee, devised *All his Lands* to *T. P.* and died; adjudged, that the mortgaged Lands passed by those Words; so if he had a Trust of a Mortgage of Lands in *H.* and had other Lands in the same Parish, by a Devise of *All his Lands in H.* the Trust will pass; but where the Testator had several Parcels of Lands in the Parishes of *H. B.* and *C.* and he devised his Lands in *H. B.* and *C.* and all his Lands *elsewhere*, to *W. N.* and he had at that Time Lands of greater Value in Mortgage to him, than all his Lands in *H. B.* and *C.* but not lying in either of those Parishes or Places; in such Case the mortgaged Lands will not pass, because it could never be the Intention of the Testator to pass Lands of so great a Value by the Word *Elsewhere*, which is a Word usually inserted by the Writer *currente calamo*, and without any Consideration. 2 Vent. 351. *Sir Tho. Littleton's Case*.

17. *Stephen Norton* being seised in Fee, devised his Lands to one of his Cousin *Nicholas Amburst's Daughters*, who shall marry with a Norton within fifteen Years; *Nicholas Amburst* had three Daughters; the Plaintiff married the Heir at Law of the Testator, and one *Stephen Norton* married the Eldest of *Amburst's* Daughters; and in Ejectment the sole Question was, whether the Heir at Law, or the Devisee had the better Title; it was objected, that the Will was void for Incertainty of the Person, who should take, because more than one of the Daughters might marry with a Norton; but adjudged, that the Words of the Will fix it to a single Daughter, so that is a Certainty in the Person, tho' not in the Event; adjudged for the Defendant. Raym. 82. *Batz* versus *Norton*.

18. In a Special Verdict in Ejectment, the Case was, the Testator had issue two Sons, *Thomas*, who had issue *John*; and *Richard*, who had issue *Mary*; and he devised his Lands to his Son *Thomas* for Life, Remainder to his Grandson *John*, and the Heirs Males of his Body; and if he die without Heirs Males, then to his Granddaughter *Mary* in Tail; *Proviso*, *If my Son Richard shall have a Son by his now Wife Margaret, then all my Lands shall go to such Son and his Heirs*; afterwards a Son was born, and the Question was, whether the Estate limited to *Thomas*, the eldest Son, is defeated: *Et per Curiam*, 'tis not, for this Proviso only extends to the Title of *Mary*, and hath no Influence upon the first Estate limited to the eldest Son. 2 Mod. 293. *Evered* versus *Hone*.

19. In a Special Verdict in Ejectment, the Case was, the Father being seised in Fee, did, in Consideration of the Marriage of his Son, covenant to levy a Fine to certain Uses in the Deed mentioned, but no Fine was levied; afterwards, by his Last Will, reciting this Deed, he devised and confirmed all Estates given and granted to his Son in Marriage, according to the Deed; adjudged, that the Will referred to the Deed, and passed such Lands as were intended to be conveyed by the Deed and Fine, because the Word *Grant* in a Will shall not be taken strictly, but in the largest Sense for any Manner of Agreement. 1 Salk. 225. *Milford* versus *Smith*. See Cro. Eliz. 68. 2 Cro. 148.

Extent. See Execution. (C) per totum.

Extinguishment.

Of Commons, where, and by what Acts. (A)	Of Terms for Years and Conditions, where, and by what Acts. (E)
Of Copyholds, Services, &c. where, and by what Acts. (B)	Of Estates for Life, where, and by what Acts. (F)
Of Franchises and Liberties, where, and by what Acts. (C)	Extinguishment by Unity of Possession. (G)
Of Rents, where, and by what Acts. (D)	

(A)

Of Commons, where, and by what Acts. See *Commons*. (A) 8.

- O**NE seised of 100 Acres of Land, had Common appurtenant to forty-six Acres, which were in the several Occupations of his Tenants, (*viz.*) two Acres, Part of the forty-six in the Occupation of *B. G.* and the Residue in others; the two Acres were purchased by *B. G.* adjudged, that by the Purchase of those two Acres, which were Part of the forty-six, the whole Common was extinct, for that was entire, tho' the Acres were in the Possession of several. *Goldf.* 53. *Kempton's Case.* *Leon.* 44. *S. C.*
- A Man had Common appendant to a Yard-Land, and made a Feoffment of the Moiety of the said Land; adjudged, that the Common was not extinct, but shall be still appendant. *Goldf.* 117. *Smith versus Benson.* *Moor* 463. *S. C.* *Dyer* 337. *S. P.*
- Where a Man hath Common by Reason of Vicinage, if he enclose Part of the Land, the whole Common is extinguished. 1 *Brownl.* 174. *Bacon versus Palmer.*
- A Parson had Common appendant to his Parsonage out of the Lands of an Abbey, and afterwards the Parsonage was appropriated to the Abbey; the better Opinion was, that the Common was not extinct, because the Abbot had not so durable an Estate in the Common as he had in the Parsonage, for that might be disappropriated, and then the Parson shall have his Common again. *Godb.* 4.

(B)

Of Copyholds, Services, &c. where, and by what Acts.

- W**HERE a Man held a Messuage and Yard-Land by Fealty, Suit of Court, and a Heriot to be paid at the Death of every Tenant dying seised, and the Lord purchased Part of the Land, and the Tenant sold the other Part to another; it was adjudged, that the *Heriot-Service* was extinct; but if the *Custom* of the Manor be, that the Lord shall have a Heriot, 'tis otherwise. 8 *Rep.* 102. *Talbot's Case.*
- So if any Part of the Lands come to him by Descent, which is the Act of the Law, yet the Suit which is entire is extinct. 6 *Rep.* 1. *Bruerton's Case.*
- A Feme Sole being seised of a Manor, married one of the Copyholders, then he and his Wife suffered a Recovery of the Manor, and declared the Uses to themselves for Life, and afterwards to the Use of the Heirs of the Wife; adjudged, that the Copyhold was extinct; so if a Copyholder join with the Lord in a Feoffment of the Manor, or accept a Lease of his Copyhold from him, the Copyhold is extinct. *Godb.* 101.
- The Lord of a Manor sold Lands which were held by Copy to a Purchaser in Fee, and afterwards the Copyholder released to the Buyer; adjudged, that the Copyhold Estate was extinct. 1 *Leon.* 102. *Wakeford's Case.*

(C)

Of Franchises and Liberties, where, and by what Acts.

- W**HERE a Corporation hath Franchises by Grant or Prescription, if afterwards they are incorporated by a new Name, yet the Franchises are not extinguished, but the new Body shall have all the privileges which the old Corporation had. 4 *Rep.* 87, in *Luttrell's Case.*

2. Where the King grants any Privileges to a Subject, such as were the antient Flowers of the Crown; as the Goods of Felons, Fugitives, and Persons outlawed, Waifs, Strays, Deodands, Wrecks, &c. if they come again to the King they are extinct in the Crown; but where Liberties, Franchises, Privileges and Jurisdictions are created by the King, as granted to a Subject, as Markets, Fairs, Parks, Warrens, &c. if these come again to the Crown, they shall not be extinguished; so resolved. 9 Rep. 25, 26. in the *Abbot of Strata Marcellas's Case*.

(D)

Of Rents, where, and by what Acts.

1. **I**N Cases of Extinguishment the Party must have as high an Estate in one Thing as in another; as if he hath a Rent in Fee issuing out of the Land, and he purchaseth the Land in Fee, the Rent is extinct; but if he hath only an Estate for Life or Years in the Land, and a Fee in the Rent, in such Case 'tis not extinct, but only suspended till after the Estate for Years or Life is determined.

2. Tenant in Tail made a Lease for Years, rendring Rent; the Issue in Tail accepted the Rent, and was afterwards attainted for Treason, and executed, leaving Issue a Son; adjudged, that tho' by the Acceptance of the Rent by the Issue in Tail, he had affirmed the Lease, yet by the Attainder it was extinguished, because the Estate-Tail, out of which it issued, was extinct. *Plow. Com. 560. in Walsingham's Case*.

3. A Lease was made of an House, rendring Rent; the Lessor afterwards entered on the Lessee, and made a Feoffment of the House; the Lessee re-entered, and the Feoffee brought an Action of Debt for Rent arrear, and adjudged good; for the Rent was not extinct by the Entry of the Lessor, but only suspended, and it was revived by his Re-entry. *Dyer 361*.

4. The Archbishop of *Canterbury* made a Lease for Years of Parcel of the Manor of *D.* and afterwards granted a Rent-Charge to *Dr. Betts*, who devised the said Rent to the Archbishop till 100 *l.* should be levied, then to *B. G.* and died; the 100 *l.* was levied, the Rent was behind, and *B. G.* distrained; adjudged, that by the Devise to the Archbishop, the Rent was suspended, and that a Personal Thing once suspended by the Act of the Party, is extinct for ever. *Dyer 140. Cranmer's Case*.

5. If a Grantee of a Rent releaseth Part of it to the Grantor, and his Heirs, the Residue of the Rent may be apportioned, and the Land out of which it issues shall be chargeable; but if he release the Rent issuing out of one Acre, the whole Rent is extinct. *Goldf. 116*.

6. Lessee for ten Years granted a Rent-Charge out of the Land to his Lessor during that Term, then the Lessee himself granted the Remainder of the Land to the Lessee for Years; adjudged, ^{4 Leon. 2. S. P.} that the Rent-Charge was extinct, because the Lessor, who had the Rent, was a Party to the Destruction of the Lease, which was the Foundation of the Rent. *Godb. 137. Buckhurst's Case*.

7. Lessee for thirty Years of a Grange, demised Part of it, called *Parkfield*, to *Henry Beer*, ^{4 Leon. 115.} for twenty-four Years, another Parcel to *A.* for twenty-three Years, and another Parcel to *B.* for eighteen Years, and several other Parces to others, but all under thirty Years; afterwards the Lessee granted to *Henry Beer* and others, all his Interest in all the said Grange, during the said Term of thirty Years; then he who had the Reversion in Fee, granted a Rent of 20 *l. per Ann.* issuing out of all the Grange, then in the Tenure of *H. Beer*, and afterwards granted the Reversion of Part of the Grange to one *Lewknor*, and his Heirs, and the Reversion of the Residue to *Ognell*, and his Heirs; the Grantee of the Rent released to *Lewknor* all the Right to that Part of the Grange which was granted to the said *Lewknor*, whereupon *Ognell*, to whom the Reversion in Fee of the Residue was granted, entered, supposing, that the Rent issuing out of the whole Grange, and the Grantee having released Part of it, the whole Rent was extinguished; which is very true, if that had been the Case; but the Rent did not issue out of the whole, but only out of that Part of the Grange, which was in the Occupation of *Henry Beer*; for tho' the first Part of the Sentence mentions all the Grange, yet those general Words are restrained by those which follow; (*viz.*) All in the Occupation of *Henry Beer*. 1 *And. 178. Underhill versus Ognell*.

8. In Debt for Rent, on a Lease for Years, the Defendant pleaded, that he had Common Appurtenant, &c. and that the Lessor had enclosed Part of the Common before the Rent was due, ^{Palm. 392. 2 Roll. Rep. 415.} and that thereby the Rent was extinct; adjudged an ill Plea, for the Rent doth not issue out of the Common, and therefore it cannot be suspended by enclosing the Land. 2 *Cro. 679. Sanderfon versus Harrison*.

9. Lease of an House, rendring Rent, the Lessor commanded a Partition-Wall to be broke down; adjudged this is not such a Re-entry into the House, as shall extinguish the Rent. *Cro. C.v. Harrison's Case*.

(E)

Of Terms for Years, and Conditions, where and by what Acts.

1. **W** Here-ever the Freehold cometh to the Term, the Estate for Years is extinguished; as where Lessee for Years, Remainder in Tail to his Heirs, made a Feoffment to *B. G.* to the Use of him in Remainder, who entered; adjudged, that the Feoffment was good, tho' made by one who had only an Estate for Years; for by the Entry of him in Remainder, he was remitted to his Right Estate, and the Term for Years was extinct. *Golds. 92. Mounson versus West. See postea Pl. 13.*

2. A Man, who had an Estate for Years, granted it to *B. G.* on Condition, that if he did not pay to *S. W.* yearly 10 *l.* that the Grant should be void; the Grantor made the said *B. G.* his Executor, and died; two Judges held, that the Condition was extinguished, because the Executor could not enter upon himself, if it was broken. *Golds. 181. Tutball versus Smote.*

1 And. 18. 3. *Blount* sold the Manor of *Alexton*, to which the Advowson was appendant to one *Andrews*, and covenanted to suffer a Common Recovery to the Use of him and his Heirs, rendring 42 *l. per Annum* to *Blount*, and his Heirs; and it was farther covenanted between the Parties that as well for the Assurance of the Manor to *Andrews*, as the said Rent of 42 *l.* to *Blount*, that he the said *Blount* should levy a Fine, &c. *Provided always*, that *Andrews* should by Deed give the Advowson to *Blount* for his Life; and farther it was covenanted, that *all Assurances afterwards to be made, should be to the Uses of this Indenture*; the Recovery and Fine were had accordingly, and *Andrews* died without granting the Advowson to *Blount*, who now entered for the Condition broken; resolved, that the Fine had not extinguished this Condition, because by the Covenant 'tis declared, that *all Assurances* afterwards to be made, should be to the Uses of that Indenture, which intends, that the Condition should be saved. 2 *Rep. 70. Lord Cromwell's Case. Moor 104. S. C. Dyer 311. Putnam's Case. S. P. Postea Rent. (G) 5. S. C.*

4 Lessee for Life, and after the Determination of that Estate, then to another for Years; the Lessee for Years died Intestate, then his Administrator and the Lessee for Life, joined in a Purchase of the Fee-simple; adjudged, that the Term was not extinguished by the Purchase of the Fee, because it was not properly a Term, but an *Interesse Terminum*, and the Purchaser had it not in his own Right, but as Administrator. *Godb. 2.*

5. The Husband and Wife had a Lease for Years, and entered; afterwards the Lessor made a Feoffment in Fee of the Lands to the Husband, who died seised; adjudged, that by the Acceptance of the Feoffment, the Husband had extinguished the Term; but if the Conveyance had been by Bargain and Sale enrolled, or by a Fine, instead of a Feoffment, it had been otherwise. *Cro. Eliz. 913. Downing versus Seymour.*

1 And. 162. By the Name of Hardington & Rudiard. 1 Leon. 92. *Golds. 59.* 6. The Testator being seised of an House in *London* for a Term of thirty-one Years, devised, that his Wife should enjoy it during her Widowhood, and that the Residue of the Term should remain to *W. R.* the Testator died, and his Widow entered, and purchased the Fee-simple, and afterwards married, whereupon *W. R.* entered, and adjudged, that his Entry was lawful; for tho' the whole Term was in the Widow, until she married, so as by the Purchase of the Fee-simple, the same was extinguished; yet that shall not defeat the Reversionary Interest of *W. R.* but that he may enter after the Marriage of the Widow. 10 *Rep. 52. Trin. 18 Eliz. Harding-ton versus Rylder.*

7. Tenant in Fee-simple made a Lease for Years to *W. R.* and afterwards made a Feoffment of the Lands to another, with a Letter of Attorney to the Lessee to make Livery, which he did accordingly; adjudged, that by his Making Livery, his Interest in the Term was not extinguished; for what he did was as Servant to the Lessor. *Mich. 32 Eliz. 1 Leon. 191. Petty versus Trevilian.*

8. The Husband had a Term for Years in his own Right, the Lands afterwards descended to his Wife; adjudged, that the Term was not extinguished, because the Lands came to him in Right of another. 2 *Cro. 275. Lady Plat versus Sleep.*

9. Lessee for Years, upon Condition that the Lease should be void upon Tender and Payment of 6 *d.* assigned the Term to a Stranger, who was disseised, then the Lessor paid the 6 *d.* according to the Condition; adjudged, that tho' the Disseisee had only a Right to the Estate, yet the Payment to him was good and sufficient to extinguish the Lease. 2 *Cro. 275. S. C.*

10. Lease for Years, rendring Rent; afterwards it was covenanted between the Lessor and Lessee, that a Bargain and Sale should be made of the Lands to the Lessee, in order to make him a Tenant to the *Præcipe*, and a Fine levied to him and others, and his Heirs, to the Intent a Common Recovery should be suffered, all which was done; adjudged, that tho' by the Fine the Term was extinct for a Time, yet it was revived by the Recovery; for that being executed, and the Bargain and Sale, Fine and Recovery, being all but one Assurance, it shall be *quasi* a Conveyance, to the Use *ab initio*. 2 *Cro. 643. Ferrers versus Fermor.*

11. *W. R.* made a Lease for 100 Years, to one *T. P.* who made a Lease for twenty Years, rendring Rent; then *W. R.* granted the Reversion in Fee, &c. and the Grantee purchased the Reversion of the Term; adjudged, that he shall not have the Rent, because that being inci-

dent to the Reversion of the Term, is now extinguished by the Reversion in Fee, both being in one Person. *Moor* 94. *The Lord Treasurer* versus *Barton*.

12. Upon an Information of Intrusion, the Case upon the Pleadings was, that *Sir Fra. Englefield* went beyond Sea with the the Queen's License, for a certain Time, and after that Time was expired, he was commended to return, which he refused to do; whereupon a Commission issued out of Chancery, returnable in the Exchequer, to make Inquisition, and to seise his Lands, which was done, and thereupon the Queen, *Anno* 14 of her Reign, made a Lease thereof to one *Champion*; afterwards *Sir Fra. Englefield* was indicted in *Middlesex* in *B. R.* for a Treason by him committed at *Namure* in *Flanders*, and the Indictment was found, and thereupon he was outlawed; adjudged, that by the Outlary the Lease was extinguished. *Moor* 239. *Sir Francis Englefield's* Case.

13. The Testator being seised in Fee, and having three Sons, *Francis*, *Jasper* and *George*, devised his Lands to *Jasper* for twenty-one Years, to perform his Will, and pay his Debts, and made him Executor; and if *Jasper* died within that Term, then the like Devise to *George*; and he devised the Lands themselves to *Francis* in Tail, Remainder in Tail to *Jasper*, &c. the Testator died, and *Jasper* entered; then *Francis* died without Issue, so that the Inheritance descended on *Jasper*, who had the Issue, the Defendant, and died within the Term; thereupon *George* entered; adjudged, that by the Descent of the Inheritance to *Jasper*, who was then in Possession, by Virtue of the Devise to him for 21 Years, that the Term was extinguished. *Moor* 286. *Lee* versus *Lee*. See *antea* pl. 1.

14. In a Special Verdict in Trespass, the Case was, the Lady *Finch* had two Sons, *Sir Moile* and *Henry*, and levied a Fine to the Use of her self for Life, and afterwards to the Use of her Executors for five Years, then to the Use of *Sir Moile* in Tail, Remainder over; then she married, and she and her Husband granted the Term of five Years to *Sir Moile*; afterwards she and her Husband levied another Fine to *Sir Moile*, *sur Cognissance de droit*, and then she, with the Assent of her Husband, made her Will, and constituted her Son *Henry* sole Executor, and died; then *Henry* entered as Executor, and *Sir Moile* entered on him, and being put out, brought an Action of Trespass; adjudged, that this Fine had extinguished the Term, and had made such a Disturbance of the Possession, that the Use which was Future, ought to arise at that very Instant in the Executor, upon the Death of the Lady, or it should never arise at all; as it was adjudged in *Chudleigh's* Case for the same Reason. *Moor* 339. *Sir Moile Finch* versus *Finch*.

15. *Sir John Savage* levied a Fine, and declared the Uses to himself for Life, Remainder to his Wife for Life, Remainder to his Executors for 20 Years, Remainder in Tail to his eldest Son, with several Remainders over; afterwards *Sir John* levied another Fine of the same Lands, and to the same Uses, only leaving out the Term of twenty Years to his Executors; *Sir John* died, leaving his Wife *Executrix*, who married *Sir Robert Remmington*; adjudged, that this Remainder to his Executors for twenty Years, being in Abeyance during the Life of *Sir John* and his Wife, is extinguished by the second Fine. *Moor* 754. *Remmington* versus *Savage*.

16. Lessee for 99 Years, Reversion to *Margaret* for Life; she married, and then the Lessee granted the Term to the Husband, then the Wife died; the Question was, whether this Term was in the Husband; and the better Opinion was, that it is, for he had the Term in his own Right, and the Reversion in Right of his Wife; but on the other Side it was said, that it was extinguished; for he had both the Possession and Seisin, tho' it was in the Right of another. 2 *Roll. Rep.* 472. *Liebden* versus *Winfmore*.

17. There being a Grant of the next Avoidance in Being, the Parson, Patron and Ordinary, before the *Stat.* 13 *Edw.* joined in a Lease of the Parsonage for 99 Years; the Parson died, the Grantee of the next Avoidance presented, and his Incumbent enjoyed it, discharged of the Lease, all his Life-time; after his Death the Patron, who joined in the Lease, presented one, who was instituted and inducted; adjudged, that by his Induction he hath the Freehold immediately, and by Consequence the Lease is wholly extinguished. *Cro. Car.* 582. *Plowden* versus *Oldford*. *Possess* Presentation. (C) 1.

18. In Debt upon Bond, for Performance of Covenants, the Case was, *Secombe* the Defendant being seised in Fee of a Moiety of a Rectory, sold it to *Sir Warwick Hele*, by a Deed of Bargain and Sale, for so much Money, in which there was a Covenant for farther Assurance; and the better to ascertain the yearly Value, they agreed by Parol at the same Time, that the Deed was executed, that *Secomb* should take a Lease of it for 21 Years at such a Rent, which in Truth was more than it was worth, and this was done to deceive the Purchaser; the Lease was made accordingly, and afterwards *Secomb* in Performance of the Covenant for farther Assurance, levied a Fine to the Purchaser; the Question was, whether this Fine had extinguished the Lease, or whether it was save by the Parol Agreement; it was insisted, that it was saved by that Agreement, and not extinguished by the Fine, because all the subsequent Conveyances are directed by that Agreement; for the Fine is not an Independant Conveyance of it self, but relates to the Bargain and Sale, and both make but one Conveyance; and so is *Puttenham's* Case. But adjudged, that if this Lease is preserved, it must be by a Thing of as high a Nature as the Bargain and Sale, which a Parol Agreement is not, and the Inconvenience would be great, if such a Parol Agreement shall make it good both against a Bargain and Sale, and a Fine, because in such Case a Purchaser could never be safe in his Title. *Palm.* 506. *Hill* versus *Secombe*.

(F)

Of Estates for Life, where, and by what Acts.

1. **I**N a Special Verdict in Ejectment, the Case was, a Copyholder in Fee surrendered to the Use of one for Life, Remainder to two other Persons in Fee; one of those in Remainder made a Lease for Years to the Defendant; and then the Tenant for Life and both the Remainder Men joined a Surrender to several Persons and to several Uses, &c. adjudged, that by this Means the Estate for Life was extinguished in him who had the Reversion. *Hill. 31 Eliz. 1 Leon. 174. Dove versus Willett.*

(G)

By Unity of Possession.

1. **T**HE Lord Grey prescribed to hunt Deer in the Demesnes of his Manor of S. as in the Purlieus of *Whaddon-Chase*, &c. the Manor afterwards came to the Queen, who granted it to B. G. in Fee, with a free Warren in the Demesnes, *Ita quod*, no Man should enter there to hunt Deer without his Leave; adjudged, that this Unity of Possession did not extinguish the Privilege to hunt Deer in the said Manor, being the Purlieu of the Chase, and that the *Ita quod* did not extend to her Keepers, but to other Subjects. *Dyer 326.*

2. In a Prohibition, the *Bishop of Lincoln* suggested a Prescription to hold the Manor, &c. discharged of Tithes, during the Time it was in their Possession; and that in the Reign of *Ed. 6.* the said Manor was conveyed to the *Duke of Somerset*, and afterwards came to the Bishop again; adjudged, that a Prescription in a Spiritual Person to be discharged of Tithes, is good, which was not destroyed by an Unity of Possession. *Cro. Eliz. 276. Bishop of Lincoln versus Cooper. Leon. 248. S. C.*

W. Jones
145.
Letch
153. S. C.

3. The Plaintiff being possessed of a *Rectory and Curtilage*, &c. in *Marcham*, prescribed to have a Water-course flowing in a Stream there, from the Curtilage to his House, and that the Defendant, on such a Day, had stopped it; the Defendant pleaded, that *H. 8.* was seised of the said Rectory in Fee, and having a Piece of Ground lying between the Water-course and Stream, granted the same to one *Box*, and so by mesne Conveyances brings down a Title to himself, and that by Unity of Possession in the Plaintiff, the Water-course was extinct, and so justifies the Stopping; adjudged, that by this Unity of Possession of the Rectory and Water-course, it was not extinguished, and that the Prescription was still good. *Cro. Car. 302. Survy versus Pigot. Poph. 166. S. C.*

Extortion.

See Indictment.

(A)

1 Mod. 5. 1. **I**Nformation against a *Kentish* Attorney, upon the Statute 3 *Jac. cap. 7.* for taking Extor-
S. C. sive of his Client 1 *l. 3 s. contra formam Statuti*; upon Not guilty pleaded, he was found guilty, and it was insisted in Arrest of Judgment, that by this Statute another Method was directed, (*viz.*) An Action, in which the Party grieved should have Costs and treble Damages, and therefore an Information would not lie. *Sid. 434. The King versus Troy.*

2. Indictment against *W. R.* and another, for that they being Receivers of the Queen's Tax, did, *colore officii*, extort Money from several Persons; adjudged, that Two may be jointly indicted for an Extortion or Battery, because 'tis a Crime at Common Law, of which they may be jointly or severally guilty. 1 *Salk. 382. The Queen versus Atkinson & al.*

1 Vent.
302.

3. By the Statute 1 *Will. 3. cap. 21.* 'tis enacted, that if a Clerk of the Peace do misbehave himself in his Office, and if a Charge in Writing of such Misdemeanor be exhibited against him to the Sessions, they may discharge him: The Sessions made this Order, *ff.* Whereas by a Complaint in Writing exhibited to this Court against *R. B.* Clerk of the Peace, he was charged with divers Misdemeanors in his Office, (*viz.*) That he exacted of *T. P.* 8s. for a Subpœna, and did compel *W. R.* to pay 9s. more than his due Fee; and it doth appear upon Evidence, that the said *R. B.* misbehaved himself in his Office, by the Extorting of the said *T. P.* 5s. more than was his due Fee, and of the said *W. R.* 9s. more than was his due Fee; this Court doth discharge and remove him

from

from the said Office of Clerk of the Peace: This Order being removed by *Certiorari* into *B. R.* it was quashed, because here was no positive Charge of Extortion in his Office; for all before the (*viz.*) is nothing but Recital, and a general Charge, which is not allowed in any Case, but in *Barrettry*, the Nature of which Crime consists in many particulars; now, what comes after the *Vi-delicet* is not a positive Charge of any Misdemeanor relating to his Office; it is not said that he took the 8*s.* or the 9*s.* *extorsive*, or *colore officii*, which Word *Extorsive* is as essential to a Charge for Extortions, as *Proditorie* or *Felonice*, to a Charge of Treason or Felony; and what follows after *upon Evidence before the Sessions*, will not make this Order better, because what appeared to them is no Part of the Charge, which ought to have been very certain, especially in this Case, where the Defendant is to be deprived of his Freehold, and of the Benefit to be tried by a Jury. 2 *Salk.* 680. *The King versus Baynes.*

Failure of Record.

For Variance between the Pleadings and the Record certified. (A)	it self, is certified. (B) Where <i>Nul tiel Record</i> is a good Plea; and where not. (C)
Where the Tenor, and not the Record	

(A)

For Variance between the Pleadings, and the Record certified.

1. **I**N a *Formedon in Descender*, a Fine with Proclamations levied *Anno 30 H. 8.* was pleaded; and upon an Issue of *Nul tiel Record*, the Tenant brought it in at the Day, but in the Proclamations made in *Trinity-Term*, the Year of the King was left out; but because those which were made in *Easter-Term* before, and in *Michaelmas-Term* after were right, and the Year of the King was expressed in them, therefore the other were held to be right, for it must be in the same Year. *Dyer 234.*

2. In *Affise*, the Defendant pleaded, that the Plaintiff was outlawed; the Plaintiff replied *Nul tiel Record*, and being at Issue thereon, the Tenor was brought in by *Mittimus*, by which it appeared, that there was a Variance between the Day of the Return of the *Exigent*, and that where the Outlawry was pronounced; and this was held a Failure of the Record. *Dyer 187.*

3. In *Affise*, the Tenant pleaded, that before that Time the now Demandant had brought an *Affise against his Father*, who pleaded, that the Demandant had made a Feoffment to him, and it was so found by the *Affise*; the Demandant pleaded *Nul tiel Record*, and upon that Issue the Tenant brought in the Record, by which it appeared, that the *Affise* was brought against his *Father and Mother*; adjudged, that this Variance did not make a Failure of the Record in *Foster and Jackson's Case.* *Hob. 55.*

4. *Formedon* of the Manor of *Isfeild*; the Defendant pleaded in Bar a Common Recovery of the said Manor against the Donee in Tail, who replied *Nul tiel Record*, and being at Issue, the Defendant brought in the Record, by which it appeared, that the Recovery was of the Manor of *Iffeild* instead of *Isfeild*; adjudged, that this being in a Common Recovery, it shall not be a Failure of Record for this small Variance, but it shall be amended, it being the Misprision of the Clerk. 5 *Rep. 46.* *Cook's Case.*

5. In Debt upon an Escape, the Plaintiff declared, that he had obtained a Judgment in an inferior Court, upon which the Party was taken, and the Sheriff suffered him to escape; the Defendant pleaded *Nul tiel Record*, and being at Issue, the Defendant brought in the Record at the Day, by which it appeared that there were several Variances in the Continuances and Process; but yet, because the Plaintiff, Count, and Judgment certified, did agree with the Plaintiff's Declaration, adjudged, those Variances made no Failure. *Hob. 179.* *Coachman versus Hally.*

6. Upon an Information for Non-residence, the Defendant pleaded another Information exhibited against him 28 *April*, 14 *Jac.* in the Exchequer, for the same Offence; the Plaintiff replied *Nul tiel Record*, upon which they were at Issue; and upon the Record certified, it appeared, that the Information in the Exchequer was exhibited 29 *April*, in the same Year, and it was Right in every other Thing; and thereupon this was adjudged no Failure of the Record. *Hob. 209.* *Parry versus Paris.*

(B) Where

(B)

Where the Tenor, and not the Record it self, is certified.

1. **I**N Affise, the Defendant pleaded, that the Plaintiff was outlawed, the Plaintiff replied *Nul tiel Record*, and being at Issue, the Defendant brought in the Tenor by *Mittimus*; adjudged, this was a Failure of the Record. *Dyer* 187.

2. The Defendant pleaded, that the Plaintiff was outlawed, who replied *Nul tiel Record*, and before the Day in which the Defendant was to bring in the Record, it was removed by Writ of Error, and thereupon he brought in an Exemplification of it, without Writ, or without any Seal, but that of the King's Bench; adjudged, this was a Failure of the Record, and so it had been if it had been reversed upon the Writ of Error, tho' there was such a Record at the Time of the Plea pleaded. *Dyer* 227.

3. Upon *Non damnificatus* pleaded, the Plaintiff replied, that he was damnified by a Judgment had against him upon a Plaint in *London*, the Defendant rejoined *Nul tiel Record*, and being at Issue, the Plaintiff at the Day brought in the Tenor by *Mittimus*; adjudged a Failure of the Record. *Dyer* 187.

4. In an Information against the Defendant for Recusancy, he pleaded, that he was indicted in *Middlesex* for the same Offence; the Plaintiff replied *Nul tiel Record*, and being at Issue, the Defendant took out a *Certiorari* directed to the Justices of the Peace, and at the Day brought in the Tenor of the Record certified by the *Custos Rotulorum* by *Mittimus*; now, tho' this Certificate was void, because it was not made by the Justices of the Peace to whom the *Certiorari* was directed, and by Consequence the Defendant had failed to bring in the Record at the Day; yet because it was the Award of the Court, it was held to be no Failure in the Defendant. *Hob.* 135. *Pie versus Thrill. Antea Certiorari.* (B) 1. S. C.

(C)

Where Nul tiel Record is a good Plea, and where not.

1. **I**N *Audita querela* the Plaintiff set forth, that he was taken in Execution upon a *Capias ut legatum* on an Outlary after Judgment, and that the Sheriff suffered him to escape; the Defendant pleaded, that after the Escape, and before the *Audita querela* brought, the Outlary was reversed for Error, and so *Nul tiel Record*. 8 Rep. 142. In *Dr. Drury's Case*.

Fairs, Markets, &c.

(A)

1. **I**N Trespass, the Defendant justified as *Clerk of the Market*, &c. for a Distress of 3 s. 4 d. for not using Measures marked according to the Standard in the Exchequer; and upon Demurrer to this Plea it was insisted for the Defendant, that this was an Authority which he had by Virtue of the Statute 14 Ed. 3. cap. 12. sect. 2. 1 Salk. 327. *Burdett's Case*.

2. Adjudged upon a Demurrer, that the Inhabitants of one Market-Town may sell Goods in another Market-Town; for that Statute of *Ph. & Mar.* extends only to those who live in Villages, and sell their Goods in Market-Towns. 2 Lev. 89. *Davis versus Leving*.

False Imprisonment.

Against whom, and in what Cases, it | Pleas to this Action, not good. (B)
will lie, and where it will not lie. (A) | Pleas to this Action, good. (C)

(A)

Against whom, and in what Cases it will lie, and where it will not lie.

1. **W** H E R E a Court hath Jurisdiction of a Cause, altho' the Proceedings are *inverso ordine*, yet for an Arrest and Imprisonment, an Action will not lie; as for a *Capias* against an Earl; but where the Court hath no Jurisdiction, then 'tis *coram non Judice*, and the Action lies. 10 Rep. 75. *Case of the Marshalsea*.

2. If an Officer hath a Warrant upon a *Ca. sa.* against a Countess, and he arrests her, an Action of False Imprisonment will not lie, because he is not to examine the Judicial Act of the Court, but to obey; but if the Arrest is upon a feigned Action out of the Counter, in such Case the Action lies. 6 Rep. 56. *Countess of Rutland's Case*. Moor 765. S. C.

3. King Edw. 6. incorporated the Town of *St. Albans*, and gave them Power to make By-Laws; the Term was kept there, and the Mayor, &c. with the Assent of the Plaintiff, who was one of the Burgesses, assessed every Inhabitant in a certain Sum, for the Charges in erecting Courts there, and if any one refused to pay, *that he should be imprisoned*; the Plaintiff refusing to pay, &c. was committed, and in an Action of False Imprisonment brought against the Mayor, he justified under this By-Law; but it was adjudged against him, because it was a By-Law against *Magna Charta*, *quod nullus liber homo imprisonetur*, &c. 5 Rep. 64. *Clerke's Case*.

4. By the Statue 14 H. 8. no Man is to practice Physick in *London*, or within seven Miles thereof, unless allowed by the President and Censors of the College of Physicians, and that there should be *four Censors* every Year, who should punish by Fine, Amerciaments and Imprisonment, for Offences by those who practised *in non bene exequendo, faciendo & utendo facultate medicinæ*. *Dr. Bonham* being a Graduate in *Oxford*, practised Physick in *London*, and being summoned to appear before the President and Censors, he told them, he would practise without their Leave, for which they fined and committed him to the Counter, without Bail; and in an Action of False Imprisonment, adjudged, that they had not pursued their Authority either in the Person's committing, or in the Offence for which they had committed *Dr. Bonham*; because the Censors had only Authority to commit, and here the Commitment was by the President and Censors; and he was committed for saying he would practise without their Leave, when they had only Authority to fine and commit *pro non bene utendo facultate medicinæ*. 8 Rep. 114. *Dr. Bonham's Case*. 2 Brownl.
266.
2 Bull.
130.

5. In an Action of False Imprisonment, the Defendant justified, setting forth, that the Lord Mayor of *London* was a Justice of Peace, and that the Defendant was a Serjeant at Mace, and that the Lord Mayor commanded him *pro diversis causis eidem majori bene cognititis*, to arrest and imprison the Plaintiff, &c. adjudged no good Plea, because it did not appear, whether the Command was, as he was Lord Mayor, or a Justice of Peace, or for what Cause he was imprisoned. 1 Brownl. 204. *Woody's Case*. 2 Cro. 81. S. C. reported by the Name of *Boucher's Case*.

6. In False Imprisonment, the Defendant justified under a Prescription in the *Marshalsea*, to hold Plea of *all Causes within the Verge*, and under a *Capias* returnable at next Court, and because he did not shew *between what Parties*, (for that Court hath only Authority to hold Plea *between Parties of the Household*) and because the *Capias* was not returnable at a Day certain, but only at next Court, adjudged, that the Awarding the Process was ill, and that the Action was well brought. 2 Cro. 314. *Johns versus Smith*. 2 Bullf. 36. S. C. 1 Mod. 81. S. P. Cro. Car. 254. *contra*.

7. In Trespass against the Sheriff for arresting and imprisoning the Plaintiff, he justified, that by Virtue of a *Latitat*, at the Suit of *B. G.* he took the Plaintiff *in exitu ab officio suo*, and left him in Prison to *R. B.* his Successor; the Plaintiff replied, that *B. G.* who sued out the *Latitat*, commanded the Sheriff to discharge him of that Action before the Imprisonment, and released him of that Action, notwithstanding which the Defendant detained him; adjudged, that this Replication is good; for the Sheriff is bound to take Knowledge of the Party, as well in order to discharge the Person at whose Suit he is detained, as he is to arrest him. 2 Cro. 379. *Withers versus Henley*. 1 Roll.
Rep. 342.

8. In False Imprisonment by the Husband, the Defendant justified by a *Ca. fa.* and the Truth was, that before Judgment she married the Plaintiff; adjudged, that the *Capias* shall be against her, and not against her Husband. 2 *Cro.* 323. *Doily versus White.* 2 *Bulst.* 80. S. C.
9. In False Imprisonment, the Defendant justified, for that the Plaintiff brought a little Child to the Parish Church of *R.* and would have left it there without Nourishment, to the Danger of the Child, and *contra pacem*, and that he being Constable arrested and imprisoned the Plaintiff, until he promised to carry the Child back again, &c. and upon Demurrer, this was held an ill Plea, because a Constable cannot imprison a Man at his Pleasure, he ought to have carried him before a Justice of Peace, &c. 1 *Leon.* 327. *Beal versus Carter.* *Poph.* 13. S. C. *contra.*
10. A Man was imprisoned by a Mayor of a Corporation for Misbehaviour, in giving scurrilous Language to him, and this appearing upon the Return of an *Habeas Corpus*, the Party was discharged; for tho' 'tis an Offence, yet the Mayor ought not to imprison a Man in a Dungeon, without Bread to eat, or a Bed to lie on. 2 *Bulst.* 139. *Hodges and Hawkins versus Mayor of Liskirrett.*
11. In False Imprisonment against a Justice of Peace, he justified, for that on 27th of September, 9 *Jac.* a Minister came into the Church of *St. L.* in *R.* to preach, and that the Plaintiff and another, together with the Church-wardens, laid violent Hands on the Minister, and hindered his Preaching, against the Form of the Statute, for which Offence he was brought before him, being a Justice of Peace, and being thereof convicted by sufficient Witnesses, he sent him to Prison; and this was held a good Plea. 2 *Bulst.* 47. *Creswick versus Rokesby.*
12. Sir William Chauncey being committed to the Fleet by a Warrant from the High Commissioners, brought an *Habeas Corpus*, the Return whereof was, (*viz.*) We require you to take into your Custody the Body of Sir William Chauncey, for that he being convented before us for Adultery, and for expelling his Wife from his Company, without allowing her any Maintenance, and being convicted thereof by his own Confession, he was by Order of the Court enjoined to allow his Wife a competent Maintenance, according to his Ability, which he refused, &c. adjudged, that this Court of High Commission being erected by Letters Patents, cannot imprison by Virtue thereof; for the King cannot give any such Power, where they cannot imprison by the Common Law; and for Adultery a Man cannot be imprisoned at Common Law; wherefore Sir William Chauncey was discharged upon Bail. *Pasch.* 9 *Jac.* 2 *Brownl.* 18. *Sir William Chauncey's Case.* 12 *Rep.* 82. S. P.
13. False Imprisonment against a Mayor, who justified, for that he being a Magistrate, the Plaintiff, said he was a Fool; adjudged, that the Plea was ill, for he cannot justify, &c. unless he had called him Fool whilst he was in his Seat, or in the Exercise of his Office; for in such Case, where a Man speaks scandalous Words, either in Contempt of his Authority, or which might disable him to execute his Office (if true) he may commit the Party. *Moor* 247.
14. In False Imprisonment, the Defendant justified, for that he having a Warrant to arrest *J. D.* he (the Defendant) demanded of *Coot* the Plaintiff, what his Name was, who answered, *J. D.* whereupon he arrested him; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Officer is to take Notice of the Right Party at his Peril. *Moor* 457. *Coot versus Lightworth.*
15. A *Ca. fa.* was delivered to the Sheriff, who on the same Day made a Warrant to his Bailiffs to arrest the Party, and on the same Day there was a *Superfedeas* on a Writ of Error, delivered also to the Sheriff, of which the Bailiffs had no Notice, who afterwards arrested the Party, and he escaped, and the Bailiffs having afterwards Notice of the *Superfedeas*, retook him; and thereupon an Action of Trespass and False Imprisonment was brought, and adjudged well brought. *Moor* 677. *Prince versus Allington.* *Superfedeas.* (A) 4. S. C. *Cro. Eliz.* 918. S. C.
16. In False Imprisonment, the Defendant justified, for that he was Sheriff of London, and having taken one *T. S.* he escaped, and being in Pursuit after him in February circa horam nonam, in the Night, he met the Plaintiff, who used him indecently, thrusting him against the Wall, and giving him scurrilous Language, and thereupon he being wandring in the Street, in the Night-Time, and misbehaving himself, the Defendant committed him; and upon a Demurrer to this Plea it was objected, that it was ill, because circa nonam horam was uncertain as to the Time; besides, that was not a Time to be committed for a Night-Walker, it being usual for Men at that Time of Night to be about Business; then the using him uncivilly is too General, and the Thrusting him against the Wall might be by Accident; *Sed per Curiam*, taking it altogether the Justification was good, and the Defendant had Judgment. 1 *Roll. Rep.* 237. *Chune versus Pyott.*
17. Judgment against Baron and Feme, and the Wife being taken in Execution upon a *Ca. fa.* and a *Capi Corpus* being returned by the Sheriff, she was brought to the Bar and committed by the Court, in Execution to the Marshal; but no *Committitur* being entered on the Roll, she brought an Action of False Imprisonment; and because this was a Default in the Clerk, it was moved, that it might be altered and amended; *Sed per Curiam*, there is a Difference where a Man is brought into Court by an *Habeas Corpus*, and by the Return of a *Capi Corpus*; for in the one Case an Entry is made in the Office-Book of the Commitment; but if he is committed upon the Return of a *Capi Corpus*, without an *Habeas Corpus*, then there is a special Entry of his

Commitment made on the Roll; and in the principal Case the Omission was amended. 2 Roll. Rep. 112. *Abington's Case*.

18. Upon the Return of an *Habeas Corpus*, it appeared, that the Party was committed by a Warrant from the Lord Chancellor, for *certain Matters* concerning the King, there to remain till delivered by him; adjudged, that the Return was too general, for it doth not mention the Causes; 'tis likewise incertain how long he might remain in Prison, for it may be during Life, if the Lord Chancellor will not deliver him. 2 Cro. 219. *Addis's Case*. *Chambers's Case*, 5 Car. S.P. *Postea Habeas Corpus*. (D) 8.

19. The Defendant was committed by the Sessions until he should obey an Order for Taking upon himself the Office of *Constable* of such a Place; he denied, that he was an Inhabitant within the Hundred; adjudged, that he ought not to have been committed, but to be indicted, upon his Refusal to take the Office; and if upon the Indictment he was found to be an Inhabitant in the Hundred, he should have been fined, and committed upon Non-payment of the Fine. *Crowly's Case*. Cro. Car. 409.

20. By the Contrivance of B. G. the Daughter of a Gentleman was married to a Plowman, for which he was excommunicated and imprisoned, and being afterwards absolved, he was again committed by the High Commission-Court for the same Offence; adjudged, that this Matter was not examinable in that Court, and so upon a Motion the Party was discharged; and the Court was of Opinion, that an Action of False Imprisonment did lie against the Commissioners. *Godb. 158*. *Peirepoint's Case*. Noy 17. *Williams's Case*. S. P.

21. In False Imprisonment, the Defendant justified by Virtue of a Warrant to the Bailiff to arrest the Plaintiff, and that he was required to assist in doing it, and detaining him till discharged by the Sheriff; and upon Demurrer to this Plea it was objected, that the *Process being executed, it ought to be returned*, otherwise the Justification is not good, which is true in respect to the Sheriff, if the Action had been brought against him, but not in respect to his *Servant*, as the Defendant was. Cro. Car. 322. *Girling's Case*.

22. In an Action of Assault, &c. and False Imprisonment, the Defendant justified, for that the Plaintiff being a common Cheater, played with the Defendant with false Dice, cheated him of his Money; thereupon he *Molliter* laid his Hands upon him, in Order to have him before a Justice of Peace, who, upon his Examination, bound him over to the next Sessions, &c. it was objected, that this Plea was not good, because a Man cannot be detained for an Offence without a proper Officer; but adjudged, that the Plea was good, for a common Cheat may be brought before a Justice of Peace by any one. Cro. Car. 234. *Holiday versus Oxenbridge*.

23. In False Imprisonment, the Defendant justified under a Prescription to have a Court of Record in London, and that he was a Serjeant of the Mace of the said Court, and had a Warrant directed to him to arrest the Plaintiff *pro quodam contemptu*, for not paying 20 s. to B. G. which he did; and upon Demurrer the Plea was held ill, for to imprison a Man *pro quodam contemptu* is too general; 'tis true, the Officer is to obey the Order of the Court, but that is where the Court hath Jurisdiction; and by this Plea it doth not appear that the Court hath any Jurisdiction of the Cause. March 117. *Dye versus Ollive*.

24. *Alderman Langham* was committed to Newgate by the Lord Mayor and Court of Aldermen, who brought his *Habeas Corpus*; and upon the Return it appeared, that there is a Custom in London, if a Freeman he elected Alderman, he ought to take an Oath to serve in that Office; and that if he refuse, he shall be committed till he doth; that *Langham* was a Freeman of the City, and that he was *debito modo* chosen Alderman of such a Ward, and being summoned to the Court, he appeared, and the Oath was tendered to him, which he refused to take, *in contemptum Curiae, & contra consuetudinem, &c.* whereupon he was committed by the Court, &c. it was objected, that a Custom to imprison was not good, because 'tis against *Magna Charta*; but adjudged, that 'tis incident to a Court of Record to imprison, and this being such a Court, they might justify the Imprisonment without a Custom; but *a fortiori*, where there is such a Custom, and especially when that Custom is confirmed by Act of Parliament. March 179. *Alderman Langham's Case*.

25. Upon an Information given to a Justice of Peace, that *Sir William Brounker* cheated with false Dice; the Justice required him to find Sureties for his Good Behaviour, which he refusing, was committed, and afterwards he brought an *Habeas Corpus*, and this Matter appearing upon the Return, adjudged, that a Justice of the Peace cannot bind one to the Good Behaviour upon such a general Information, nor commit, if in such Case he refuses to find Sureties. Style 16. *Sir William Brounker's Case*.

26. Commission of Rebellion against *Thurbane*, but one *Green* appeared before the Commissioners, and affirmed himself to be *Thurbane*; whereupon he was apprehended, and in resisting, he snatched the Commission from them, and tore it into Pieces; and upon an *Affidavit* made of this Matter, an Attachment was granted against him: But *per Hule Chief Baron*, tho' he affirmed himself to be the Person against whom the Commission was awarded, yet that will not excuse the Commissioners from False Imprisonment, because they had no warrant to take him. Hardres 323. *Thurbane's Case*.

27. False Imprisonment against the Defendant, who was a Gaoler within a Franchise, for that the Plaintiff was arrested by his Deputy *out of the Franchise*, and brought to the Defendant, who received him into the Gaol, and there detained him; 'tis true, the Plaintiff had Judgment, but it was reversed, because it did not appear that the Defendant did know that the Plaintiff was arrested *out of the Franchise*; and if so, then he was not privy to the Wrong; therefore it would be

unreasonable to punish him with an Action for doing his Duty, *Olliot versus Bessy. Raym. 421.* See Action on the Case, (V) Where it was adjudged, that an Action would not lie against a Judge or Officer, for proceeding upon a Plaint levied in an inferior Court against the Plaintiff, tho' the Cause of Action did arise *extra jurisdictionem*: See Cases, where one Man must answer for the Acts of another, (*viz.*) *Weaver versus Ward*, *Coot versus Lightworth*, *Withers versus Henley*, and *Prince versus Allington*.

28. The Defendant was arrested on a Sunday, and he moved the Court to be discharged, but it was denied, and he was directed to bring his Action of False Imprisonment. 5 *Mod. 95. Wilson versus Guttery.*

(B)

Pleas to that Action, not good.

1. **I**N False Imprisonment the Defendant pleaded, that London had a Court of Record by Prescription, which was confirmed by Act of Parliament, and that he was Serjeant at Mace of that Court, and that a Warrant was directed to him out of that Court to arrest the Plaintiff, for a certain Contempt committed by him to the Court, in not paying 20 s. to B. B. by Virtue of which Warrant he did arrest the Plaintiff, &c. and upon Demurrer it was adjudged, that the Plea was too general, and very incertain, for the Defendant ought to shew *what the Contempt was*, and in what Action, that it might appear they had a Jurisdiction of the Cause; and as it is hard to punish an Officer for obeying, when the Court have a Jurisdiction, so it would be unreasonable, that he should go unpunished for acting where they have none; and in this Case it doth not appear that the Court had a Jurisdiction. *March 117. Dive versus Olive.*

2. In False Imprisonment, the Defendant justified, that York was a City by Prescription, incorporated by the Name of Mayor, &c. and that they had, Time out of Mind, a Court, called a Court of Chancery, for all Causes of Equity arising in the City, between the Citizens, &c. and that the Mayor had always used to direct Precepts for Appearance, and to imprison for a Contempt of his Orders, and that a Bill was exhibited against the Defendant, who being summoned, did appear, but refused to answer; thereupon an Order was made against him, that he should answer or stand committed, and because he still refused to answer, the Mayor commanded the Defendant, who was Serjeant at Mace, to arrest him, which was done, and he was brought into Court, where he was in open Court committed, and so justified, &c. and upon Demurrer to this Plea it was adjudged ill, because the Prescription being laid for the Mayor to direct Precepts for Appearance, those must be supposed to be in Writing, but the Precept to the Defendant to arrest the Plaintiff was by Word only, so that the Justification is vitious, tho' the Commitment in Court was good; besides, the Plea is ill in Substance, because a Court of Equity did not lie in Grant, and much less in Prescription, as here it is alledged, it being a Jurisdiction to be derived from the Crown; for it hath been resolved by all the Judges, that the King could not grant to the Queen to hold a Court of Equity, and that the Courts of Chancery in Chester and Durham are Incidents to a County Palatine which had *Jura Regalia.* *Hob. 63. Martin versus Keys.*

3. In Trespass and False Imprisonment for such a Time, *quousq;* the Plaintiff paid 11 s. the Defendant justified under the Statute 3 Jac. 1. cap. 15. for erecting a Court of Conscience in London, and that on such a Day the Plaintiff was summoned to appear, &c. and he not appearing, the Court did Order, that he should be imprisoned in the Counter until he paid 7 s. being the Debt, and 2 s. 6 d. for Costs, by Virtue of which Order, the Defendant being an Officer, took him, and detained him six Hours; and upon Demurrer to this Plea, it was objected, that it was ill, because the Defendant did not answer the Detaining, &c. *quousq;* the Plaintiff paid 11 s. but as to that, it was adjudged, that the Plea was good, for the *Quousq;* is not the Cause of Action, but only Matter of Aggravation; and if the Defendant had detained the Plaintiff for more than 9 s. 6 d. then he ought to have replied to it, which he had not done; but the Plea was adjudged ill, because the Order was to carry the Plaintiff to the Counter, and the Defendant did not shew, that he detained him six Hours in the Counter, or in carrying him thither; and this differs from the Case of a common Arrest, for in such Case the Officer may make any Place his Prison, because the Writ commands, that *Habeat Corpus ejus coram, &c. apud Westm'*, which is a general Authority, and 'tis sufficient, if he have him at the Return of the Writ; but in the Principal Case 'tis a special Authority to carry him to the Counter. 1 *Salk. 401. Swinsted versus Liddall.*

4. In Trespass, Assault, Battery, and False Imprisonment, &c. and detaining the Plaintiff in Prison, until he paid ten Pounds; the Defendants, as to all, besides the Assault, Battery, and False Imprisonment, plead Not guilty; and as to the Assault, &c. they justify by Virtue of a Warrant, upon an Attachment of Privilege, setting forth, that the Plaintiff was arrested and imprisoned by the Defendant Holmes, and that the other Defendant, who was called to his Assistance, *molliter manus imposuit* on the Plaintiff, lest he should Escape, *quæ est eadem transgressio, absq; hoc*, that they were guilty of any Assault, &c. before the Warrant delivered, or after the Return of the Attachment; and upon Demurrer to this Plea it was objected, that the Defendants had not answered the Detaining the Plaintiff until he paid ten Pounds; this seemed a material Exception. 2 *Lutw. 919. Fowler versus Holmes & al'. See Trespass. (K) 38. S. P.*

See Evelyn v. Slowly.
See Moor 704.
2 Saund.
5.
1 Sid. 472.

(C)

Pleas to this Action, good.

1. **I**N False Imprisonment, the Defendant justified, for that a Writ *de Vi laica amovenda* issued to the Sheriff of, &c. to remove the Force, &c. who came to the House, and the Defendant came to his Assistance, and there they found the Plaintiff in the said House *ad pacem Domini Regis disturband' & eos resistentem*, &c. and upon Demurrer to this Plea it was objected, that this Justification was ill, because the Writ is *Si aliquos in ea parte resistentes inveneritis*, and the Defendant doth not say that there were any in *ea parte* resisting, but only *one*; neither did he set forth, that there was *Vis Laica* or *Armata potestas* in the House: *Sed per Curiam*, the Justification is good, for the Words *in ea parte* must be necessarily intended, that when they came to the House to remove the Force, and the Plaintiff resisted them, it follows, that he resisted them in removing the Force. 2 Roll. Rep. 177. Parson Clossé's Case.

False Judgment.

See Court-Baron. Error. (G) 35.

(A)

1. **I**N a Writ of False Judgment, if the Plaintiff assign Errors, he shall not say, *In hoc erratum est*, but the Form is thus, *Unde queritur diversimodo sibi falsum judicium factum fuisse, judicium, (viz.) in hoc, &c.* Moor 73.

2. In Trespas, the Defendant justified under a Precept in the Hundred-Court, &c. for that the Plaintiff was nonsuit, and *Costs taxed*, and a Precept to levy it; and upon a Demurrer it was objected, that there is no Statute gives Costs in this Case, but the Statutes 23 H. 8. and 4 Jac. 1. and those are where the Plaintiff is nonsuit *after Appearance*; and 'tis not mentioned throughout the Pleadings, that there was any Appearance; but adjudged, that the Judgment shall be taken to be good till reversed by Writ of False Judgment, and the Plaintiff shall not take Advantage of it in Pleading. 2 Lev. 81. Doe versus Parmiter. See Traverse. (C) 10. S. C.

3. Trespas *quare Vi & Armis*, the Defendant assaulted him; the Action was brought in the County-Court, and the Plaintiff had Judgment, but it was reversed in C. B. upon a Writ of False Judgment, because the County-Court cannot Fine the Defendant as he ought to be, if the Cause goes against him, the Words *Vi & Armis* being in the Declaration; but without those Words Trespas will lie in the Court, tho' 'tis not a Court of Record. 1 Mod. 215. Wing versus Jackson.

4. Trespas, &c. in an inferior Court by an Infant, upon Not guilty pleaded there was a Verdict for the Plaintiff; and upon a *Recordare facias loquelam* to remove the Record into the Court at Westminster, these Errors were assigned, (*viz.*) that the Plaintiff being an Infant, had declared, but not *per proximum Amicum*, as he ought, and in the *Venire facias* it was *Scire* for *Sciri*, and then it was, that Twelve of the Jury *qui ad Veritatem per Curiam electi, triar' & jurat' existen'*, gave their Verdict for the Plaintiff, when the Jury could not be *triar' per Curiam*, for they are to be tried by the *Triers*, and for these Reasons the Judgment was reversed. 2 Lutw. 954. Wilson versus Leathat.

5. Judgment for the Plaintiff in an inferior Court, in an *Indebitatus Assumpsit* and *Quantum meruit*, the Defendant brought a Writ of False Judgment, and assigned for Error, that 'tis not mentioned in the Plaint what Damages the Plaintiff had sustained; and there being several other Errors assigned, the Plaintiff pleaded, that the Judgment was not falsely given, and that the Court ought not to proceed to examine Errors, because it appeared in the Plaint what Damages the Plaintiff had sustained, and so he answers all the other Errors assigned, and that there was a *Variance* between the Plaint returned upon the Writ of *Recordare*, and that upon which the Judgment was given; and traverses, that any of the Errors assigned were contained in that Plaint, *Et hoc paratus est verificare unde petit judicium*.

This Plea is grounded upon the Statute 1 Ed. 3. cap. 4. by which 'tis enacted, that when a Record is removed into B. R. by a Writ of False Judgment, and the Party alledgeth a Variance between the Record removed and that on which the Judgment was given, the Trial shall be by those who were present in Court when the Record was made up. 2 Lutw. 957. Butterfeild versus Sutton.

False Latin.

(A)

Where it will not vitiate a Declaration, Plea, Indictment, &c. Bond, &c. See *Amendment*. (A) 23, 24. *Bonds*. (C) 3.

1. **F**alse Latin will not vitiate a Plea or Grant, as it was held in *Osborne's Case*. 10 *Rep.* 133. *a.* it will not vitiate an Indictment, as it was held in *Long's Case*, which was an Indictment for Murder, where the Word *Mamilla* was spelled with a single *m.* 5 *Rep.* it will not vitiate a Writ, as where *Quod ei deforciat* was brought against two *Tenants*, and it was *quod ei reddat* in the singular Number. 2 *Saund.* 38. *Cro. Eliz.* 543. *S. P.* so in a Declaration by the *Sheriffs of London* against the Defendant *quod reddat ei* in the singular Number. *Hob.* 70. *Cro. Eliz.* 877. *S. P.*

2. Debt against the Defendant brought by the *Sheriffs of London*, the Declaration was, (*viz.*) *Queruntur de N. B. in Medicinis Doctor alias dict' N. B. in Medicinis Doctorem*; and upon Demurrer to this Declaration, the Defendant had Judgment in *B. R.* but it was reversed upon a Writ of Error in the Exchequer, upon the Authorities above-mentioned. 1 *Lutw.* 884. *Raymond & al' versus Barton.*

3. In Trespas against two Defendants, for Taking a Hogshead of Cyder, the Defendants *ven' & defend' vim, &c. & dicunt quod ipse compelli non debet, &c.* and so plead in Abatement, that the Plaintiff is outlawed; and upon Demurrer it was objected against the Plea, for the False Latin, (*viz.*) *Quod ipse*, when there were two Defendants; and this was held a good Exception, the Plaintiff having demurred specially, and shewed it for Cause; and that it would have been ill upon a general Demurrer. 2 *Lutw.* 1529. *Ford versus Edgcomb & al'.*

4. In an Appeal of Murder, the Declaration was, that at *Clapham* in the County of *Surrey*, *Venerunt præd' Johannes & quidem Daniel Stokely modo defunct'*; and upon Demurrer it was adjudged, that admitting this Word *Quidem* made the Sentence False Latin, yet it would not abate the Bill, for it did not at Common Law. 1 *Sulk.* 328. *Bennett versus Preston.* See 5 *Rep.* 121. *Long's Case*, and 10 *Rep.* 133.

5. On a Writ of Error brought, it was assigned for Error, that the Verdict was *affident damna*, instead of *Affidunt*, but it was held well enough, for it may be the present Tense of the Verb *Affideo*, and there is not so much Strictness required in Verdicts as in Pleading, because those are the Words of a *Lay Jury*. 1 *Sulk.* 328. *Redwood versus Coward.*

Falsifying a Recovery.

See *Infant*. (A) 21.

(A)

1 And.
282. S. C.
Moor
154.
4 Leon.
150. By
the Name
of Hunt v.
Gately.

1. **T**enant in Tail, Remainder in Tail, he in Remainder granted a Rent-charge out of the Land, then the Tenant in Tail suffered a Common Recovery, and sold the Estate, and died without Issue; the Grantee of the Rent-charge distrained, and the Alienee of the Tenant in Tail replevied; adjudged, that this Recovery barred all the Remainders, and all Charges made by them, and likewise all those in the Reversion, and that the Grantee of the Rent shall never falsify this Recovery; because the Remainder out of which his Estate is derived can never come in Possession after the Recovery suffered. 1 *Rep.* 61. *Capell's Case.*

2. Husband and Wife *Jointenants* of Lands, Remainder to the Heirs of the Body of the Husband, Remainder to *H. Norris* in Tail; the Husband suffered a Common Recovery *alone* of the Whole, without naming his Wife, as he ought; *H. Norris* was attainted of Treason, and executed; the Husband died without Issue; the Queen restored the Son of *H. Norris*, and granted him the Lands which she had by the Attainder; adjudged, that tho' the Recovery was erroneous, yet so long as it was in Force, it was a good Bar against him in Remainder as to a Moiety, but as to the other Moiety, it may be falsified by the Issue in Tail. Three Resolutions in the *Marquess of Winchester's Case*. 3 *Rep.* 1.

3. Tenant for Life, Remainder in Tail, Reversion in Fee to the Heirs of the Devisor: Tenant for Life suffers a Common Recovery, in which he in Remainder was vouched, and the Uses were declared to him, who was the Remainder in Tail; adjudged, that by this Recovery all Remainders and Reversions were barred, for no Statute made any Provisions for those who had Remainders or Reversions upon an *Estate-Tail*, and therefore they could not falsify this Recovery; the Statute of *Westm. 2. cap. 3.* provides for him, who hath a Reversion *after Possibility of Issue extinct*, and the Stat. 32 *H. 8. cap. 31.* for those who have Reversions or Remainders after an *Estate for Life.* 10 *Rep. 43. Jenning's Case.*

4. An Infant brought an Assise in *B. R.* pending which Action the Tenant brought an Assise against the Infant in the *C. P.* for the same Lands, and had Judgment by Default, which he pleaded in Bar to the Assise brought by the Infant, who set forth all this Matter in his Replication, and that the Demandant, at the Time of the second Writ brought, was Tenant of the Land, and prayed, that he might falsify this Recovery; and adjudged he might. *Godb. 271. Plott's Case*; because he could not have a Writ of Error or Attaint. See *Infant. (A) 21. S. C.*

5. He in Reversion suffered a Common Recovery, and declared the Uses; adjudged, that his Heir shall not falsify it by Pleading, that his Father had nothing at the Time of the Recovery suffered, because he is estopped to say, that he was not Tenant to the *Præcipe.* *Godb. 189. Duke versus Smith.* 4 *Leon. 253.*

6. Tenant for Life, Remainder in Tail, join in a Lease for Years to on *Briscoe*; afterwards, in the Life-time of the Tenant for Life, the Tenant in Tail suffered a Common Recovery, and then the Recoverors turned the Lessee for Years out of Possession, and made a *Feoffment in Fee to Lincoln College in Oxon*; then the Son and Heir of the Tenant in Tail, in the Life-time of his Father, released to the College with *Warranty*; the Lessee for Years re-entered, then both the Tenant for Life and Tenant-tail died, and the Issue in Tail made a Distress on the Cattle of the Lessee Damage-feasant, who brought a Replevin; and adjudged, that the Taking the Cattle was not wrongful, because the Issue in Tail was not barred by the Recovery; 'tis true, where there is a Tenant for Life, and he in Remainder in Tail suffers a Recovery in the Life time of the Tenant for Life, he is estopped to say, that he had nothing in the *Freehold*, and the Heir is liable to this Estoppel, as well as he is inheritable to the Land; and the Reason why they are both bound by Estoppel is, because the Father, who suffered this Recovery, is supposed to have a real Recompence in Value from the Common Vouchee, but here he had no real Recompence, but only in Estoppel, and tho' he himself was estopped, yet, by the Re-entry of the Lessee for Years, the Estate for Life, and the Remainder, was again reduced to the same Tenant in Tail; but because neither the Remainder in Tail, nor his Son and Heir, had any Thing in Interest, when the Release was given to the College, therefore that Release should not enure to that Body of Men, nor the Warranty; for 'tis the Nature of a Warranty to keep one out of Possession who never had it, and therefore it ought to be made to one who is in Possession; and because the Tenant in Tail in this Case was never out of Possession, in Interest, but only in Estoppel, neither the Release or Warranty shall discontinue the Tail; so that the Issue in Tail is not barred by this Recovery, but he may falsify it in a possessory Action, as this is. *Moor 245. Briscoe versus Chamberlaine.*

7. Tenant in Tail made a Feoffment in Fee to his own Son, who was then of full Age, and afterwards he disseised him, and then levied a Fine, but before the last Proclamation the Son entered, and made a Feoffment, then all the Proclamations were made, and afterwards both the Father and Son died; then the Feoffee of the Son made a Lease to *W. R.* and died seised, and the Issue of the Tenant in Tail brought a *Formedon* against the Heir of the said Feoffee, who was in by Descent, and recovered against him by a feint Defence of his Title, and then he turned the Lessee for Years out of Possession, who thereupon brought an Ejectment; adjudged, that he might falsify the Recovery had by the Issue in Tail, because the Estate-Tail was bound by this Fine; but because it appeared by the Pleading, that the Fine was levied by the Father to that very Person, to whom the Feoffee of the Son had granted this Lease for Years, and who was now Plaintiff, and it not being averred to be levied to any other Use, therefore his Lease was extinguished, and he was incapable to falsify the Recovery obtained by the Tenant in Tail. *Moor 391. King versus Hunt.*

Fees.

(A)

Of Actions for Fees by Attornies, Registers, Proctors, Commissioners, &c.

1. **R**ULED that no Rule ought to be made to refer an Attorney's Bill to be examined by the Master, unless there is an Action depending for his Fees. 1 Salk. 332. *Springate versus Springate*.

2. *Quantum meruit* against the Defendant, for that at his Request, the Plaintiff had served him as a Commissioner in a certain Commission, out of the Exchequer, to examine Witnesses: Upon *Non assumpsit* pleaded, the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that a Promise of a Reward could not be made to one who acted by Commission of the Court; but adjudged, that he acts by such Commission, yet he is appointed at the Nomination of the Defendant, and therefore he ought to pay him for his Service. 1 Salk. 330. *Stockhold versus Callington*.

3. Prohibition was granted to an Ecclesiastical Court, where the Libel was for Fees, because no Court has Power to establish Fees; 'tis true, the Judge of the Court may think them reasonable, but that is not binding; but if the Plaintiff bring a *Quantum meruit* for Fees, and the Jury find for him, then they become established Fees. 1 Salk. 333. *Gifford's Case*.

4. Libel by the Register of an Ecclesiastical Court for 4 s. 6 d. Fees; the Plaintiff proceeded to Excommunication, then the Defendant came in and suggested, that the Office of a Register was a Temporal Office, in which he had a Freehold; and upon a Motion for a Prohibition, it was granted, for those Courts have no Power to compel Men to pay Fees to their Officers, they must bring a *Quantum meruit*; 'tis so for *Proctors Fees, because there is a Remedy at Common Law upon the Retainer. 1 Salk. 333. *Ballard versus Gerrard*.

* 4 Mod.
234.
Johnson
v. Oren-
den. S. P.

fees. See Attorney. (F) Indictment (N) per totum.

Fee-simple in Wills.

By the Word Heirs, (A)

By Words Paying and Purchase, and by
a Devise of the Profits of the Lands.
(B)

By a Devise of his Estate, and by a De-
vise of his Inheritance. (C)

By the Words, To give, or sell at his
Will or Pleasure. (D)

(A)

By the Word Heirs. See Executory Devise. (A) 18. Heir. (D) per totum.

7 Rep.
41. S. C.
Moor
4:4. S. C.

1. **T**IS generally true, that the Word *Heirs* makes a Fee-simple both in Wills and Deeds, and so doth the Words *Heirs Males*; as where the Testator devised his Lands to *T. P.* and *his Heirs Males begotten*, this was adjudged a Fee-simple, and not an Estate-Tail, because the Word *Body*, from whom those Heirs Males should come, was left out; but if it had been to *the Heirs Males of T. P.* it had been an Estate-Tail, for tho' the Word *Body* is likewise left out in that Clause, yet it must be intended of the Body of *T. P.* for 'tis expressly limited to the Heirs Males of *him*, (*i. e.*) of his Body; this is the express Text of *Littleton*, and my Lord, in his Comment upon it, that in Wills the Law shall supply the Word *Body*. *Cro. Eliz.* 478. *Abraham versus Trigg*. *Litt S. E.* 31.

2. The Testator being seised of Lands in Fee, and having Issue three Sons, (*viz.*) *William* his eldest Son, by one Venter, and *James* and *Francis* by another Venter, devised his said Lands to *James* and *Francis*, (but without limiting for what Estate) and that if either of them, or *their Heirs*, shall sell the same, then the Devise shall be void, and it shall return to the *Whole Heirs* again;

again; and in another Clause he appointed *James and Francis* to pay to *William and his Heirs* 3 *l.* &c. The Father died, and afterwards *James and Francis* died without Issue; adjudged, that the Lands shall go to their Heir at Law, and not to *William*, who was the eldest Son of the Half-Blood, because they had a Fee simple by this Devise, which was created by those Words, (*viz.*) If either of them, or their Heirs, shall sell, &c. Likewise by the Reservation of an Annuity of 3 *l.* payable to *William and his Heirs*; and there are no Words in this Will which can create an Estate-Tail, except where 'tis devised to return to the *Whole Heirs*; which Words are void, because they come after a Limitation of an absolute Fee-simple before. *Cro. Eliz.* 744. *Shauland verſus Barker.*

3. Adjudged, that these Words in a Will, (*viz.*) *I Release all my Lands, &c. to T. S. and his Heirs*, make a good Estate in Fee, to *T. S.* and his Heirs. 1 *And.* 33.

4. The Testator devised Land to *T. P.* for Life, and after his Decease to the Heir of his Body for ever; here the Word *Heir* was in the singular Number, yet 'tis *nomen collectivum*, and the same with *Heirs* in the plural Number; and so *T. P.* hath a Fee-simple executed in him, and his Heirs shall take by Descent, and not be Purchase. 1 *Roll. Abr.* 253. *Pawſey verſus Lowdall.* *Style* 273. *S. C.* Descent. (A) 13. *S. C.*

5. The Testator appointed *T. P.* to be Heir to his Lands; adjudged he shall have it in Fee-simple, because the Testator having a Fee-simple in it himself, the Devisee shall have as great an Estate; so 'tis if he had appointed him to be his Heir, without mentioning to his Lands; and if the Words had been written in improper English, as *ſole Ayre*, and *Texecutor*, yet the Devise had been good. *Style* 301, 307, 319. *Taylor verſus Webb.*

6. But there may be a Case where the Word *Heir* doth not import a Fee-simple; as if the Testator should devise some Lands to *T. P.* and other Lands to *W. C.* and doth not mention what Estate either of them shall have; but afterwards these Words are added, (*viz.*) *If either of them die, then one shall be the other's Heir*, without saying to what Land; in this Case the Survivor shall have only an Estate for Life, because the Person who was dead, had only an Estate for Life by Implication.

(B)

By the Word Paying and Purchase, and by a Devise of the Profits of his Lands.

1. THE Law allows many Words and Expressions in Wills, to pass an Estate in Fee-simple, which will not pass such an Estate in Deeds; and first, as to the Word *Paying*, this generally makes a Fee-simple in Wills, unless where the Money is to be paid out of the *Rents and Profits* of the Lands or Tenements devised; for in such Case the Devisee hath only an Estate for Life, because he can have no Manner of Loss by such Payment, the Money being appointed to be raised out of the Profits, before 'tis to be paid; but where there is a Probability, that the Devisee may be a Loser by the Payment, there it makes a Fee-simple; as for Instance, where the Devisee may die after the Payment made, and before he can have any Satisfaction for the Sum which he hath paid, the Law in such Case makes it a Fee-simple, because it intends, that the Devise was for his Benefit, and not to his Disadvantage. *Cro. Eliz.* 378. *Walker verſus Collier.* 6 *Rep.* 16. *a. S. C.* by the Name of * *Walker's Case.* 2 *Cro.* 527. *S. P.* *Godb.* 280. *Spicer verſus Spicer.* *S. P.* 2 *Cro.* 527. *S. C.* 2 *Roll. Rep.* 80. *S. C.*

* 1 Bull.
75.
Moor
152. 852.
Palm.
392.

2. But where after the Word *Paying* the Estate is expressly limited over to another, there it will not make a Fee-simple; as for Instance, the Father devised several Lands to his two Sons respectively, but did not say for what Estate, only *Paying* to each of his Daughters 10 *l.* a-piece, as soon as his said Sons should respectively enter on their Parts; Provided, that if either of them marry, and have Issue, and die before he enter on his Part, then that Part shall remain to the Heirs of his Body, and not to the surviving Brother: Now here being a farther Limitation of the Estate after the *Paying*, it shews, that the Testator intended, that the Son who entered on his Part, should have only an Estate for Life, and that the Payment of 10 *l.* a-piece to the Daughters, shall be intended only for that Estate devised to the Son. *Cro. Eliz.* 497. *Bacon verſus Hill.* *Moor* 464. *S. C.*

3. Devise of the Profits of the Lands to his eldest Son, till the youngest Son should come of Age, and then to his said youngest Son in Tail; adjudged, that by this Devise the eldest Son had a Fee-simple in the Lands till his Brother came of Age. 3 *Leon.* 78, and 216. *Gates verſus Holliwell.*

4. In Affise, &c. the Case upon the Evidence was, the Testator being seised in Fee, made his Will, reciting, that he was indebted to *T. S.* in 100 *l.* and that in Consideration the said *T. S.* would release to his Executors the aforesaid Sum, he devised his Lands to the said *T. S.* without saying for what Estate; adjudged, that *T. S.* had a Fee-simple by this Devise; so if it had been by Deed, (*viz.*) if a Man in Consideration of so much Money, sell his Lands to *T. S.* without saying *Habendum* to *T. S.* and his Heirs, yet by this Sale, and for such a Consideration, the Fee-simple passes. 1 *And.* 35. *Brian verſus Baldwin.*

1 Roll. 5. Devise of Lands to *T. P.* for Life, Remainder to *W. C.* and his Heirs, *paying 10 l. out of*
 Rep. 136. *the Issues and Profits*, &c. the Remainder Man died, leaving his Heir within Age, and in the
 198. Life-Time of *T. P.* who was the Tenant for Life in Being, and afterwards it was found by
 3 Bullt. Office, that the Lands were held of the King *in Capite*, and thereupon they were seised during
 58. the Infancy of this Heir; afterwards, when he came of Age he entered, and adjudged, that he
 had a good Title; for the Money being to be paid out of the *Issues and Profits*, it must be in-
 tended when he shall receive it, and hitherto the King received the Whole. 2 Cro. 374. *Slide versus*
Thompson.

6. The Husband devised Lands to his Wife for Life, Remainder to his eldest Son, *Paying* to
 his Brothers and Sisters 40 s. a-piece; now, tho' here was no express Estate devised to the eldest
 Son, but only to him generally, *Paying* so much; yet, tho' the Sums to be paid were of no greater
 Value than 40 s. this makes an Estate in Fee by Way of *Limitation*, and that in Default of Pay-
 ment it shall go to the next in Remainder; it cannot be a *Condition*, because if the Money is not
 paid by the Son, he himself would take Advantage of it, because the Lands descend on him, and
 so the Money would never be paid. Cro. Eliz. 204. *Wellock versus Hammond.* 3 Rep. 20. S. C.
See Remainder. (F) 1.

1 Roll. 7. The Father devised Lands to his Son after the Death of his Mother, and if his Daughter sur-
 Rep. 398. vive his said Son, and his Heirs, then to her for Life, and afterwards to *Roger and John*, *paying*
 436. S. C. yearly to the Company of *Merchant-Tailors* 6 l. 16 s. and if the said *Roger and John*, or their
 2 Cro. Successors, deny Payment thereof, then the Company to enter; adjudged, this was an Estate in
 415. S. C. Fee in *Roger and John*, by Reason of the Word *Paying*; and that 'tis not material of what yearly
 Bridgm. Value the Lands are above the Sum to be paid, because the very Payment of any Money makes an
 84. S. C. Estate in Fee in the Legatee; and in this Case the Word *Successors* shall be taken for Heirs. *Moor*
 3 Bullt. 852. *Webb versus Herring.* 2 Mod. 25. *Read versus Hutton.* S. P.
 193. S. C.

Hob. 65. 8. The Testator devised Lands to his eldest Son for Life, and afterwards to his youngest Son,
 S. C. *paying* to his Sisters 10 l. a-piece, except the eldest Son purchase Lands of as good Value for the
 youngest Son, and then the Eldest to have the Lands so devised to the Youngest, *to sell at his Will*
and Pleasure; adjudged, this was a Fee-simple in the youngest Son. 2 Cro. 599. *Green versus*
Dewell.

9. The Case last mentioned is likewise reported by my Lord *Hobart*, by the Name of *Green*
versus Armsted. ff. The Testator had one Son named *William*, who had issue *Robert and Thomas*,
 and being seised of Lands in *Clay*, he devised the same to *William* for Life, then to remain to
Thomas, except *William* purchase other Lands, and so good in Value (but 'tis not said of yearly
 Value) as the Lands in *Clay*, for his Son *Thomas*, and then *William* shall sell those Lands in *Clay*
as his own, and *Thomas* shall pay to his Sisters 10 l. a Year; adjudged, that *William* had a Fee-
 simple; 'tis true, by the first Part of the Will he had an express Estate for Life, but the Word *Pur-*
chase imports an absolute Purchase of an Estate in Fee, (tho' a Man may likewise Purchase for Life
 or for Years) and the subsequent Words *So good in Value*, must be intended in the Money paid
 for the Purchase, and not of the yearly Value; and *William* must have a Fee-simple in the Lands
 at *Clay*, for otherwise he could not sell them as his own. Hob. 65. *Green versus Armsted.* 2 Cro.
 599. S. C. 1 Roll. Abr. 833. S. C.

10. There is a Case where the Word *Paying* was left out of the Will, and yet it was under-
 stood in Order to make a Fee-simple, as where the Husband devised his Lands to his Wife for
 Life, and that after her Decease, *Robert*, his eldest Son, should have them *ten Pounds under the*
Price they cost; and if he die without Issue of his Body lawfully begotten, then in like Manner to
Richard, &c. the Court inclined to this Opinion, that the Words *Ten Pounds under the Price*,
 &c. signify, that *Robert* should have the Lands, *Paying ten Pounds under the Price*, which makes
 a Fee simple determinable upon the Non-payment of the Money, tho' the Words which imme-
 diately follow make an Estate-tail. *Moor* 361. *Bullen's Case.* Goldf. 134. S. C.

2 Lev. 11. The Testator devised several Legacies to be paid out of his Lands, in such Case, if the
 249. Profits will not amount to pay those Legacies at the Time limited by the Will for the Payment
 thereof; 'tis a Devise of the Land it self in Fee simple, as for Instance, the Testator was seised of
 the Reversion in Fee, after the Determination of an Estate for Life of Lands of the yearly Value of
 34 l. and had only a Rent of 40 s. per Annum reserved to himself out of those Lands; and being so
 seised, he devised several Legacies to several Persons, amounting in the Whole to 97 l. to be paid
 out of his Lands, within a Year after his Death, and he devised the said Lands to *T. P.* without
 limiting for what Estate, and afterwards died; the Question was, what Estate *T. P.* had in these
 Lands; it was objected, that he had an Estate only for Life, because the Charge of Payment of
 these Legacies was not on his Person, but out of the Profits of the Lands; but adjudged, that he
 had a Fee simple, because the Profits of the Lands would not amount to the Sum of 97 l. in the
 Time wherein the Legacies were appointed to be paid by the Will, if the Testator had then been
 in the actual Possession of the whole Estate; therefore the Payment thereof, before the Devisee
 could have any Satisfaction made out of the Profits, was a certain Loss to him, and by Consequence
 he had an Estate in Fee; and it was not conditional, for if it had, the Heir might have entered
 for Non-performance. *T. Jones* 113. *Freak versus Lee.*

Postea (D) pl. 7. 12. The Father being seised in Fee, devised the Lands which he purchased of *A.* to his Son
 * Per Cu- *John*, and the Lands which he purchased of *B.* to his Son *James*, upon Condition, that he al-
 riam, he low to his Brother *Nicholas*, Meat, Drink, Clothes, and Lodging during his Life; there was no
 badenly an Estate for Life.

other Provision made for *Nicholas*, and the Lands devised to *James* were 20 *l. per Annum*; *James* performed the Condition, and died, and *Nicholas* survived; the Question was, what Estate *James* had: *Et per Curiam*, he had a Fee-simple by this Devise, because it came to him with an immediate Charge, before he could receive any Thing out of the Profits, tho' it was objected, that the Word *Allow*, implies it should be out of the Profits. *T. Jones* 107. *Lee* versus *Withers*. See An-
fley v. Chap-
man.

13. The Testator devised all the *Rents and Profits* of his Lands to *S. B.* the Wife of *W. B.* during her natural Life, *To be paid by his Executors* into her own Hands, without the Intermeddling of her Husband; adjudged, that by the Devise of the *Rents and Profits*, the Land it self passeth; and two Judges against the Opinion of the Chief Justice *Holt* held, that the Words *To be paid by the Executors into her own Hands*, did not restrain the first Words of Devise of the *Rents and Profits*. 1 *Salk.* 228. *South* versus *Allen*. 5 *Mod.* 101. *S. C.*

14. The Testator being seised in Fee, devised his Lands to his Son *George*, and his Heirs, and if *George* should die before he was twenty-one, and without Heirs of his Body, Remainder over; the Testator died, *George* entered and devised the Lands to his three Daughters equally, and an Annuity of 5 *l. per Annum* to his Wife, and died; the Question was, whether *George* could charge these Lands with this Annuity, and that depended on another Question, (*viz.*) what Estate *George* had by the Will of his Father; it was insisted, that he had a Fee-simple, for by the first Clause he had an Estate in Fee expressly devised to him; and as to the subsequent Words, (*viz.*) *If he die before twenty-one, and without Issue*, those are not Words of Limitation of the Estate, but qualify it with a collateral Determination upon such Contingencies, (*viz.*) that his Estate in Fee shall not determine, unless he die within Age, and without Issue: The Case was not adjudged. *Hardres* 148. *Hall* versus *Deering*.

15. The Testator being seised in Fee, devised the Lands to his Wife for Life, and if she had a Son, and she should cause him to be called by the Christian and Surname of the Testator, then he devised his Inheritances to him after his Mother's Life; and if he die before twenty-one Years old, then after the Life of his Wife, to his own right Heirs; the Testator died, his Widow married one *Broughton*, then the Brother and Heir of the Testator conveyed the Reversion by Bargain and Sale, and Fine, to *Broughton* and his Wife, and their Heirs; afterwards a Son was born, who was baptised by the Christian and Surname of the Testator; then *Broughton* and his Wife, by Bargain and Sale enrolled and Fine, conveyed the Lands to one *Weston*, and his Heirs; it was adjudged, that by this Conveyance of the Reversion to the particular Estate for Life, which the Wife had by the Will, that the contingent Remainder to the Son was destroyed, which see in *Tit. Remainder*, pl. . so that it was not debated what Estate the Son would have if the Remainder had vested in him; but *Saunders*, the Reporter, was of Opinion, that he would have an Estate in Fee, because the Testator had devised his Lands to his own right Heirs, if the Son should die before twenty-one Years of Age; now, if he had not intended him a Fee-simple, the Devise to his own right Heirs had been impertinent, because it would have come to them without such Devise, therefore by this special Appointment to whom it should come, if the Son died within Age, it must be intended, that the Testator gave him a Fee-simple. 2 *Stund.* 388. In *Purefoy* and *Rogers's* Case.

16. In a Special Verdict in Ejectment, the Case was, that the Testator being seised in Fee of a House called the *Bell-Tavern*, settled the same to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his Son in Tail, Remainder to his Wife in Fee; the Husband died, and the Wife being seised of the *Bell-Tavern*, and possessed of other Leasehold Estates, did by her Last Will, give all her Estate, Right, Title, Interest, &c. in whatever she held by Lease, and also the House called the *Bell-Tavern* to *John Billingsley*, without saying for what Estate; this *John Billingsley* was the Son and Heir of him who made the Settlement, and also had the Remainder in Tail in the *Bell-Tavern*, but was not the Heir of the Wife; and the Question was, what Estate he had by this Will; three Judges against *Holt* Ch. Just. held, that he had an Estate in Fee, because 'tis but one entire Sentence coupled by the Words *and also*, and governed by one Verb, and the Preposition *In* is carried to the *Bell-Tavern*, and this would be very plain by a little Transposition of the Words, (*viz.*) *I give my Term of Years, and all the Estate, Right, and Title, I have in my Term, and also in the Bell-Tavern*, and this is an honest Construction, because it brings back the Fee of the Reversion to the right Heir of the Husband by whom it was created: But the Chief Justice held, that the Intent of the Testator must be collected out of the Words of the Will, and not by any Circumstances of his Estate, that as to the Honesty of the Construction, the Wife might bring a great Portion, and so 'tis as honest to construe the Will in Favour of her Heir, as in Favour of the right Heir of the Husband; that the subject Matter of her Estate, Right, Title, and Interest, is her leasehold Estate, and the Preposition *In* terminates in that; that the Words of a Will are never to be transposed where they are Sense; for to displace Words which are intelligible without, is to alter the Sense of the Will; 'tis true, this is done where they are Nonsense, that it may have some Meaning, so he concluded, that *Billingsley* had but an Estate for Life, by this Will, in the *Bell-Tavern*. 1 *Salk.* 234. *Cole* versus *Robinson*. See *Dyer* 19. *Moor* 873. *Hob.* 2. *Moor* 52. 3 *Cro.* 330.

17. In a Special Verdict in Ejectment, upon a feigned Issue out of Chancery, to try whether the late Duke of Bolton had devised certain Fee-Farm Rents to the Earl of Bridgewater in Fee, the Devise was thus, (*viz.*) *I give to my Son in Law John, Earl of Bridgewater, his Executors and Assigns, all my Mines, together with all my Plate and Jewels, and all other my Estate real and personal, not otherwise disposed by this my Will, to be given by him to his Children, as he shall* Mod. Ca-
ses 106.
think

think convenient, and in another Clause, *Whereas I have contracted for the Sale of my Fee-Farm Rents*, my Will is, that if my Debts shall not be satisfied out of my other Estate, my Executors (whereof the Earl of Bridgewater was one) shall sell some Part, or all of them, for Payment, &c. notwithstanding the Rents are not devised by this my Will; adjudged, that by these Words *All my real and personal Estate*, the Fee-Farm Rents do pass, because the Word *Estate* is *Genus generalissimum*, and includes all both real and personal, and *All my Estate* is the whole Estate of the Testator, and a Description of the Fee. 1 Salk. 236. *Countess of Bridgewater versus Duke of Bolton*.

18. In a Special Verdict in Ejectment, the Case was, the Testator being seised in Fee, devised to his Daughter for Life, Remainder to W. R. her eldest Son, and his Heirs; and for Want of such Heirs, Remainder to the right Heirs of T. S. adjudged, that the Limitation to W. R. and his Heirs, made a Fee-simple, and not an Estate-tail, because the legal Sense of the Words shall be taken, where it doth not appear from a plain and necessary Implication, that the Testator meant otherwise; therefore in this Case, the Want of such Heirs may be intended Heirs general, and not Heirs of his Body, for there is nothing that shews he intended otherwise; and by Consequence the Remainder to the right Heirs of T. S. is void in its Creation. 1 Salk. 238. *Aumle versus Jones*. See 2 Cro. 416. *Cro. Car.* 57.

19. In a Special Verdict in Ejectment, the Case was, that the Testator being seised in Fee, devised an Annuity, &c. to W. R. in Fee: Item, I devise my Manor of Bucknall to T. S. and his Heirs: Item, I devise all my Lands, Tenements, and Hereditaments to the said T. S. but did not say for what Estate: Item, I give all my Goods and Chattels, Money, and Debts, and whatever else I have not before disposed, to the said T. S. He paying my Debts and Legacies; the Question was, what Estate T. S. had in the Lands, Tenements, and Hereditaments; it was insisted, that by the Word *Item* the Sentences were joined, and the Meaning of the Testator was carried on to give the like Estate in Lands, &c. as he had done in the precedent Sentence in the Manor of Bucknall, and that by the Word *Hereditaments* he intended to give an Inheritance in Fee; for where the Statute 12 Car. 2. gave the Lands, Tenements and Hereditaments of the Regicides to the Crown; it was adjudged, that by that Word the Inheritance in Tail of one of them did pass. 2 Lev. 169, 196. Adjudged in the principal Case, that a Fee-simple did pass, not for the Reasons before-mentioned, but upon different Reasons, for the Word *Item* doth not join the Sentences, but in Wills is always introductive of new Matter; that the Word *Hereditament* cannot in this Place denote the Measure or Quantity of Estate, because it hath another proper Meaning, for it extends to Annuities, and may extend to Advowsons in Gross, which are not comprised by the Words *Lands and Tenements*; and the Reason why the Word *Hereditaments*, in the Case of the Regicides, was adjudged to extend to an Inheritance, was not, because that Word did import an Inheritance in Tail; but because a Forfeiture of their Hereditaments was reasonably construed a Forfeiture not only of their Lands, but of the Estate which they had in them; now, in the principal Case, these Words, (*viz.*) *Whatever else I have not before disposed*, carry a Fee, for they can have no Effect on his personal Estate, because that was devised as fully as Words could pass it by the precedent Clause, therefore they must extend to whatever else remained in him to dispose, and that was a Fee-simple, and the rather, because of the subsequent Words, *Paying my Debts, &c.* 1 Salk. 239. *Hopewell versus Ackland*. See *Allen* 28, and 2 Vent. *Willow's Case*.

20. In Ejectment, the Case was, the Testator being seised in Fee, devised several personal Legacies, and amongst the rest four Coats to four poor Boys of the Parish of B. for ever; and all his Lands (and personal Estate, which was of the Value of 1000 l. and upwards) he devised to his Wife Margaret, and her Assigns, and made her Executrix, and died; afterwards she married again, and then Husband and Wife covenanted to levy a Fine to the Use of themselves, for their Lives, Remainder to the Husband, and his Heirs, with Warranty, and a Fine was levied by them accordingly; adjudged, that Margaret, the Wife, had a Fee-simple by this Devise, because she took the Land with a perpetual Charge. 2 Salk. 685. *Smith versus Tyndall*.

Sid. 191. 21. Upon a Special Verdict in Ejectment, the Case was, what Estate passed by these Words, Lev. 130. *I give all to my Mother, all to my Mother*; adjudged, that the Lands do not pass. Raym. 97. *Bowman versus Milbanke*. See 3 Mod. 45.

(C)

By a Devise of his Estate, and by a Devise of his Inheritance.

1. A Fee-simple passes by the Devise of all his Inheritance, as for Instance, the Testator devised his Lands to one for eight Years: Item, I give my Daughter Agnes, All my Lands of Inheritance, if the Law will permit; adjudged, that Agnes had a Fee-simple by this Devise. Hob. 2. *Whitlock versus Harding*. Godb. 207. S. C. Moor 873. S. C.

2. But there is a very extraordinary Case in *Jones*, which is thus, (*viz.*) The Testator devised Lands to his Son, upon Condition, that he allow his Brother, Meat, Drink, Clothes, and convenient Lodging; it was objected, that the Word *Allow* implies, that the Allowance must arise out of the Profits of the Lands, and for that Reason the Legatee had only an Estate for Life; but adjudged, that he had a Fee-simple immediately, because his Brother was to have a present Maintenance, which might be a Charge upon him before he could receive any Thing out of the Profits. Jones 107. *Lee versus Withers*.

3. The Husband devised to his Wife his *whole Estate*, paying Debts and Legacies; adjudged, that she had a Fee-simple, because those Words *whole Estate*, shall extend to the *Estate* which he had in his Lands, and especially where the *personal Estate*, (as in this Case, was not sufficient to pay the Debts and Legacies. *Style 293. 282. Johnson versus Kirman. 1 Roll. Abr. 834. S. C.*

4. So where the Son devised his *Inheritance* to *T. P.* after the Death of his Mother; and if he die before he come of Age, then to *his own right Heirs*; it was the Opinion of *Saunders Ch. Just.* that this was an Estate in Fee in *T. P.* for if the Testator had intended him only an Estate for Life, it would have been impertinent to have limited it over to *his own right Heirs*, because the Law would have done it without that Clause in the Will. *2 Saund. 388.*

5. There are Lands in the North, called *Tenant-right Lands*, which are in the Nature of Copyhold, but they pass by Deed, without Livery or Seisin; and the Testator being seised of such Lands, devised to his Cousin, &c. All his *Tenant-right Estate in Brigsend*, with all that he and his Father took of *T. P.* of his Majesty's Land, and of the Marquess's Fee, with *all his Lands in Beckside*; it was insisted, that an Estate only for *Life* passed by these Words, *All my Tenant-right Estate*, because they were only a Description of the Nature and Quality of the Lands devised, and not a Limitation of the Estate, especially since all the subsequent Words made an Estate for Life, and no more; and these Words being all joined together in one entire Sentence with the other, shall make no greater an Estate; but adjudged, that *T. P.* had a Fee-simple, because the Word *Estate* comprehends all the *Interest* which he had in the Lands, and he having devised all that he had, left nothing in himself. *1 Mod. 100. Wilson versus Robinson. 2 Lev. 91. S. C.*

6. Where the Testator hath both a real and personal Estate, and devises *all his Estate* to *T. P.* &c. and it doth not appear in the Will, what Estate he intended, the Whole shall pass; and so it was decreed by my Lord Chancellor *Finch*, (*viz.*) the Testator devised several Money Legacies, &c. and all the rest of his Money, Goods, Chattels, and *other Estate* whatsoever to *T. P.* whom he made sole Executor, and died; it was decreed, that notwithstanding those Words *other Estate* were placed amongst personal Things, yet the Testator having Lands, a Fee-simple passed in them. *3 Mod. 45. Reeve versus Winnington. 1 Ch. Rep. 262. Tirrill versus Page.*

7. So where the Testator being seised both of Freehold and Copyhold Lands, devised *all the rest of his Estate*, whether Freehold or Copyhold, to his Wife and Children, equally to be divided amongst them; it was insisted, that the Word *Estate* must pass a Fee, because in the legal Signification it must import all the *Interest* and Title which he had in those Lands. *Show. r 348. Carter versus Horner. 4 Mod. 89. S. C.*

(D)

By these Words, to dispose, or to give, or sell at his Will and Pleasure.

1. THE Testator devised Lands to *Edith for Life*, Remainder to *T. P.* in Tail; and if he die without Issue of his Body, living *Edith*, then the Lands to remain to her, *to dispose at her Pleasure*; adjudged, that the Devisee *Edith* had a Fee-simple by those Words. *1 Leon. 156. Jenner versus Hardy. Antea Authority. (A) 10. S. C.*

2. Devise to his Wife for Life, *To dispose and employ* the Lands upon her self and her Sons, at her *Will and Pleasure*; adjudged, that she had a Fee-simple, for the Law will make such a Construction of those Words as may be agreeable with the Intention of the Testator, by supplying the Defect of other Words in order to make it a Fee-simple Estate. *Moor 57.*

3. So where the Devise was to his *Wife for Life*, then to his Son, &c. and if he fail, then all his Part to the *Discretion* of his Father; adjudged, that the Father had a Fee-simple; and in the same Case it was held, that if the Devise had been, that the Lands should be at *his Disposal*, or, *I Will my Lands to him, to give or sell at his Pleasure*, this had made a Fee-simple. *1 Leon. 156. Whiskin versus Cleyton.*

4. The Testator having three Sons, devised several Parts of his Lands to them respectively, but without limiting for what Estate, then these Words follow; and if they live to the Age of twenty-one, and have *Issue of their Bodies*, then to them and *their Heirs*, in Manner as aforesaid, *to give and sell at their Pleasure*; but if one of them die without *Issue of his Body*, then the other Brothers to have his Share in Manner, as aforesaid, and *if all die without Issue*, then to be sold, &c. adjudged this was a Fee-simple Estate in each of them respectively, when they severally came to the Age of twenty-one Years; for tho' those Words, *If they have Issue of their Bodies*, create an Estate-tail by Implication, yet that could never be the Intention of the Testator in this Will, because the subsequent Words *To give and sell at Pleasure*, gave them Power over the Lands, to dispose as they pleased, which Tenant in Tail cannot do; and if it should be admitted, that the last Clause, (*viz.*) *If All die without Issue*, should make an Estate-tail by Implication, yet since an absolute Estate in Fee-simple was given to them in the first Clause of the Will, without any Manner of Contingency, that shall never be controlled by an Estate-tail implied in any subsequent Clause. *2 Leon. 68. Brian versus Cawfen. 3 Leon. 115. S. P.*

5. The Husband devised Lands to his Wife, *to dispose at her Will and Pleasure*, and *to give it to which of her Sons she pleaseth*; now here was no express *Estate for Life* devised to the Wife, but the Court was divided in Opinion, whether she had an Estate for Life, or not, with a Power

to dispose the Reversion, or whether she had a Fee-simple, with a restrictive Power not to alien the Lands to any Person, except one of her own Children; Justice *Doderidge*, who was a learned Judge, was of Opinion, that she had a Fee-simple. *Latch* 9, 39, 134. *Daniel* versus *Upley*. *W. Jones* 137. *S. C.*

6. So a Devise to his Wife for Life, with a Power to *dispose* the Lands to such of her Children as she shall think fit; adjudged, that by the Word *Dispose*, a Power was given to dispose the Fee-simple, tho' she had only an Estate for Life her self; 'tis true, this was against the Opinion of the Lord Chief Justice *Vaughan*, who held, that the Wife having only an Estate for Life, she could not give a greater Estate than what she had her self; but if the Testator had not devised to her an express Estate for Life, then it would have been a Fee-simple by those Words; this Case is so reported in 1 *Mod.* but *Serjeant Levinz*, who reports the same Case, tells us, that the Court was divided, and that the Lord Chief Justice *Vaughan* held, that she had a Fee-simple, but he did not report it of his own Knowledge, but upon the Relation of *Serjeant Willmot*. 1 *Mod.* 89. *Leife* versus *Saltingstall*. 2 *Lev.* 104. *S. C.*

7. So where the Testator devised all his *real* and personal Estate to *T. P.* to *dispose* for the Payment of his Debts, this was decreed to be an Estate in Fee-simple in *T. P.* and not a Trust in him by Implication, for the Benefit of the Heir at Law to have the Surplus after the Debts were paid. 1 *Ch. Rep.* 262. *North* versus *Crompton*.

8. The Testator devised his Lands to his Sister for Life, and after her Decease, the whole Remainder of all those Lands to his Brother, which he had given to his Sister for Life, in Case he survive her; and if not, then his whole Remainder to his other Sisters, and their Heirs; adjudged, that the Brother had a Fee-simple in the Lands by the Devise of the whole Remainder to him; for those Words must necessarily extend to the remaining Part of his Estate in the Land, after the Determination of the Estate for Life to the Sister; it could not extend to the Quantity of the Land it self, because the Whole was given to the Sister for her Life, so there could be no Remainder of the Land, therefore that Word must extend to the Quantity of Estate in the Land. 1 *Lutw.* 762. *Norton* versus *Ladd*.

Felons Goods, and Felo de se.

See *Quo Warranto*. (B) 2.

(A)

1. **T**HE Archbishop of Canterbury had Felons Goods in the Manor of R. and afterwards he committed Treason; then the King made a general Grant to the Almoner of the Goods of Felo de se: *Hales*, a Lessee for Years, was Felo de se in the Manor, and notwithstanding this Grant to the Lord Almoner, the King granted the Term for Years to B. G. adjudged, that he should have it, and not the Almoner, because the Almoner had no Property, but only an Interest as a Minister, and the Grant to him need not be recited in the last Grant to B. G. 2 *Mar.* *Dyer* 107.

2. Where the King granted to a Man, and to his Heirs, Felons Goods, &c. within such a Place, the Grantee cannot devise them, nor leave them to descend for a third Part; upon the Statute 32 *H. 8.* because they are not of any yearly Value; but if a Man is seised of a Manor, to which a Leet or Waif, or Estrays are appendant, tho' they are of no yearly Value, yet they shall pass by the Devise of the Manor, with the Appurtenances, because the Statute which enables the Testator to devise the Manor, by Consequence enables him to devise all the Incidents which belong to it. 3 *Rep.* 32, in *Butler* and *Baker's* Case.

3. A Man who was not *Compos mentis*, gave himself a mortal Wound, and before he died he was of perfect Mind, and afterwards he died of the Wound, and of *Sane Memory*, yet because the Original Cause of his Death was when he was not *Compos*, he shall not be Felo de se. 4 *Rep.* 42, in *Heydon's* Case.

4. *Bona fugitivorum* are the Goods of a Felon who flieth for it, and are not forfeited till 'tis found by Indictment, that he fled for the Felony, and therefore they cannot be claimed by Prescription; but a Man may prescribe to have Waifs, Estrays, Treasure-trove, Wreck of Sea, because they may be gained by Usage, without Matter of Record. 5 *Rep.* in *Foxley's* Case.

5. If a Felon steal Goods, and hides them, and afterwards fly, these Goods are not forfeited, or Waifs in Law, for those are when the Felon hath the Goods about him, and being closely pursued, leaveth them for fear of being taken, and that he may more readily get away, in such Case the Goods are forfeited, but in the other Case the Owner may take them where ever he finds them. 5 *Rep.* 109. *Foxley's* Case.

6. When a Felon dies after the Exigent awarded, and before the Attainder, a Writ of Error lieth for Necessity, because the Goods would be otherwise forfeited without any Manner of Remedy. 11 Rep. 38. in *Metcalf's Case*.

7. *Quo Warranto*, &c. for claiming Felons Goods; the Defendant pleaded, that the Abbot of *Strata Marcella* lawfully had and enjoyed them till the Dissolution of the Abbey, and then they were given to the King by the Statute 27 H. 8. and then pleaded the Statute 32 H. 8. cap. 20. by which all the Privileges lawfully used by the Abbots, were revived and vested in the King, who being seised of the said Privileges and Franchises, to have Felons Goods in R. he granted the Manor of *W.* in R. Parcel of the Possessions of the Abbey to *B. G. & tot talia & tanta privilegia* as the late Abbot had, under whom the Defendant claimed the said Manor by Feoffment, & *eo Warranto clamat Libertates & Franchisias tanquam Manerio præd' spectant'*; adjudged, that because the Defendant had conveyed to himself a Title to the Manor, &c. by Feoffment, which he pleaded generally, without setting forth the Deed, he did not convey to himself a Title to the Felons Goods, for they will not pass without Deed; but if the King had granted a Manor & *Bona & Cattalla felonum dicto Manerio spectant'*, they pass, tho' they cannot be appendant to a Manor. 9 Rep. 23. *Abbot de Strata Marcella*. Moor 297. S. C. by the Name of *The Queen versus Vaughan*. Postea *Quo Warranto*. (A) 2.

8. The Defendant was taken in Execution upon a Judgment, and afterwards the Plaintiff, at whose Suit he was taken, became *Felo de se*, by Reason whereof the Lord Almoner seised the Goods, and would have acknowledged Satisfaction of the Debt and Damages on the Judgment; but it was doubted, whether he could, or not. 1 Brownl. 73. *Lord versus Huxley*.

9. The Plaintiff being committed upon Suspicion, that he committed Felony, the Money which he had about him was taken away before Conviction, for which he brought an Action of Trespass, and declared for seising his Money, &c. and this was upon the Statute 1 Ric. 3. cap. 3. by which 'tis enacted, *That no Person shall have the Goods of another, &c. after a Verdict for the Plaintiff*; it was moved in Arrest of Judgment, that this Case was not within the Statute, because Money was not Goods; but it was adjudged to the contrary, *Quod nota Bene*. Raym. 414. *Osborn versus Wandall*.

Felo de se.

See *Coroner*, per totum.

(A)

1. UPON a Bill in the Exchequer, the Case was, Sir *William Hix* lent Sir *William Cooper* 100 *l.* and took a Bond in the Name of *Tooms*, for Re-payment thereof, who afterwards became *Felo de se*, and now Sir *William Hix* was relieved in Equity against the King, this being a *Trust in Tooms* for him; and this was upon the Statute 33 H. 8. cap. 39. and that the Plaintiff should be indemnified against all others. *Hardr.* 196. *Hix versus Cooper*.

2. Information against the Defendant *Sutton*, for that *Elizabeth Lapworth* late of *Sow* in *Warwickshire*, at *Sow* aforesaid, became *Felo de se*, and shewed how *prout per quandam Inquisitionem, &c. apparet*; and that the Defendant *Sutton*, late of *Pulston*, was indebted to the said *Eliz. Lapworth*, at the Time of her Death, in the Sum of 80 *l.* *prout patet* by a Bond, &c. and that the Defendant had not paid the said 80 *l.* to the said *Felo de se* in her Life-time, so that this Action did accrue to the King, &c. and thereupon the Attorney General prayed Process for the King, against the Defendant, who came in, and pleaded in Bar to this Information, an Indenture made by King *Car. 1.* to *Sir Symon Clerke*, under the Seal of the Dutchy, &c. * *per quod Testatum existit*, that the King granted to the said *Sir Simon* the Court-Leets of *Brinklow, &c. Nec non bona & catalla felonum ibidem acciden'*. *Qua omnia* were mentioned in a Particular, to be Parcel of the Dutchy of *Lancaster*, and this was for thirty-one Years, which Lease was still in Being, and which was now vested in *Dorothy Clerke*, as Executrix of *Sir Simon*, and avers, that *Pailton* was and is a Member of *Brinklow*, and that the said *Dorothy* demanded the Money, and the Defendant paid it her, & *hoc paratus est verificare*, and so prayed to be discharged; upon a Demurrer to this Plea, it was adjudged to be ill, for several Reasons: First, because the Defendant had pleaded the King's Grant by a *Testatum existit*, when he ought to have pleaded it positively, (*viz.*) that the King *concessit*, and not by a *Testatum existit quod concessit*; in the next Place a Grant is pleaded under the Dutchy-Seal, and the Defendant did not aver, that the Liberties granted were Parcel of the Dutchy, and the Recital *Quæ omnia* are mentioned, &c. to be Parcel of the Dutchy, will not help, because such a Suggestion may be false on purpose to deceive the King; there, if in Fact the Liberties granted under the Dutchy-Seal are not Part of the Dutchy, the Grant is void; then, as to the

* This is not good.

Grant

Grant it self, 'tis of *Felons Goods*, by which Grant the Goods of a *Felo de se* will not pass; and for this Reason chiefly, Judgment was given for the King, *Nisi causa*; at another Day the Counsel for the Defendant would have offered something in Behalf of the Defendant, but the Court told him, that he could never make the Plea good; but *Saunders* tells us, the Information was ill, because 'tis not positively found, that *Eliz. Lapworth* was *Felo de se*, but only *prout per inquisitionem patet*, whereas the Information should shew the Matter of Fact, and then set forth, that an Inquisition was taken before the Coroner upon View of the Body, and set forth the Substance of it, and then conclude, *prout patet, &c.* or at least he ought to have set forth the Inquisition at Large; for that is the Principal Matter, and without it no Forfeiture accrues; besides, the Information lets forth, that the Defendant was indebted to the *Felo de se*, as by the *Bond it appeareth*, when it ought to be charged positively, that he is bound, *&c.* and not by a *prout patet*; for if the Defendant should deny the Debt, he cannot plead, that he is not indebted, *modo & forma*; but is Plea is *Non est factum*. 1 *Saund.* 273. *The King versus Sutton.* *Plow. Com.* 143. *S. P.*

Sid. 167,
264.
Lev. 120.
S. C.

3. The Administrator of *Toomes* brought a *Scire facias* against the Defendant *Etherington*, to shew Cause why he should not have Execution of a Judgment obtained against him, by the said *Toomes*, for 200 *l.* *&c.* The Defendant pleaded in Bar, that *Toomes* the Intestate, after he had obtained the said Judgment, hanged himself, and so became *Felo de se*, and that by Inquisition taken before the Coroner, upon View of the Body, it was found, that he was *Felo de se*, *prout patet per Inquisitionem, &c.* by Reason whereof he had forfeited this Debt to the King, *&c.* the Plaintiff replied, that after his Intestate became *Felo de se*, the King by the the Act of General Pardon, 12 *Car.* 2. *cap.* 11. pardoned all Felonies, *Forfeitures, &c.* by Virtue whereof the said 2000 *l.* were discharged from any Forfeiture for the said Offence, and made the usual Averments, *&c.* and upon Demurrer to this Replication, the Defendant *Etherington* had Judgment; because by the Return of the Inquisition the Debt was vested in the King, and by the General Pardon it was not revested in the Administrator, without a Writ of *Restitution*, but still remained in the King: Afterwards the King brought a *Scire facias* against the Defendant *Etherington* to have Execution of this Judgment, and the Defendant pleaded this Act of General Pardon, with the usual Averments, as before; and upon Demurrer Judgment was given against the King for the Defendant, that this Debt was released to the Defendant by the Pardon, so that the Creditors of *Toomes* lost all their Debts, and his Debtors were discharged; which being a very hard Case, the Administrator of *Toomes* brought a Writ of Error in Parliament; but it was never argued, for his Counsel despaired to reverse this Judgment. 1 *Saund.* 361. *Toomes versus Etherington.* See Pardon General. (B) 10.

4. Upon an Inquisition taken before the Coroner, he returned, that *T. S.* was *Felo de se*, and upon a Motion for a *Melius inquirendum*, for that it appeared by several *Affidavits*, that he was *Non compos*, and that the Coroner was Partial in executing his Office, have refused Proof, that he was *Non Compos*; the *Melius Inquirendum* was denied, because this Inquisition is traversable, therefore let the Administratrix of the deceased remove Inquisition by *Certiorari* into *B. R.* and then to suggest her self aggrieved by it, and by this Means to bring the Truth of the Inquisition in Judgment. *T. Jones.* 198. *Riply's Case.*

5. The Defendant being *Felo de se*, the Coroner's Inquest found him a *Lunatick*; and a Motion for a *Melius Inquirendum*; it was denied, because no *Affidavit* of any indirect Proceeding either in the Coroner or Jury. 3 *Mod.* 80. *Hetherfall's Case.*

6. *Saloway* drowned himself in a Pond, and the Coroner's Inquest found him *Non Compos*; it was moved to quash the Inquisition, for that it was *Saloway* on such a Day and Hour threw himself into a Pond, & *per abundantiam aquæ ibidem suffocat' & emergit' erat*, which is insensible; *Sed per Curiam*, the Word *Suffocat'* carries the Sense, and is therefore sufficient; but if it stood singly upon the Word *Emergit' erat*, it had been ill. 3 *Mod.* 100. *The King versus Saloway.*

7. Upon an Inquisition the Coroner returned *Non Compos*, when in Truth the Party was *Felo de se*; and thereupon a Motion was made for a *Melius Inquirendum*; but it was denied, because there appeared no Fault in the Coroner, or any Incertainty in the Inquisition. 3 *Mod.* 238. *The King versus Bunny.*

Felony.

(A)

Indictments for Felony, and for Burglary, &c. See *Attainder*. (B) per totum.

1. **U**PON an Inquisition taken before the Coroner, it was found, that *W. R.* on the 10th Day of *January*, Anno 30 *Eliz.* about four a Clock in the Afternoon, with a Pitch-fork, did mortally wound one *B. B.* of which Stroke he died at eight in the Evening of the same Day and Night, and that then the said *W. R.* escaped; afterwards the Town of *Green in Sussex*, where this Escape was made, was amerced; and upon a Motion, it was insisted, that the Town ought not to be amerced, because the Escape was in the Night, and 'tis not Felony, till the Man was dead; the Court seemed of that Opinion. *Pasch. 30 Eliz. 1 Leon. 107. Town of Green in Sussex's Case.*

2. The Defendant was indicted for stealing a Hat, &c. he pleaded, that before that Time he was indicted for stealing Goods on the same Day, and at the same Time, and was thereof acquitted; the Court was divided whether the Plea was good or not. *Mich. 40 Eliz. Goldf. 132.*

3. Indictment, for that he *burglariter fregit ecclesiam in nocte ad spoliandum & depradandum Bona parochianorum in eadem existentia*, but he took away nothing; yet it was adjudged Burglary, and the Indictment good. *Pasch. 1 Mar. Dyer 99.*

4. Indictment *quod felonice cepit Bona & Catalla cujusdam ignoti*; adjudged good, because the Goods might be carried into another County, and the Owner might not be found. *Dyer 99.*

5. The Defendant was indicted, for that he being possessed of a Lease for Years in London, the same felonice, voluntarie & malitiose combussit, ea intentione ad eandem domum mansionalem, necnon diversas domus mansionales diversorum ligeorum Domini Regis, ibidem contigue adjacentes, adtunc & ibidem felonice & malitiose totaliter comburendum & igne consumendum contra pacem, &c. adjudged, that it was not Felony to burn a House of which a Man is possessed; and tho' 'tis set forth in the Indictment, that it was done *ea intentione* to burn the Houses contigue adjacentes, yet, that being only an Intention, and not the Act, it cannot be Felony; 'tis a very great Offence, and the Defendant was fined 500 *l.* and committed. *Cro. Car. 274. Holme's Case.*

6. A Woman was indicted upon the Statute 1 *Jac.* for having two Husbands; it was found, that she was lawfully married to *B. G.* and divorced from him *Causa sevitiae*, and this was a *Mensa & Thoro*, and she was expressly prohibited by the Sentence, not to marry any other, during the Life of her said Husband; but she afterwards married *R. W.* her former Husband still living, but that she did not know he was alive; it was insisted, that this was Felony, because the Divorce arising *ex causa subsequenti* the first Marriage, the same still continued a good Marriage, and was no Dissolution a *Vinculo matrimonii*; and the Court seemed to be of that Opinion, and advised the Woman to get a Pardon. *Pasch. 12 Car. 1. Porter's Case.*

7. Indictment upon the Statute 4 & 5 *Mar.* for taking away *M. R.* the Daughter of *B. R.* under the Age of sixteen, in the Custody of her Father, and without his Consent, *contra formam Statuti*, &c. the Punishment by the Statute is two Years Imprisonment, and to pay such a Fine as the Star-Chamber shall appoint. *Cro. Car. 335. Mary Smith's Case.*

8. Three were indicted upon the Statute 3 *H. 7. cap. 10.* for that *Sarah Cox* having a Portion of 1300 *l.* the Defendant to gain the said Portion, took her against her Will at *Newington in Middlesex*, and carried her to *St. Saviour's in Surrey*, and there one of them, by the Procurement of the other two, married her, &c. against the Form of the Statute, &c. it was objected, that she gave her Consent to be married; but adjudged, that the Taking her away being unlawful, and against her Will, tho' the Marriage was with her Consent, 'tis Felony; and tho' it was not a Marriage *de jure*, because she was under a continual Fear, yet 'tis a Marriage *de facto*, and Felony within the Statute, and the Benefit of Clergy being taken away by the Statute 39 *Eliz. cap. 8.* Judgment was given, that they should be hanged. *Cro. Car. 447. Fulwood's Case.*

9. Several Soldiers were pressed, and going towards *Ireland* to serve against the Rebels, they deserted; resolved, that the Statute 18 *H. 6. cap. 19.* was of little force, because the ancient Manner of lifting Soldiers was altered, but that the Statutes 7 *H. 6. cap. 1.* and 3 *H. 8. cap. 5.* were perpetual and in Force; for the Word King in those Acts extends to all his Successors, and thereupon several were attainted and executed. *6 Rep. 27. Case of Soldiers. Cro. Car. 51. S. P.*

10. A Woman was indicted at the Sessions in *Suffolk*, for Felony and Witchcraft, and upon an *Habeas Corpus* was arraigned at Bar, and Exceptions were taken to it, for it doth not say, that the Justices before whom it was taken were *Justitarii ad pacem tenend' in praedicta Villa*, and that the Indictment was too general, for it was, that the Defendant *practicauit artis Diabolici*

cas, but doth not say what, or wherein; but adjudged, that the employing wicked Spirits to any Intent whatsoever, is Felony within the Statute. *Style 116. The King versus Camell.*

11. *Rawlins* personated one *Spicer*, in acknowledging a Judgment, and the Court was moved to vacate the Judgment; 'tis true, the Statute 21 *Jac. cap. 26.* makes it Felony, but it doth not make the Judgment void; one * *Timberly* personated another in giving Bail, but it not being filed, he escaped. 1 *Mod. 46. Rawlins's Case.*

* Bail.
H) 3.

12. The Defendant was indicted for Felony, in Stealing two laced Cravats; the Jury found, that the Defendant came to the Shop of *Anne Chartres*, in the Indictment mentioned, and asked to see two Cravats, which she shewed, and delivered them into his Hands, who asking the Price she told him 7 s. he offered 3 s. and run away with the Goods openly, in her Sight; adjudged Felony, because the subsequent Act in running away shews his Intention to take the Goods *felleo animo*; and tho' they were delivered to him by the Owner, yet they were never out of her Possession, because the Contract was not perfected, and by Consequence the Property not altered, so that this Fact is as if he had taken the Goods in the Shop, and run away with them. *Raym. 276. Chiffer's Case.*

13. The Defendant *Farr*, knowing *Mrs Steneer* had a considerable Sum of Money and Goods in her House in *St. Martin's Lane*, procured an *Affidavit* to be filed, of the Service of a Declaration in Ejectment, at his own Suit, tho' he had no Manner of Title to the House, and thereupon got Judgment, and by Virtue of an *Habere facias possessionem*, got a Warrant from the Bailiff of *Westminster*, directed to one of his Bailiffs, who, together with *Farr*, turned *Mrs. Steneer* out of Possession, and seised and converted her Goods to his own Use, for which he was indicted at the *Old Bailey*, and found guilty of Felony, and executed, because he used the Process of the Law with a felonious Purpose in *fraudem Legis*. *Raym. 276. The King versus Farr. Sid. 254. S. C.*

Fences.

Distress. (A) 13, 14.

(A)

1. **I**N Replevin, the Case was, *T. S.* had a Lease of sixty Years in three Closes, and he demised two of the Closes to *Lacy*, who put in his Cattle, and they escaped out of those Closes into the third Close adjoining, it being not sufficiently fenced; and the Owner of that Close finding the Cattle *Levant and Couchant* there, distrained them for Rent; adjudged, that the Distress was lawful, because the Close was Debtor, and the Owner of the Close, who granted the Lease for sixty Years, came to his Debtor for the Rent, and found the Cattle there, which he may take, without enquiring how they came thither. *Palm. 43. Lacy's Case.*

2. Inquisition for throwing down Fences *noctanter* against the Statute, and two Vills were found guilty, and 80 l. Damages assessed, and thereupon a *Disfringas* issued against them, to which they pleaded, that it was not done *Noctanter*; and Issue being taken upon that Point, it was found against them, and second Damages were given, upon which it was moved to set aside the first Damages, but adjudged they should stand, because the second Verdict is void as to the Damages, for the Issue was, whether it was done *Noctanter*, or not; 'tis true, the first Damages were assessed upon an Inquisition, where no Attaint lies, and this is according to the Direction in the Statute; but if they are excessive, then the Defendants might plead *Protestando*, that the Damages were excessive, and that they were not but to such a Value, upon which another Issue might be taken. *Sid. 212. The King versus The Vills of Upwood and Roveley.*

3. *Disfringas* upon the Statute *W. 2.* for throwing down Enclosures against the Inhabitants of the adjoining Vills; two of each Vill pleaded for themselves and the other Inhabitants of each Town, that the Fences were thrown down in the Day-time, when the Persons might be known, and traverse that it was done *Noctanter*, or at such a Time when the Offenders could not be known, upon which they were at Issue on this *Disjunctive*; and at the Trial it was held, that whether it was done by Night or by Day, so publicly, that the Offenders might be known, 'tis not within the Statute. 1 *Lev. 106. The King versus Inhabitants of Woodford & al.*

4. In Replevin, the Plaintiff declared for Taking his Cattle, &c. the Defendant avowed the Taking in the Place where, for Rent arrear, upon a Lease for Years made by one *Longvill*, &c. the Plaintiff replied in Bar, that he himself was possessed of a Close contiguous to the Place where, &c. and that the Defendant *Longvill*, and all those whose Estate he had, Time out of Mind, have used to repair and make the Fences between the Place where, &c. and the Plaintiff's Close, and that the Fences were not repaired, by Reason whereof, and for Want of Repairing, the

the Plaintiff's Cattle escaped out of his said Close into the Place where, &c. and that the Defendant took them before the Plaintiff had any Notice that they were there; and upon Demurrer to this Replication it was adjudged ill, the Court relying upon the Year-Book 10 H. 7. 21. b. that if Cattle escape into another Man's Land, and the Lord distrains them, such Distress is good, and that 'tis not material in such Case, whether they were *Levant or Couchant*, or not; and now upon a Writ of Error brought by the Plaintiff, that Judgment was affirmed in *B. R.* but * *Saund. * And* ders tells us, there is a vast Difference between a Lord distraining within his Lordship, and a Les- *Holt C. 7.* for distraining for Rent arrear reserved on his own Lease; for as to the Lord, 'tis not material *said, 'tis fit* whether the Fences are repaired, or not, but 'tis not so as to the Lessor, for if he is bound to re- *it should be* pair the Fences, he must take Care that his Tenant shall do it, otherwise he may take Advantage *considered.* of his own Wrong, which is unreasonable. 2 *Saund.* 289. *Pool* versus *Longvill.* See *Dyer* 317. *Mod. Ca-* *ses* 198. *S. P.* See *Mod. Cases* 189. *Elmore* versus *Tucker.* *S. P.* where *Holt* Chief Justice held, that it was hard to maintain that Judgment in *Pool's* Case; for where the Plaintiff is bound to repair, and doth not, 'tis unreasonable that he should take Advantage of his own Wrong.

5. Case, &c. wherein the Plaintiff declared, that he was possessed of a Close adjoining to the Defendant's Close, and that the Tenants and Occupiers of that Close had, *Time out of Mind, made and repaired* the Fence between the two Closes, and that for not repairing, &c. the Defendant's Cattle came into the Plaintiff's Close; there was Judgment by Default in *C. B.* and now upon Error brought in *B. R.* it was adjudged, that this being a Charge upon the Defendant against common Right, by obliging him to make a Fence for another, and being laid on him as Owner of the Soil, or as Tertenant, the Plaintiff ought to shew a good Title in his Declaration, which he had sufficiently done in this Case, by setting forth, that the Defendant was bound to this Charge by Prescription; for by Tenants the Owners of the *Fee-simple* are intended, and by Occupiers, those who come under such Tenants. 1 *Salk.* 335. *Starr* versus *Rooksby.* *Dyer* 75. 2 *Cro.* 665. 3 *Cro.* 445. 2 *Roll.* Rep. 285. *Raym.* 192.

6. Indictment on the Statute of *W. 2. cap. 4.* for pulling down Hedges; the Defendant moved to quash it, but it was denied, for the Court never quashes Indictments for heinous Offences, without Pleading to it, or demurring. 1 *Salk.* 372. *The King* versus *Inhabitants of Belton.*

Feoffment.

Where the Uses are vested or changed by a Feoffment, where not. (A)	the Uses of another, and to his Last Will. (B)
Of Feoffments upon Conditions, and to	Of Livery and Seisin. (C)

(A)

Where Uses are vested or changed by a Feoffment, where not.

1. **T**HE Lord Audley made a Feoffment to *B. G.* and others, and afterwards by Indenture, reciting the said Feoffment, he declared the same was made, to the Intent his Feoffees should perform his Last Will to this Effect, (*viz.*) *My Will is, that my Feoffees shall stand seised, &c. to pay all my Debts, and afterwards that they make an Estate of the Lands to me, and Elizabeth my Wife, and to the Heirs of our Bodies, with divers Remainders over; the said Lord had Issue by one Wife a Son, and by another a Daughter; the Feoffees paid the Debts, and made an Estate to the Lord and his Wife accordingly; adjudged, that by this Feoffment and Deed, no Use was changed, for tho' the Feoffees shall be seised to the Use of the Feoffor and his Heirs, (for there was no Consideration for which they should be seised to their own Use) yet the same cannot make a new Use to the Lord and to his Wife in Tail, neither can this Writing take Effect as a Will, because it appoints an Estate to be made to the Lord himself, and he cannot take by his own Will.* 2 *Leon.* 159. *Lord Audley's Case.* *Dyer* 324. *S. C.* *Moor* 516. 4 *Leon.* 166, 210.

2. Lease to Husband and Wife for the Life of the Wife, Remainder to the Heirs of the Husband; afterwards the Husband made a Feoffment in Fee to the Use of himself and his Wife, for their Lives, Remainder to his own right Heirs; the Husband died, the Wife committed Waste; and in an Action of Waste brought against her, it was adjudged, that she is in, not by the Lessor, or by the Feoffment, but by the Statute of Uses. 2 *Leon.* 222. *Vavasor's Case.*

(B)

Of Feoffments upon Conditions, and to the Uses of another, and to his Last Will.

1. **T**HE Feoffor seised of Lands in Socage, made a Feoffment thereof to his Son and the *Heirs of his Body*, to the Use of him and *his Heirs*; adjudged, that the Son had an Estate-tail, and no Fee-simple, because Tenant in Tail cannot stand seised to an Use: At Common Law, if a Feoffment had been made to one, and to the *Heirs Males of his Body*, such an Estate had been a Fee-simple conditional; and if it had been afterwards limited to the Use of him and *his Heirs*, these are always intended such Heirs as were named before, (*viz.*) the *Heirs of the Body* of the Feoffee. See *Plowd. Com.* 555. in *Walsingham's Case*.

2. Feoffment in Fee, to the Use of such Person and Persons, and for such Estate and Estates as he shall appoint by his *Last Will*; in such Case, by the Operation of Law, the Use vests in the Feoffor, and he is seised of a qualified Fee, (*viz.*) until he make a Will, and declare the Uses according to the Power reserved; so where he makes a Feoffment to the Use of his *Last Will*, he is seised in the mean Time to the Use of himself and his Heirs; and when the Will is made, 'tis only directory, for nothing passes by it, but all by the Feoffment. 6 Rep. 18. *Sir Edw. Cleer's Case*. Moor 567. S. C. Cro. Eliz. 877. S. C. 1 Bulst. 200. *Semain's Case*. S. P. Moor 476. *Worme versus Webster*. S. P.

3. Feoffment in Fee to B. G. upon Condition, that he shall not alien, this Condition is void; but if Livery is made, the Feoffment is good against the Feoffor, but a Covenant that he shall not alien may be good. 2 Cro. 596. *Broad versus Joyliffe*.

4. Feoffment in Fee to the Use of another, upon Condition, &c. it was enrolled in Chancery, but no Livery made, adjudged no good Feoffment; but the Enrolment shall conclude the Person to say, that it was not his Deed. Poph. 6. *Gibbons versus Maltyard*. Antea 3.

5. The Husband made a Feoffment, upon Condition, that the Feoffee should make a Feoffment to the Use of the Husband and his Wife for Life, Remainder over in Fee to a Stranger; adjudged, that the Feoffee is not bound to make this Feoffment till required by the Husband, because the particular Estate for Life, which is the foundation and Support of the Remainder, ought to be made to the Husband himself, who is a Party to the Condition; but if he should die before the Feoffment made, then the Feoffee is bound to make it to the Wife, without Request; she is a Stranger to the Condition, and if she dies before 'tis made, then it must be made to him in Remainder, without Request. Hetley 56. *Wilkinson's Case*.

(C)

Of Livery and Seisin.

1. **I**N Replevin, the Defendant made Cognisance, and justified under a Lease, the Taking, &c. Damage-feasant; the Plaintiff replied, that long before the Defendant had any Thing in the Lands, &c. the Abbot of S. was seised, and that he, with the Assent of the Convent, made a Lease to the Plaintiff for Life, &c. and upon Demurrer adjudged, that this Replication was ill, because the Plaintiff did not set forth, that Livery was made, nor that the Lessee for Years attorned. Dyer 117. *Sentlo's Case*.

1 And.
58.

2. Feoffment of a Messuage in the Tenure of *Thomas Cotton*, and a Letter of Attorney to make Livery of a Messuage in the Tenure of *Robert Cotton*; adjudged, that the Feoffment was good, notwithstanding this Variance, for the Livery was made of the right House, and the Mistake of the Tenant's Name shall not make it void. Dyer 376. Hob. 171. *Stables versus Butler*. S. P.

3. In an Assise brought by Husband and Wife *de libero Tenemento* in *Southampton*, the Plaintiff was of a Messuage, forty Acres of Meadow, &c. *cum pertinentiis*, &c. the Defendant pleaded a Lease for Years, made to him by J. P. at S. *per nomen* of a capital Messuage, &c. in the County of H. and of all Lands, &c. which were demised with the said Capital Messuage, and which were in the Occupation of the said I. P. or his Assigns, and averred, that the Lands mentioned in the Plaintiff were occupied with the said capital Messuage by the said I. P. to this Plea the Plaintiff demurred, for that the House and Lands were in several Counties; but adjudged, that upon a Lease for Years, the Lands in both Counties shall pass; but 'tis otherwise upon an Estate for Life, or upon a Feoffment, because there must be several Liveries. Hill. 8 Eliz. Dyer 246. *Carew versus Marsh*.

4. The Feoffor being seised in Fee of three Acres, made a Feoffment of one Acre to B. G. to the Use of the Feoffor in Fee, and so of another Acre to another, and of the third Acre to another, to the same Use; and afterwards he made another Feoffment of all three Acres to another Person in Fee, with a Letter of Attorney to R. M. to deliver Seisin in the Name of all three Acres; adjudged, this was a good Feoffment and Livery, and that all the three Acres passed. Bendl. 15.

5. A Deed of Bargain and Sale was made, without the Words *Dedi & Concessi*, and at the Bottom of the Deed there was a Letter of Attorney to *B. G.* to make Livery; this Deed was given in Evidence at a Trial in an Action of Trespass; and it was objected, that the Letter of Attorney was void, because the Attorney was not a Party to the Deed; but adjudged, that this Sort of Conveyance is a common Assurance, and therefore good. *Cro. Eliz.* 905. *Moile versus Leane* 1 *Leon.* 25. *Benecome versus Parker.* S. P.

6. Lessee for Years of an House, and a Close distant from the House, and other Lands, afterwards the Lessor made a Feoffment of the said House, and all the Lands mentioned in the Lease, and made Livery and Seisin in the Close, (*the Lessee being within the House*) adjudged, that 'tis void for the Whole, because when an House and Land is demised together, the House is the Principal, and the Possession of the House is the Possession of the Whole, therefore the Lessee being in the House, he had the Possession of the Whole, and by Consequence the Livery not good; but if the Lessee had made a Lease for Years of any Part of the Land, and the Lessor had made Livery on that Part, it had been good to pass that Part; but not if such Lease had been at Will. 2 *Rep.* 32. *Bettesworth's Case*

Moor
250.
Hicynar
2. Bettesworth.

7. The Disfeisor made a Feoffment in Fee, and a Letter of Attorney to enter and take Possession of the Lands, and afterwards to make Livery *Secundum formam Chartæ*; adjudged, this was a good Feoffment, tho' the Disfeisee was out of Possession at that Time, because the Power given to the Attorney was executory, and nothing passed till he had made Livery and Seisin. 37 *Eliz.* *Brown versus Terry.*

Demand.
(A) 2. S. C.
Dyer
130. S. P.

8. Lease for Years, and afterwards the Lessor bargained and sold the Lands to *T. S.* and his Heirs, which Deed being not enrolled, the Bargainor delivered Seisin on the Lands *secundum formam Chartæ indentat' prædict'*; the Question was, whether this was a Feoffment, and adjudged that it was; 'tis plain that the Bargainor intended it should be so by the Livery; another Question was, if the Lessee had attorned to the Bargainee, whether the Reversion would have passed; and it seemed that it would not, because there were no Words in the Deed to pass it as a Reversion; and it was said, where a Man hath a Reversion, and he releases or confirms to another all his Right in the Lands, if he to whom the Release was made had nothing in the Land, altho' an Attornment is made, nothing operates by such Deeds, altho' there are Words in them to enlarge an Estate, (*viz.*) *habendum* to them and their Heirs. 2 *And.* 68. *Denton's Case.*

9. In Ejectment, the Case upon the Pleadings was, the Father being seised in Fee, did, in Consideration of the Marriage of his eldest Son, speak these Words, *Stand forth Eustace, reserving an Estate to my self and my Wife, I do give thee my Lands, and to thy Heirs*; it was objected, that a Man could not pass a Freehold from himself to begin at a Day to come, and by it to make a particular Estate to himself at the same Time; 'tis true, it was adjudged, that these Words being spoken on the Lands amounted to a Livery, and that the Son should have a Fee-simple after the Death of his Father and Mother: But this Judgment was reversed in the Exchequer-Chamber; first, because no Use was raised by these Words, and it could not be a Feoffment, because there are not proper Words for that Purpose, nor any Livery. *Poph.* 47. *Callard versus Callard.*

2 And.
64.
Poph. 47.
Moor
637. S. C.

10. A Lease for Years may commence *in futuro*, because it may be made without Livery, but a Lease for Life cannot, and a present Livery cannot be made upon a future Estate, therefore nothing passes by such Livery; but if there are two joint Lessees for Years, Remainder to *B. G.* for Life, the Livery made to one in the Name of both, is good, because they have an Interest in the Land before they enter, and such Livery made to one is sufficient to support the Remainder to *B. G.* 5 *Rep.* 93. *Barwick's Case.*

Dyer
296. 96.

11. So where a Man makes a Feoffment in Fee, or a Lease for Life, and said to the Feoffee, being on the Land or in Sight of it, *enter into that Land and enjoy the same*, according to the Purport of the Deed, this is a good Livery; but the Delivery of the Deed on the Land, without any farther Ceremony, or saying any Thing, doth not amount to a Livery. 6 *Rep.* 26. *Sharp's Case.*

Moor
458.
Sharp v.
Swaine.

12. Tenant in Fee made a Feoffment, and delivered it on the Land in the Name of Seisin; adjudged, that this Delivery is good, and hath a double Operation at the same Time, (*viz.*) to make the Writing take Effect as a Deed, and to deliver Seisin of the Land according to the Deed. 9 *Rep.* 136. *Thoroughgood's Case.*

13. *William Lord Dacres*, the Father, made a Feoffment in Fee to his two Sons, upon Condition, that they should make a Feoffment over to *Tho. Dacres* and one *Middleton*, with a Letter of Attorney; but before the Father had delivered the Deed to his Sons, they had delivered their Deed of Feoffment to *Thomas Dacres* and *Middleton*, with a Letter of Attorney to *B. G.* to make Livery; afterwards the Father delivered his Deed, and then Livery was made by Virtue of the Letter of Attorney; adjudged, that the Livery was void, because the Sons, at the Time they made the Feoffment, had nothing to pass. 2 *Bull.* 302. *Butler versus Finch.*

14. Adjudged, that where a Man covenants to make a Feoffment of the Value of 50 *l.* to *T. S.* and afterwards he makes a Feoffment to the Uses in that Indenture generally, and doth not mention the 50 *l. per Annum* certainly: That in such Case nothing passes but the very Land on which the Livery was made. 1 *Roll. Rep.* 187. *Woodhouse versus Futer.*

15. Feoffment was made, *Habendum* to the Feoffee and his Heirs, after the Death of the Feoffor, and Livery was made, yet adjudged a void Feoffment, because an Estate of Freehold in Lands cannot begin at a Day to come; but where the Lessor made a Lease to Three for their Lives,

Lives, and granted the Reversion, *habendum* to the Grantee for his Life, which said Estate for Life shall begin after the Death of the Survivor of the said three Lessees for Life; this was adjudged a good Estate in Reversion for Life. *Underhay* versus *Underhay*. *Hob.* 171.

16. The Father having two Sons, did give to his youngest Son certain Lands, in Consideration of Marriage, *habendum* to him and his Heirs, after the Death of the Father, but no Livery was made; the Father died; it was insisted for the youngest Son, that the Lands did pass by Way of Covenant to stand seised; but adjudged, that they should not, for by the Word *Give*, it shall be intended to pass an Estate by Transmutation of Possession, and that cannot be done without Livery; but if Livery had been made in this Case, it had been void, because the Gift of the Land was to his Son and his Heirs, after the Father's Life, and an Estate of Freehold cannot begin at a Day to come, because the Livery must enure on a present Estate. *March* 50. *Pitfeild* versus *Peirce*.

1 Mod.
91.
2 Lev.
34. S. C.

17. In a Special Verdict in Ejectment, the Case was, two Women were Jointenants in Fee, one of them made a Feoffment, with Livery within the View, (*viz.*) *Go enter, and take Possession*; but before it was executed by an actual Entry, she married the Feoffee; it was insisted, that this Feoffment was void, because there was no Entry, and by the Marriage the Feoffee became seised in Right of his Wife, and now cannot by his own Act, work any Prejudice to her Right; but adjudged, that this Livery might be well executed after the Marriage, for he had not only an Authority to enter, but an Interest passeth by the Livery in View, and the Woman did all on her Part to be done. 1 *Vent.* 186. *Parsons* versus *Petus*.

18. In Ejectment, &c. it was held by Chief Baron Hale, and the Court, that where a Letter of Attorney is made to enter into any Part of the Lands in the Name of the Whole, and to make Livery, that the Attorney may enter into any Part accordingly, tho' in the Possession of several Tenants, and make Livery of the several Tenements severally. *Hardres* 314. *Freind* versus *Drury*.

Fieri Facias. See Execution.

Fines in Court.

(A)

Of Fines set in Court, &c.

1. **I**Nformation against several, for a criminal Offence, and Judgment against them; the principal Offender was fined 500 *l.* and the rest were fined severally; adjudged, that Fines being assessed in Court upon a Judgment against the Offenders in an Information, cannot afterwards be mitigated; this was for Assaulting a Sheriff in serving an Execution, so that the Party escaped. *Cro. Car.* 112. *Sir James Wingfeild's* Case. See Default. (A) 4. S. C.

2. The Defendant was indicted for Striking with a Weapon in the Church-yard; and this Indictment being removed into *B. R.* he prayed to submit to pay a small Fine; 'tis true, this may be done in Trespasses; but in this Case it cannot, because the Statute inflicts another Punishment, upon Conviction, for this Offence, and that is to lose his Ears, therefore *B. R.* cannot prevent the Conviction. *Palm.* 344. *Potter's* Case.

3. Some Peers were committed to the Tower for High Treason, and one *Bedlow* being a Witness against them, *Nath. Redding*, who was a Barrister at Law, was convicted for persuading *Bedlow* not to prosecute them, and fined 1000 *l.* and was set in the Pillory; and on June 18, 1680. he came to the Bar, with an Information ready drawn, against Justice *Dolben* and *Jones*, before whom he had been tried for this Misdemeanor, and demanded, that it might be received by Mr. *Astrey*, Clerk of the Crown, and filed, and accused those two Judges with Oppression; the Court ordered the Words to be recorded, and then fined him 500 *l.* and to lie in Prison till he paid it; but on the last Day of the Term, he petitioned, that his Fine might be spared, and the Court ordered both Fine and Imprisonment to be remitted, and took a Recognizance for his Good Behaviour; in this Case one *Marshall's* Case was cited, he being fined 1500 *l.* and in the same Term the Fine was mitigated to 500 *l.* tho' 'tis said in *Sir James Wingfeild's* Case. *Cro. Car.* 251. that a Fine assessed in Court, upon a Conviction in an Information, cannot afterwards be qualified or mitigated; but that must be understood, that it cannot be done in another Term, for in the same Term the Court hath that Power. *Raym.* 376. *Redding's* Case.

4. Upon a *Certiorari* to return all Orders made by the Sessions in *Middlesex*, concerning the Sheriffs of *Middlesex*, it was returned, that at such a Sessions, it was ordered, that the Sheriffs should attend in Person on such a Day, that Oath was made, that they were served with the Order, but did not attend, and thereupon they were fined 100 *l.* which was estreated into the Exchequer, upon a Mandate of the Chief Baron; and upon a Motion to File the Return, it was denied, because the Fine being estreated, the Order was executed in Part, and now the Matter is properly determinable in that Court. *T. Jones* 169. *The Sheriff of London and Middlesex's Case*.

5. Debt against the Defendant, for a Fine of 60 *l.* wherein the Plaintiff declared, that the Defendant was chosen Bailiff of the Corporation of, &c. for a Year, according to their Charter, which gives them Power to fine such as refuse to accept the Office; that the Defendant refused to qualify himself, by taking the Oath according to Stat. 13 *Car.* 2. and that by his Refusal the Office was void; that the Bailiff usually spends in his Office 60 *l.* and that the Defendant for his Refusal was fined 60 *l.* there was a Verdict and Judgment for the Plaintiff, and now upon a Writ of Error brought, the Error assigned was, that the *Corporation-Act* 13 *Car.* 2. doth not enable them to fine, for it only makes the Office void, if the Person chosen doth not take the Oath, and subscribe the Declaration therein required; but adjudged, that the Refusal to take the Oath is in Effect a Refusal to accept the Office, and a Refusal to accept, &c. is within their Charter to fine. 3 *Lev.* 116. *Starr versus Mayor of Excester, &c.*

6. It being a Question, whether a Fine might be set on a Person who was absent; it was held, that it might, but that nothing can be offered in Mitigation, unless the Party is present; in this Case the Defendant was found guilty, for striking another Gentleman at the Election of a *Burgefs* for *Cirencester*, and was fined 500 Marks; tho' *Hale* said they were discouraged from setting Fines, because by a late Statute they are to be estreated into the Exchequer, and are farmed by Patentees. 1 *Vent.* 209. *Howe's Case*.

7. The Defendant was fined 1000 *l.* for drinking a Health to the pious Memory of *Stephen Colledge*, who was executed at *Oxford* for High Treason, and to stand in the Pillory, and to find Sureties for his Good Behaviour. 3 *Mod.* 52. *Anonymus.* 36 *Car.* 2.

8. Since the Statute 5 & 6 *Will.* 3. there can be no *Capiatur pro fine* entered in Trespafs, E- 5 *Mod.* 385.
jectment, Assault and Battery, but instead thereof the Plaintiff is to have 6 *s.* 8 *d.* in Costs, allowed to him, and taken by the Officer upon Signing the Judgment, to pay so much to the King for the Fine, and the Judgment is entered without taking any Notice of the Fine; but in *C. B.* they enter the Judgment *nihil de fine quia remittitur per Statut.* 1 *Salk.* 54. *Linsey versus Clerke*, See 3 *Lev.* 401.

9. The Defendant being indicted for an Assault, confessed it, and submitted to a small Fine; adjudged, that in such Case he may produce *Affidavits* to prove on the Prosecutor, that it was *son Assault*, and this in Mitigation of the Fine before 'tis set, because the Entry upon Confession is only *Non vult contendere cum Domino Rege sed ponit se in Gratiam Curiae*; but this cannot be done where he is found guilty; and the Defendant, tho' absent, may submit to a Fine, if the Clerk in Court will undertake to pay it; but not where he is to have Corporal Punishment, for there Judgment cannot be given, unless he is present. 1 *Salk.* 55. *The Queen versus Templeman*.

Fines levied.

Of the Writ of Covenant, <i>Dedimus</i> , King's Silver, and of the Concord. (A)	Where the Pleading a Fine shall be good, where not. (E)
By Tenant in Tail, where they Bar the Estate-Tail, where not. (A)	Of Fines <i>sur concessit</i> . (F)
Of Nonclaim, and of Entry within five Years after the Fine levied. (B)	Of Fines <i>Sur Cognissance de droit</i> , what passes by them, what not, and of Fines of Lands in two Vills, (G)
Where reversed for Error, and for what Errors, and for what not. (C)	Of Fines <i>Sur Grant</i> and Render. (H)
Where Levying a Fine makes a Forfeiture, and where not, and where the Entry for such Forfeiture is good. (D)	Of the Uses of a Fine, where well limited, where not. (I)
	Fines levied by Husband and Wife. (K)

(A)

Of Writ of Covenant, and Dedimus, and King's Silber, and of the Concord.

1. **A** Fine was taken by *Dedimus*, but it was not mentioned in what County the Lands did lie; the * King's Silver was entered, but the Fine remained at the Chirographer's Office, not yet engrossed, and the *Conusor* died; it was held to be a good Fine, by Virtue of the *Dedimus*, and might be engrossed as a Fine at Common Law, and not by the Statute 4 H. 7. because if the Party had been living, he might have it with or without Proclamations, but being dead, no Election can be made. *Mich. 8 Eliz. Dyer 254. Compton's Case.*

* 4 Leon.
96. *Sir*
John
Brown's
Case.

Hob. 330.
12 Rep.
124.
Warn-
come v.
Carrell.

2. A Fine was taken by *Dedimus*, in *Hillary* Vacation of *Carrill* and his Wife, of the Lands of the Wife, who was then about the Age of nineteen Years; the Writ of Covenant was dated in *January*, returnable *Craftino pur'*, and the *Dedimus* was dated three Days after, and the Queen's Silver was entered in *Easter-Term*, four Days before the Death of the Wife, (viz.) *Die veneris in septimana Pasche*; but the Fine was not engrossed *usque diem Mercurii prox.* whereupon the Heir of the Wife moved, that the Fine might not be recorded; but adjudged, that because the Caption was well taken by the *Dedimus*, and the Queen's Silver entered, tho' the Wife died before the Fine was engrossed, yet it was a good Fine, and should bar her Heir. *Hill. 5 Eliz. Dyer 220. Carrell's Case. 3 Mod. 140. S. P. 2 Vent. 47. S. C. Ball versus Cock.*

3. The Writ of Covenant was *Teste 24 April*, returnable *Quinden' Pasch.* which was in Truth the 15th of *April*, and so the Return was nine Days before the *Teste*, but this being a Common Assurance between, and by the Consent of the Parties, shall be amended, but not in other Writs. *5 Rep. 45. * Gage's Case. Moor 571. S. C. contra. that 'tis not amendable. See Amendment. (K)*

* Co. Ent.
250.

4. Where the Sheriff is one of the Deforceants, the Writ must be directed to the Coroner; otherwise 'tis not good. *Smithier versus Done, 1 Cro. 300.*

5. The Fine was, *Hæc est finalis concordia facta, &c. a Die Sancti Michaelis in tres septimanas Anno 10 Wilhelmi tertii coram Thoma Trevor, &c. & postea in Craftino Sanctæ Trin' Anno primo Annæ concess' & recordat' coram Justitiariis ejusdem, &c.* the Question was, of which Term this should be a compleat Fine; adjudged, it should be of that Term in which the Concord was made, and of which the Writ of Covenant was returnable; for the Concord is the compleat Fine, but the *concess. recordat.* is only Leave to enrol it. *1 Salk. 341. Loyd versus Lord Say and Seal.*

6 Rep.
68.
Hob. 330.
2 Vent. 47.

(A) 25p

(A)

By Tenant in Tail, where they Bar the Estate, where not. See Recoveries.

1. **T**ENANT in Tail levied a Fine, and five Years passed, and then he died ; it was objected, that the Issue in Tail shall not be reputed Privy, because he pleads *per formam doni*, and then his Right is saved by the second Saving in the Statute ; but adjudged, that tho' he is the first to whom the Right descends after the Levying the Fine, yet because he suffered five Years to pass without any Claim, he shall be barred. 19 H. 8. Dyer 3.

2. Tenant for Life, Remainder in Tail to B. G. when he should come to the Age of twenty-five Years ; the Tenant in Tail levied a Fine in the Life-Time of the Tenant for Life, and before he was twenty-five Years old, and this was to the Use of R. W. adjudged, that tho' the Tenant in Tail had nothing in the Lands till he was twenty-five Years of Age, yet this Fine had extinguished his Right, and barred the Estate-Tail. 2 Leon. 36. Bellamy's Case. Goldf. 107. Johnson versus Carlisle. S. P.

3. A Woman Tenant in Tail within the Statute 11 H. 7. acknowledged a Fine *Sur cognisance de droit come ceo*, and by the same Fine rendered the Land to the Cognisee for 100 Years ; it was adjudged, this was a Discontinuance, and within the Penalty of the Statute, which is, &c.

for by such Practise the Meaning of the Law might be defeated ; for if the Render of 100 Years should be good, it might be so for 1000 Years, which would be as Prejudicial to him in the Reversion as a Discontinuance. 2 Leon. 168. Barker versus Tailor.

4. Husband and Wife were Tenants in Tail, and they had Issue two Sons ; the Husband died, and his Widow married again, then she and her Husband in Consideration of Money paid, did bargain and sell the Lands to her eldest Son, but no Livery was made ; afterwards the eldest Son, in the Life-time of his Mother, who was the surviving Tenant in Tail, by Bargain and Sale, and Fine, conveyed the Lands to B. S. and his Heirs, for a valuable Consideration in Money paid, and then the said eldest Son died without Issue, his Mother still living ; adjudged upon a Writ of Error brought to reverse this Fine in the Exchequer-Chamber, that it did not bar the second Brother ; for tho' the elder Brother was inheritable to the Estate-Tail, and if he had survived his Mother, who was Tenant in Tail, his Fine would have barred his Brother ; yet because he was never seised by Force of the Tail, by Reason of his Death in the Life-time of his Mother, his younger Brother shall never mention him in a *Formedon in Descender*, and by Consequence his Fine shall be no Bar. Cro. Eliz. 314. Bradstock versus Scovell.

5. Tenant in Tail, Remainder in Tail ; the Tenant in Tail in Possession made a Lease for three Lives, warranted by the Statute 32 H 8 and afterwards died without Issue, he in Remainder in Tail, before he was in Possession of the Land, levied a Fine thereof, with Proclamations ; adjudged a good Bar to the Estate-Tail, because by the Death of the Tenant in Tail, without Issue, the Freehold and Inheritance was immediately vested in him in the Remainder. 20 Eliz. 1 Leon. 268.

6. Tenant in Tail bargained and sold his Lands in Fee, the Bargainee levied a Fine with Proclamations, and five Years passed in the Life-time of the Bargainee ; adjudged, that the Issue in Tail is not barred by this Fine, but that he shall have a new five Years to make his Claim after the Death of the Tenant in Tail, for he is within the Saving of the Statute. Cro. Eliz. 897. Pennistone versus Lister. See Tail. (G) 1. S. C.

7. The Father being seised in Fee, had Issue two Sons, the eldest Son had likewise Issue two Sons by several Venters ; the Father made a Feoffment in Fee to the Use of himself for Life, Remainder to the Use of his eldest Grandson in Tail, Remainder to the Use of his eldest Son in Tail, Remainder to the Use of the Right Heirs of the Father, who died ; then his eldest Son died, and the Grandson, who was Tenant in Tail, levied a Fine, and declared the Uses to himself in Tail, Remainder to the Use of his Uncle, who was the younger Brother of his Father, in Fee, and died without Issue ; adjudged, that by this Fine he had barred his half Brother by Virtue of the Statutes 4 H. 7. and 32 H. 8. Mich. 7 Eliz. 1 Leon. 3. Stamford's Case.

8. Lands were given to the Grandfather and his Wife, in Special Tail ; the Grandfather died, the Father disseised the Grandmother, and levied a Fine in her Life-time, with Proclamations, then she died, and the Father afterwards died ; adjudged, that the Son was barred by this Fine, and yet the Father at the Time when he levied it, had only a Possibility to inherit the Estate-Tail. 1 Rep. in Archer's Case.

9. the Cognisor being seised in Fee, levied a Fine of Lands to two, and to the Heirs of one of them, who granted and rendered the same Lands to the Cognisor, and his Wife, (who was no Party to the Writ) and to the Heirs of the Body of the Cognisor, who suffered a Recovery, with Vouchers, in the Life-time of his Wife, and afterwards died ; the Wife died, he in the Remainder brought a *Sci. fa.* to have Execution of it ; adjudged, that the Grant and Render to the Wife was not void, but only voidable, because she was no Party to the Writ, and that this Recovery

covery against the Husband alone, did not bar the Remainder. 27 *Eliz. Owen versus Morgan*. *vouched in Mary of Winton's Case*. 3 *Rep.* 6.

10. Adjudged, that where a Tenant in Tail levies a Fine, and dies before all the Proclamations are made, tho' the Right of the Estate-Tail descends upon the Issue *per formam doni*, immediately upon the Death of the Ancestor, yet, if Proclamations are made afterwards, such Right shall be barred by the Fine by the Statutes 4 *H.* 7. and 32 *H.* 8. which is explanatory of the Statute 4 *H.* 7. for 'tis provided by that Act, that *Every Fine after the Engrossing of it, and Proclamations had and made, shall be a final End, and conclude as well Privies as Strangers*, and it cannot be denied, but that the Issue in Tail is *Privy*, for he claims as Heir by Descent; and if it should be objected, that by the Equity of the Statutes the Issue in Tail might claim where his Ancestor dies before Proclamations are made, for otherwise that Solemnity would be to little Purpose; the Answer is, that by the Statute 4 *H.* 2. every one had Liberty to levy a Fine according to the said Act, either with Proclamations, or without, as at Common Law; and therefore the Act 32 *H.* 8. appoints, that Proclamations shall be made according to the Statute 4 *H.* 7. not to enable the Issue in Tail to claim where his Ancestor dies before they are made, for that would be against the express Intention of the Act it self; but it was to distinguish such a Fine from a Fine at Common Law, where Proclamations were not requisite; and it would be very inconvenient, if when such Fine is levied, either for some valuable Consideration in Money, or for the Advancement of his Family, or for Payment of his Debts, and the Cognisor shall die before all the Proclamations pass, that all should be avoided by the Claim of the Heir. 3 *Rep.* 84. *Resol. on Statute of Fines*. 1 *Rep. Shelley's Case*. 97. *S. P.*

2 *Roll.* 11. Husband and Wife were Tenants in Tail, Remainder to the Husband in Fee; he died, *Rep.* 490, and after his Death the Wife, who was now the surviving Tenant in Tail, and the Son and Heir of the Husband levied a Fine, &c. to the Use of him and his Heirs, and afterwards she 498. made a Lease of the Lands for twenty-one Years, and died; the Son devised the said Lands to 500. *Hutt.* 84. *See Sid.* 62. *Cudmore* it was adjudged, that the Issue in Tail himself was barred by this Fine to avoid the Lease, 6. *Betti-* son. and that tho' the Estate-Tail was barred, yet 'tis not quite extinguished, but shall have a Being to 18. support the Lease, so long as any of the Issue in Tail are living. *Bridgm.* 28. *Crocker versus Kel-* *sey.* 2 *Cro.* 688, *S. C.* *See Pl.* 13. *S. P.*

12. Feoffment in Fee to the Use of himself and his Wife, and to the Heirs Males of their two Bodies, Remainder to the Husband and his Heirs; they had Issue a Son and Daughter, and then the Husband died, the Son levied a Fine to the Use of himself in Fee, and died without Issue; adjudged, that this was no Bar to his Sister, because he had only a Possibility to inherit the Tail, which was wholly in his Mother after the Death of his Father; and she surviving both her Husband and Son, the Land so entailed shall descend to her Daughter immediately upon her Death. *Hob.* 332. *Mackwilliam's Case*.

Hob. 324. 13. Tenant in Tail, Remainder to the King, levied a Fine with Proclamations; adjudged, that *Palm.* this Fine shall bind his Issue notwithstanding the Saving in the Statute 32 *H.* 8. which speaks of 224. a Reversion, and not of a Remainder, and here there was no Reversion in the King; 'tis true, 4 *Leon.* in the Statute 34 *H.* 8. cap. 20. there is a Proviso, that no Act done by the Tenant in Tail shall 40. *S. C.* prejudice his Issue; but that must be intended where the King is the Donor, as it appears by the Preamble of that Statute. *Moor* 115. *Jackson versus Darcy*.

1 And. 14. *Formedon in Descender* by the Issue in Tail for a Moiety of Lands in *Northmoulton* in 165. *Com. Devon.* in which the Demandant counted upon a Gift in Tail made to one of his Ancestors in the Reign of *Ed.* 1. the Tenant *Bumpfield* pleaded in Bar, that the Great-Grandfather of the Demandant *Anno* 30 *H.* 8 levied a Fine of the Lands to the Use of himself for one 138. Month, Remainder to the Use of his Wife for Life, Remainder to the Use of the Cognisor and 1 *Leon.* his Heirs; that the Wife was dead, and that the Cognisor being thus seised in Fee, made a 75. Feoffment of the Lands in Fee, under whom the Tenant now claims, and demands Judgment, if the Plaintiff should claim by the Entail against the Fine of his Ancestor; the Demandant replied, that at the Time of the Levying the Fine, his Ancestor was seised but of a Moiety, and avers, that the *Bumpfields* was seised of the other Moiety, and then sets forth how they became Jointenants at that Time, and always afterwards, and so *partes finis nihil habuerunt*; and upon Demurrer to this Replication, the Question in Law was, whether the Issue in Tail might thus aver against the Fine of his Ancestor, that *partes finis nihil habuerunt*; and adjudged, that he could not; 'tis plain, that the Issue could have no such Averment at Common Law, for being the lineal Heir to the Tail, he is Privy to him who levied the Fine, and is barred as the Party himself was, until the Statute of *Westm.* 2. which gave him the *Formedon* to recontinue the Estate-Tail, by which Statute he might avoid the Fine, in Respect to the Tail, until the Statute 4 *H.* 7. was made, by which 'tis enacted, that both Parties and Privies shall be bound by a Fine and Nonclaim; now ever since the making that Statute it hath been held, that the Issue in Tail is bound as Privy; and tho' by that Statute there is a Saving of the Averment, that *partes finis nihil habuerunt*, yet that extends only to Strangers, and not to those who are either Parties or Privies to the Fine; but even between these two Statutes, there was another made, which explains this Matter, (*viz.*) the Statute 32 *H.* 8. by which 'tis enacted, that no Man shall demand any Lands against the Fine of his Ancestor; which Words are peremptory against the Issue in Tail, and bar him from any Plea to avoid the Fine, whether *partes finis* had any Thing or not.

not. *Moor* 250. *Zouch* versus *Bampfild*. *Postea* Replication. (B) 3. S. C. 3 *Rep.* 88, cited in the Resolution on the Statute of Fines.

15. Grandfather, Father, and Son; the Grandfather being Tenant in Tail, made a Feoffment in Fee to *W. R.* rendring Rent to him and his Heirs, and died; the *Father* accepted the Rent; then *W. R.* who was the Feoffee, levied a Fine with Proclamations, and the five Years passed without any Claim; then the Father died, and the Son brought a *Formedon*; the Question was, whether the Father had extinguished his Right to the Estate-tail by the *Acceptance of the Rent*, for if so, then when the Fine was levied he had no Manner of Right; and if he had no Right at that Time, then the Son shall be barred by the Fine, and the five Years incurred in the Life-time of his Father, because if the Father had no Right, then the Son was the first to whom the Right came after the Levying the Fine, and he should have made his Claim within the five Years after it was levied; but adjudged, that he was not barred, because by the Acceptance of the Rent the Father had not extinguished his Right and Interest in the Estate-tail, but only by Way of Estoppel. *Moor* 301. *Hulme* versus *Ice*.

16. The Case upon the Pleadings in Replevin and Avowry was thus: The Husband made a Feoffment to the Use of himself and his Wife, for their Lives, and afterwards to the Use of *B.* their eldest Son, and after his Decease to the Use of him who should be his eldest Son at the Time of his Death, in Tail, Remainder to *C.* in Tail, Remainder over in Fee; the Husband died, the Wife made a Lease for Years to *B.* who afterwards made a Feoffment to *W. R.* and then the Wife died, and *C.* levied a Fine, &c. to *W. R.* the Feoffee; then *B.* died, having Issue a Son, who entered; adjudged, that the Feoffment made by *B.* and the Fine levied by *C.* had prevented the future Use to arise in the Son of *B.* and this upon the Authority of *Dillon* and *Freyne's* Case. *Moor* 545. *Bolls* versus *Smith*.

17. Tenant in Tail Male, Reversion to *W. R.* his Brother, made a Lease for three Lives, warranted by the Statute 32 *H. 8.* and afterwards levied a Fine of the same Lands to one *Taylor*, with Warranty against all Persons, and died, leaving Issue only a Daughter; then the Brother died without Issue, the said Daughter being his Niece and Heir at Law; the Lease for Lives expired, and then *Taylor* the Cognisee of the Fine entered; the Question was, whether the Warranty in the Fine should make a Discontinuance in Fee, and be a Bar to the Daughter, or whether it was determined by the Death of her Father; adjudged, that it was a Bar to the Daughter, for when her Father made an Estate for Lives, with Warranty likewise against all Persons, he gained a new Fee; and then when by the Fine he granted the Reversion with Warranty, that being annexed to the Fee, binds him or her who hath any Right; for the Reversion being devested and displaced, the Fine and Warranty enures thereon; and tho' it did not descend upon the Brother who had the Right of Reversion upon the Tenant in Tail's Dying without Issue Male, yet upon the Death of his Brother, it descended upon his Niece, who was the Daughter of the Tenant in Tail, and she is barred; for when her Uncle, who had a Right at the Time of the Death of the Tenant in Tail, and did not prosecute that Right by a *Formedon* in Reverter, but suffered five Years to pass after the Fine levied, and without any Entry or Claim, 'tis a Bar, and he shall not have the Advantage of Entering, after the Expiration of the Estate for three Lives, because he had no other Title upon their Death than before, for his Title was by the Death of the Tenant in Tail, without Issue Male; and then he should have brought his *Formedon*. *Hill* 20 *Car. Cro. Car.* 156. *Salvin*, or *Sawle* versus *Clerke*.

The Lord Chief Justice *Vaughan* tells us, this Case is wrong reported; for it was, that the Warranty did bind the Daughter, because the Reversion was discontinued by the Lease for Lives, and a new Fee gained thereby, and so the Reversion was displaced, and the Warranty was annexed to that Fee, and passed away by the Fine and Warranty, which could not be; for the Lease was warranted by the Statute 32 *H. 8.* and then it could be no Discontinuance, nor no new Fee of a Reversion gained, and so is *Cro. Eliz.* 602. *Keen* versus *Cope*.

18. The Case was, Tenant in Tail had Issue a Son and Daughter; the Son levied a Fine in the Life-time of his Father, who was Tenant in Tail, and this was to confirm a Lease by him made, &c. and then he died without Issue, living his Father; the Question was, whether his Sister was barred by this * Fine, and adjudged that she was not; and this depends upon the Exposition of the Word *Privy*, in the Statute 4 *H. 7.* and the Words *Heirs in Tail*, in the Statute 32 *H. 8.* Now there are three Sorts of Privies, one is Privy in Blood and not in Estate; another is privy in Estate, but not as Heir at Common Law; and the Third is Privy both in Blood and Estate; so there are three Sorts of Heirs as there are three Sorts of Privies; but the first of these Privies and Heirs is not within either of these Statutes; as for Instance, if Lands are given to *T. S.* the Son, and his Father levies a Fine, he is neither Heir or Privy within either of these Statutes; but he who claims as Heir at Common Law, or an Estate *per formam Doni*, to or from that Person who levied the Fine, he is both Privy and Heir within these Statutes; But in this Case the Sister cannot claim as Heir to her Brother who levied the Fine, because he died in the Life-time of his Father, and had no Right, but only a Reversion whilst living; 'tis true, the Sister is Heir, but not Heir to his Estate; and if so, then she must derive a Title from the Father; and if she is not in the Letter, she is not within the Intention of the Statute; for by that it was intended to bar the Issue in Tail, who claimed the Estate-tail as Heir to him who levied the Fine; for if any other Construction should be made, (*viz.*) If such Heir should be bound, who claims the Estate-tail from another Ancestor, then if Tenant in Tail hath Issue two Sons, and the youngest levies

W. Jones
208. S. C.
Latch
64, 72.
S. C.

Vaugh.
Rep. 283,
See Antea
pl. 12.

* It operates only by Way of Conclusion to bind himself and all claiming under him; but the Sister doth not claim under him, but under her Father, by immediate Descent.

a Fine, this would bar the Eldest, which no Body will maintain. *W. Jones* 31. *Godfrey* versus *Wade*.

19. The Husband being seised in Fee, covenanted to stand seised to the Use of himself for Life, then to the Use of his Wife for Life, Remainder to the Heirs Males which he should beget on her, Remainder over; he had Issue only a Daughter; the Husband and Wife afterwards levied a Fine to the Use of the Daughter, with Warranty, and both died, and the Warranty descended upon him in Remainder, who made a Lease to the Plaintiff in the Action; adjudged, that the Estate-tail was not executed in the Husband and Wife; for if it had, then this Fine had been a Discontinuance, which it was not, because there was an intermediate Estate for Life to the Wife, which remained as a separate and distinct Estate from the Inheritance; but if it had been an intermediate Estate for Years, there the Freehold and Inheritance had been united in the Husband simul & semel. *Sid.* 83. *Stephens* versus *Brittridge*. *Perkins*, *sect.* 336. *S. P.* in the Case of *King* and *Edwards*, the Husband and Wife were jointly seised to them and the Heirs of the Body of the Husband, so that the Estate tail was executed in him.

20. Husband and Wife, Tenants in Tail, Remainder to the Heirs of the Husband; they had Issue two Daughters, which Daughters levied a Fine to *W. R.* then the Husband died, and the Widow, who was the surviving Tenant in Tail, made a Lease of the Lands for 100 Years to *T. S.* and died, under which Lease the Plaintiff in Ejectment claimed; and the Question was, whether this Lease was good against the Cognisee of the Fine, and adjudged, that it was, so long as any of the Issue in Tail were living; for the Widow might have disposed of the whole Estate if she would, she being Tenant in Tail in Possession. *Sid.* 62. *Cudmore* versus *Bettison*. See *Antea* *pl.* 12, and 13. *S. P.*

21. In Ejectment, the Case upon the Evidence was, Tenant in Tail covenanted to stand seised to the Use of himself for ninety-nine Years, if he so long lived, Remainder to his first Son in Tail, Remainder over, then he levied a Fine to *T. S.* and whether this Fine shall corroborate the Remainder, or enure to the Use of the Cognisee, was the Question: *Hale* Ch. Just. held the first, because the Tenant in Tail did not limit to himself an Estate for Life, but for Years, and therefore not like *Blithman's* Case. 3 *Cro.* 279. nor *Beddingfeild's* Case 895, where the first Estate was limited for Life; but here, it being for Years, the Remainder may arise to the Son out of the Residue of the Estate the Covenantor had to dispose in his Life-time, and if so, 'tis executed in the Son, and corroborated by the Fine, like *Wingfeild* and *Duncomb's* Case. 2 *Lev.* 84. *Whaley* versus *Greenfeild*.

22. Tenant in Tail of a Rent issuing out of Lands, of which *T. S.* was seised in Fee, levied a Fine of the said Rent *come ceo, &c.* and the Question was, whether his Issue was bound by this Fine; it was argued, that they were not, because the Land was not entailed, but only the Rent; and that if Tenant in Tail of Lands grant a Rent out of them by Fine, this shall not bind the Issue, which is very true: *Sed per Curiam*, the Statutes 4 *H.* 7, and 32 *H.* 8. give a Tenant in Tail as large and ample Power to bar their Issues by Fine, as Tenant in Fee had; therefore where Tenant in Tail of an Office levies a Fine of Lands which belong to such Office, this will bind his Issue, and yet it was not the Land, but the Office which is entailed. 2 *Roll. Rep.* 500. *Foliot* versus *Sanders*.

(B)

Of Nonclaim and Entry within five Years, where good, where not.

1. Tenant in Tail levied a Fine after the Statute 4 *H.* 7. with Proclamations, and five Years incurred in his Life-time, and then he died; adjudged, that it shall bar the Issue in Tail. 19 *H.* 8. *Dyer* 3.

2. Husband and Wife levied a Fine with Proclamations, of the Lands of the Wife; the Husband died, and five Years passed after his Death, without Action or Entry; adjudged, that the Wife and her Heirs are barred. *Dyer* 72.

3. In *Ejectione firmæ* it was held, that where a Fine was levied with Proclamations, and a Friend of him who had a Right to the Land entered to his Use, but without his Appointment, in Order to avoid the Fine before the five Years passed, and the Conusee re-entered, and then the five Years passed, that this Entry should not avoid the Fine, unless he who had the Right agreed to the Entry, but his Agreement to it afterwards will not do. *Cro. Eliz.* 561. *Lord Audley* versus *Pollard*. *Popham* 108. *S. C.* reported by the Name of *Pollard* versus *Lutterell*.

4. The Husband made a Conveyance of his Land by Fine, and afterwards died; if the Widow make her Claim within five Years after his Death, she shall have her Dower, tho' five Years had incurred in the Life-time of her Husband, after he levied the Fine; but if she doth not within five Years after his Death, being full, and of full Age, &c. and not under any Incapacity, as mentioned in the Statute 4 *H.* 7. she shall lose her Dower. *Goldesborough* 148. *Moor* 53. *S. P.*

5. The Conusor being possessed of several Lands under several Titles, (*viz.*) some for Years, of others by Copy of Court-Roll, and of some in Fee, made a Lease of the Whole to *B. G.* for Life, and then levied a Fine of so many Acres to him as amounted to the whole Land, and continued in Possession, and paid the Rent to the Lord, till the five Years passed; adjudged, that the Lord should

1 *Lev.* 39.
Raym.
36.
Dower.
(A) 19.
S. P.

Moor
450, 457,
S. C.

2 *And.*
176.

should not be barred of the Copyhold by this Fine, because he could not possibly have Notice of the Covin. 3 Rep. 77. *Farmer's Case*.

6. Where Lessee for Life in Possession, levieth a Fine *come ceo*, if the Lessor doth not enter within five Years afterwards, he shall be barred, by the Opinion of the Chief Justice and another Judge; but *Windham* was of a contrary Opinion, for he hath Liberty to enter within five Years, or may stay till the Death of the Lessee for Life. 1 Leon. 46. *Braybrook's Case*.

7. There was a Lease made to commence after the Determination of another Lease then in Being; the first Lease ended, the second Lessee did not enter, but he in Reversion entered and made a Feoffment, and levied a Fine, and the five Years passed without Entry or Claim; adjudged, that the second Lessee was barred of his Term by the Statute 4 H. 7. of Fines, because the Words of the Statute are general, and extend to all Estates, and the Saving is of *Claims and Interests*, &c. and he who hath a *Term for Years*, hath an *Interest*, and such an Interest which may be barred by a Fine, and so are the Interests of Tenants by Statute-Merchant, *Elegit*, Guardians and Executors; and tho' he who hath only a Right to an Inheritance cannot levy a Fine, yet if the Tenant of the Land levieth a Fine, he shall be bound by it. 5 Rep. 123. *Saffyn's Case*. *Postea Release*. (B) 12. S. C.

8. Adjudged, that where a Disseisor levieth a Fine, and the Disseisee, to preserve his Right, entereth his Claim in the Record of the Foot of the Fine, this is not such a Claim as will avoid the Statute 4 H. 7. of Fines. Mich. 29 Eliz. 2 Leon. 53. *Brasier's Case*.

9. A Lease was made, Anno 20 H. 8. for eighty Years; the Lessee died Intestate, and Anno 4 Mar. a Fine was levied of these Lands, with Proclamations, and the Cognisee enjoyed the same till the 37th of Eliz. and then W. R. took out Administration to the Goods, &c. of the Lessee; two Judges held, that the Right of a *Term for Years* is not within the Statute of 4 H. 7. of Fines, but a *Right of Freehold*, and therefore this Lease shall not be bound by that Statute, and by Consequence, that the Entry of the Administrator was lawful; but *Anderfon* Ch. Just. was of a contrary Opinion, (*viz.*) that the Statute did extend to a *Right of a Term*, and shall bind it, if the Lessee ever was or might have been in Possession before the Fine levied. Hill. 43 Eliz. *Coots versus Atkinson*. Goldf. 171.

10. Where a Man hath a Right to a Writ of Error to reverse a Fine for an apparent Error, 1 Roll. and he suffereth five Years to pass without bringing it, he shall be barred by such Fine and Non-Rep. 36. claim, by the Statute 4 H. 7. by the Word *Actions* in the Statute, and so it was adjudged in the 2 Bullt. Exchequer-Chamber. 27 Eliz. *Mundevill's Case*. 2 Cro. 332. *Bartholomew versus Blofeild*. S. P. 244. By the Name of
See *Cockman versus Farrer*. Benfeild versus Bartholomew.

11. The Husband being seised in Fee, levied a Fine, and was afterwards outlawed for High Treason, and the Conusee conveyed the Lands to the Crown; afterwards the Daughters and Heirs of the Cognisor reversed the Outlary; and upon a Petition of *Droit de Dower* to the Queen, it was adjudged, that tho' the five Years were passed long since, and after the Fine levied, and the Death of the Husband, yet this Petition being within five Years after the Reversal of the Outlary, the Widow shall not be barred of her Dower, because so long as the Outlary was in Force, that was a Bar to her Claim; but that being reversed, she shall have another five Years after the Reversal, to make her Claim, which she had now done by Petition. Moor 639. *Menvil's Case*.

12. The Testator devised the Lands to an Infant in Fee, and died, B. G. entered and levied a Fine of it in the Life-time of the Infant, who afterwards died within Age; the Wife of E. B. being his Sister and Heir; the Husband suffered the five Years to pass without Entry or Claim; adjudged, that the Fine shall be a good Bar to him and her, and all claiming under them during the Coverture, but that the Wife, if she survive, shall have five Years more after the Death of her Husband. Cro. Car. 91. *Hewlin versus Heylock*.

13. Writ of Error to reverse a Fine, under which the Plaintiff in the Action claimed; and the Defendant pleaded, that he was beyond Sea at the Time of the Fine levied; the Plaintiff replied, that the Defendant came into England in August, within five Years after the Fine levied, upon which they were at Issue, and the Jury found that he came in July; adjudged, that tho' the Verdict differs from the Issue in Point of Time, (*viz.*) in the Month, the one being in July, and the other being in August, yet the Substance of the Issue is found, (*viz.*) that the Defendant was in England within five Years after the Fine levied, and might have made his Claim; and 'tis not material in what Month he came, so as he was here, and therefore the Fine and Nonclaim shall bar him. March 8. *Winterhouse versus Earl of Oxford*.

14. In Dower against the Tenant of the Land, he pleaded, that her Husband, Anno 14 Jac. levied a Fine of the Lands, with Proclamations, and that he died in the same Year, and that the Widow made no Claim within five Years afterwards, so that she was barred by the Statute 4 H. 7. of Fines; the Demandant replied, that Anno 15 Jac. she brought a Writ of Dower against the now Tenant and two others, and that the Writ abated by the Death of those Two, and that she now brought this Writ by *Journeys Accompts*; the Defendant rejoined, that those Two were not Tenants, but that one W. R. was Tenant; and upon Demurrer to this Rejoinder, it was objected, that it was ill, because it amounted to a negative Pregnant, and to a Confession, that the Defendant was Tenant; for if those Two were not Tenants, then he was, and so the Writ is well brought

brought against him; now, admitting that he was not Tenant then, 'tis true, that the Writ being brought against him, is not any Claim within the Statute; but if he was Tenant then where she brought her Writ against him and *Two others*, and it abated by their Death; and now she brings a second Writ by *Journeys Accompts*, tho' after the Time limited by the Statute, yet 'tis a good Claim. *Pasch. 21 Jac. Winch 66. Summers's Case.*

15. In a Special Verdict in Ejectment, the Case was, *T. S.* being seised in Fee, did, for the Continuance of his Lands in his Name, and for the Maintenance of his Brother, make a Lease to *G. D.* and *M. G.* for 500 Years, in Trust for himself for Life, and afterwards for his Brother, and upon some other Trusts, &c. afterwards, being still in Possession, according to the Trust, he covenanted with *W. W.* and *T. P.* to stand seised of these Lands, upon the same Consideration, and to the same Uses as mentioned in the Lease, and covenanted to levy a Fine accordingly, and afterwards levied a Fine, and enjoyed the Profits during his Life, and the five Years being long since passed, he died; then *G. D.* one of the Lessees in Trust entered; and the Question was, whether the Lease for 500 Years was barred by this Fine and Nonclaim; it was insisted that it was, according to the Distinction made in *Saffin's Case*. (*viz.*) where a Lease commences immediately in Point of Time, tho' the Lessee doth not enter a Fine and Nonclaim, is a * Bar; but 'tis not so where 'tis to commence in futuro, which is this Case; but adjudged, that this Fine was no Bar to the Estate for 500 Years, because it was levied in † Affirmance of it; and it shall be intended, that the Conusor continued in Possession, by the Leave and Permission of the Lessees; if so, then he was but Tenant at Will; and being in Possession upon such a Privity between them, that will protect the Interest of the Lessees; 'tis like the * Mortgagor's Levying a Fine, and five Years pass, this will not bar the Mortgagee, he being out of Possession; besides, this Fine doth not displace the Estate and turn it to a Right, as where there is Lessee for Years, Remainder for Life to another, and the Lessee for Years levies a Fine, and the five Years pass, the Lessor is not barred by Nonclaim, because the Fine operates nothing, for *partes finis nihil habuerunt* may be pleaded; but 'tis otherwise where Tenant for Life levies a Fine, because he hath a Freehold, and his Fine displaces the Remainders, and therefore an Entry is requisite within five Years after his Death, but in the principal Case the Lease was precedent to the Estate of the Lessor, who levied the Fine, and he had a Freehold expectant upon the Lease; and his Fine is so far from working a Wrong, that he intended it should fortify the Lease; therefore he shall not be made a Wrong-doer against his Will; and so it has been adjudged in *Blunden and Baugh's Case*, nor will the Court presume it to be a * Tort, if it may be intended otherwise. *Hardres 400. Focus versus Salisbury.*

16. In Ejectment it appeared upon the Evidence, that the Title of the Lessor of the Plaintiff was by Virtue of a Remainder limited to him for Life, &c. but that there was a Fine levied, and that within five Years after his Title accrewed, he sent two Persons to deliver Declarations on the Lands; adjudged, that this was no Entry or Claim to avoid the Fine, because this was no express Authority given to them for that Purpose. *1 Vent. 42. Clerke versus Phillips.*

17. Error in *B. R.* to reverse a Judgment in Ejectment in *C. B.* in a Special Verdict, wherein the Case was, that Tenant in Fee-simple made a Lease to *A. M.* for 100 l. in Trust to attend the Inheritance; afterwards the Tenant in Fee entered and took the Profits, and made two Leases to other Persons, for short Terms of Years, which were expired; then he made a Lease to one *Germin* for fifty-four Years, and levied a Fine, with Proclamations to corroborate the Term to *Germin*, who entered, and the five Years passed; adjudged, that this Fine and Nonclaim was a Bar to the Term of 100 Years. *1 Vent. 55, 80. Freeman versus Barnes. See (G) pl. 10. S. P.*

18. In a Special Verdict in Ejectment, the Case was, a Settlement was made by Covenant to stand seised, &c. to the Use of *Charles Maynell*, for ninety-nine Years, if he should so long live, Remainder to Trustees to preserve contingent Remainders, (which being two Strangers, and not of the Blood of the Covenantor, was void as to that) Remainder to the first, and so to the tenth Son of *Charles* in Tail, Remainder to *Edmund Maynell*, the Father of the Lessor of the now Plaintiff in Tail, Remainder to the right Heirs of the Covenantor; in October 1656, *Charles* made a Feoffment to the Defendant, and in Hillary-Term following levied a Fine to him; *Edmund Maynell* the Father of the Lessor of the Plaintiff, being then living, who died in March 1661, leaving the Lessor of the Plaintiff then and still under Age; *Charles* died in 1664, without Issue Male, but had a Daughter now living; the Question was, whether the Lessor of the Plaintiff shall have five Years after the Death of *Charles*, to enter to avoid this Fine, or if the Entry should not be within five Years after the Fine levied; but if the first, then he is Right in Point of Time, being at the Death of *Charles*, and still an Infant; but if the last, then the Right of Entry being attached in his Father, and he not Entering within five Years after the Fine levied, the Sons are barred; it was insisted for the Defendant, that if *Charles* had been Tenant for Life, he in Remainder would have five Years to enter after his Death, tho' he might have entered in the Lifetime of the Tenant for Life, and this by the Saving in the Statute 4 H. 7. (*viz.*) the second Saving, by which future Rights are saved; now the Title comes by the Determination of the Estate for Life, is a new Right which accrues to him in Remainder, and therefore he shall have five Years to enter and claim after the Death of the Tenant for Life; but my Lord Coke, in *Podger's Case*, tells us, 'tis otherwise where a Fine is levied by Tenant for Years; for then the Entry and Claim must be within five Years after the Fine levied, because in such Case he in Remainder hath a present Right, being disseised by the Levying the Fine; but adjudged for the Lessor of the Plaintiff, that

* 2 Cro.
60.

† Moor
220, 298.

* Noy 23.

* 3 Rep.
Fermor's
Case.
1 Cro.
304, 484.

1 Mod.
10.
1 Saund.
319.

1 Sid. 349.
458.
1 Lev.
246, 270.
Hardres
448. S. C.

Raym.
209.
1 Vent.
241.
1 Vent.
334.

that he shall have five Years to enter after the Death of *Charles*; that there are no Words either in the first or second Saving of the Statute to warrant this Difference of a Fine levied by *Tenant for Life*, and a Fine levied by *Tenant for Years*, for by the first Saving all present Rights are saved, and by the second all future Rights; and there is nothing mentioned of Freehold or Chattels: Now, when *Tenant for Years* levies a Fine, he in Remainder hath a new Right of Entry upon the *Determination of that Estate*, as well as he in Remainder hath upon the *Determination of the Estate for Life*, for in both Cases the Levying a Fine is a Forfeiture; and the Reason why it doth not bar, is because of the Trust and Privy which is between the Lessee and him in Remainder, that no Prejudice be done to him by their Acts; now in the Principal Case the Lessee was trusted with the Possession, and if he in Remainder should not have five Years to enter after the *Determination of the Estate for Years*, then there would be an apparent Injury and Fraud done by his Means and Privy. 2 *Lev. Whaley versus Tancred*.

19. Adjudged upon a Trial at Bar in Ejectment, that where a Fine *come ceo* was levied by *Tenant for Life*, and the Plaintiff in Ejectment, who had the *Reversion for Life*, after the Death of the Cognisor of the Fine, directed one to deliver a Declaration to the Tenant in Possession, within 5 Years after the Death of the Cognisor, which was done accordingly; that this did not amount to an Entry to avoid the Fine, altho' in this very Declaration the Lease was contained upon which the Ejectment was brought. 1 *Saund. 319. Clerke versus Pyewell*.

20. In Ejectment, the Case upon a Special Verdict was, that *Thomas Lewis* acknowledged two Statutes to *Knight* and *Gerrard*, and another to *Burroughs*, which *Knight* and *Gerrard* extended by *Liberate*, and afterwards they two granted their several extended Interests to one *Edward Lewis*, but that *Thomas Lewis*, the Conusor, still continued in Possession, and levied a Fine *come ceo* to *John Lewis* and his Heirs; that *John Lewis* devised the Lands to the said *Edward Lewis* in Tail Male, and for want of such Issue to his Daughters; that afterwards *Edward Lewis* being in Possession, levied a Fine to *Francis* and his Heirs, to the Use of the said *Edward* and his Heirs; the Question was, that when *Edward Lewis* had the extended Interests upon *Knight* and *Gerrard's Statutes*, and soon afterwards the Estate of Inheritance likewise in himself, and then levied a Fine to *Francis*, to the Use of himself and his Heirs, whether that Fine did destroy the extended Interests which were in him; and adjudged, that it did; for when a Fine is levied by him who hath the Freehold, whatever Interest he hath besides passes inclusively, not by way of transferring it, but Consolidation with the Fee; if so, then *Burroughs* might have entered immediately, which he did not, but five Years passing afterwards without Claim, the Extent upon his Statute is barred, for he shall not have a new five Years after *Gerard's Statute* shall be satisfied by Perception of Profits, or Satisfaction acknowledged upon Record, by Virtue of the Saving in the Statute, 4 *H. 7. (viz.) Saving such Right as shall first remain after the Fine levied, by Reason of any Matter before*, so that he pursue the Right within five Years next after it shall accrue; for whether the Extents up *Knight's* and *Gerard's Statutes* were barred by the Nonclaim in the first Fine levied by *Thomas Lewis*, or destroyed by the last Fine levied by *Edward Lewis*, there was no Pretence, that *Burroughs* claimed within five Years after either of those Fines; so that the Right was not pursued within five Years after it did first accrue; and this had been necessary to be done where there was only a *Right of Action*; as for Instance, Tenant in Tail levied a Fine, by which the Remainder was destroyed, he having before the Fine levied, made an Estate for Life warranted by the Statute, and then died without Issue; adjudged, that he in Remainder was barred of a *Formedon* in the Life of the Tenant for Life, within 5 Years after the Fine levied, and could not have a new 5 Years after the Death of the Tenant for Life, (altho' he could not enter whilst the Tenant was living) because after the Death of the Tenant for Life, the Remainder Man had no new Right, for it was the very same he had before: In *Whaley and Tancred's Case* before mentioned 'tis held, that he in Reversion shall have a new 5 Years, after a Term in Being when the Fine was levied, shall be ended by Effluxion of Time; but that was upon an apparent Fraud, where a Fine was levied by a Lessee for Years continuing still in Possession; but even in that Case the Resolution was carried beyond the Words of the Statute, for the Right was not pursued within 5 Years after it first came; and it was a Construction by Equity to weaken the Force of a Statute, contrary to the very Reason of the Common Law, which takes no Care for a Reversionary Interest; besides, to let him, who has a Reversion by Extent, have five Years to claim after a precedent Extent is satisfied by Perception of Profits, or Satisfaction acknowledged, is to let in a Claim after an Estate, that no Man can see an End to, whereas other particular Estates have an End either by exprefs Limitation of the Parties, or by Operation of Law. 2 *Vent. 321. Dighton versus Greenwill*.

21. A Copyholder of a *Dean and Chapter* levied a Fine *come ceo*, and five Years passed without any Claim by the *Dean, &c.* adjudged in a Special Verdict in Ejectment, that the succeeding *Dean* was not bound by this Fine and Nonclaim; for if he should, the Statutes 1 & 13 *Eliz.* which restrain the Alienation of Church Revenues would be to little Purpose. 1 *Vent. 311. Howlet versus Carpenter*.

22. *T. P.* levied a Fine, and afterwards suffered a Common Recovery, wherein the Conusor of the Fine was Tenant to the *Præcipe*, but no Uses of the Fine was declared; it was therefore insisted, that the Uses of the Fine resulted to the Conusor, and tho' the Intent might be to make him Tenant to the *Præcipe*, yet, since the Statute 29 *Car. 2. cap. 3.* there shall be no Averment of an Use or Trust; but adjudged, that at Common Law the Use of a Fine was always in-

intended to be in the Conusee, and that this Statute doth not extend to Uses by Operation of Law, but to such Uses as are to a Third Person, (*i. e.*) that neither the Conusor or Conusee of a Fine shall aver the Uses to be to a Third Person; so that in the Principal Case the Party was immediately in by the Fine, and the Cognisee was a good Tenant to the *Præcipe*. 2 *Salk.* 676. *Lord Anglesea versus Lord Altham.*

(C)

Where reversed for Error, and for what Errors, and for what not.

* See Harvey v. Broad.

1. **F**OUR Proclamations were made on a Fine every Term, according to the Statute 4 *H.* 7. but the 13th was made on the 7th of June, which was not * *dies juridicus*, being Sunday, and that was assigned for Error to reverse the Fine; but adjudged, that the Fine should stand, and the Proclamations only should be reversed; for the Statute doth not appoint any new Form of Fines, but they remain in Substance and Form as they were before; 'tis true, it gives Proclamations upon the Fine to the Intent, that Strangers may have Notice of it; but the Fine itself is perfect without Proclamations, and being Matter of Record, shall bind the Parties. *Plowd. Com.* 265. *Fish versus Bocket.* *Dyer* 182. *S. P.*

2. The Husband made a Feoffment in Fee to the Use of himself and his Wife, and the Heirs of their two Bodies, Remainder to the Right Heirs of the Husband; they had Issue a Daughter, then the Husband died, and the Daughter married, and she and her Husband joined in a Fine to confirm her Estate, and then she died without Issue; her Cousin and Heir brought a Writ of Error to reverse the Fine, and assigned for Error, that after the Writ of Covenant, and before the Caption certified, (*viz.*) 25th of March, which was before the *Teste* of the *Dedimus*, the Daughter died; but this being contrary to the Record certified by the Judge, who took the Caption, was not suffered to be assigned for Error. *Dyer* 89. *Verney's Case.* *Postea* 14. *S. P.*

3. So where fifteen Proclamations were made, and one of them out of Term, it was adjudged, that the Fine should stand, and the Proclamations be reversed. 4 *Eliz.* *Dyer* 216.

4. After the *Teste* of the Writ of Covenant, and the *Dedimus potestatem* to take a Fine of a Feme sole, and before the Day in Bank to record and engross it, she married; adjudged, that the Fine shall be engrossed as her Fine, for she had done all she could do, and the Fine shall bind her and her Heirs; but if she had died, in such Case the Writ of Covenant should abate, that being by the Act of God, but Marriage was her own Act. 8 *Eliz.* *Dyer* 246.

5. Error to reverse a Fine levied in the County Palatine of Chester, and several Errors assigned, but because there was no *Sci. fa.* against the Tertenant, who might have something to plead as a Release or other Matter; there was no Answer made to the Errors, but a *Mandamus* was awarded to the Chamberlain of Chester, to warn the Tertenant *ad audiend' Errores*. 15 *Eliz.* *Dyer* 321.

6. Error to reverse a Fine, because the Caption was by Roger Manwood, Chief Baron, on the 27 *Martii* 27 *Eliz.* and the *Dedimus potestatem* was dated 9 *Aprilis*, so as the Caption was taken without Warrant; but this was held not to be Error; then it was objected, that the Caption was upon the *Dedimus*, in which the Land was mentioned to be to the Husband and Wife, and to the Heirs of his Body on her Body to be begotted, and the Fine engrossed was, to the Heirs of the Body of the Husband, on her to be begotten; so the Word *Body* was left out; but adjudged this Variance was not material, because in both Cases the Words are of the same Import, and the Wife hath but an Estate for Life, and the Husband an Estate-Tail in both Limitations. *Cro. Eliz.* 275. *Argenton versus Pestlover.*

7. Husband and Wife levied a Fine of the Lands of the Wife, she being then under Age, and afterwards they suffered a Recovery, wherein they being vouched by the Conusee in the Fine, appeared in Person, and vouched over the Common Vouchee, &c. there were two Writs of Error brought, one to reverse the Fine, and the other the Recovery; adjudged, that it was clear the Fine ought to be reversed, for the Infancy of the Wife; but it was doubted concerning the Reversal of the Recovery, because she appeared in Person, and vouched; yet afterwards it was reversed. *Goldf.* 181. *Sir H. Jones's Case.*

8. Husband and Wife levied a Fine of the Lands of the Wife, she being an Infant; both of them brought a Writ of Error to reverse the Fine; adjudged, that it shall be reversed as to both, for the Infancy of the Wife, and not stand good as to the Husband, and be reversed as to her; because 'tis an entire Thing, and cannot be affirmed in Part, and reversed in Part. 1 *Leon.* 115. *Charnock versus Worsey.* *Owen* 21. *S. C.* See Infant (F) 7.

9. Error to reverse a Fine, for that it was levied of a *Reversion*, &c. and the Conusee brought a *Quid juris clamat*, in order to compel the Tenant to attorn, and pending the Writ he died; then his Heir brought a new *quid juris clamat*, and the Tenant pleaded, that as to one Part he claimed the Fee, and as to the other Part he was ready to attorn, and the Plaintiff accepted thereof; and as to Remainder *quod defendens eat inde sine die*, and the Fine was engrossed, and Proclamations made; the Error assigned was, that the Conusee alone was to have Election, whether he would have the Fine with Proclamations or not, and that he being now dead, his Heir

cannot have it with Proclamations; besides the Judgment in the *Quid juris clamat* is, that the Fine be engrossed for Part, and here it was engrossed for the Whole; but adjudged, that the Heir hath Election to have the Fine with Proclamations, as well as his Ancestor had, for 'tis for his Benefit; and as for the *Quid juris clamat*, 'tis not material, for the Conusee might have the Fine engrossed without that Writ; 'tis true he might not compel the Tenant to attorn without it, therefore he brought the Writ for that Purpose; and tho' the Judgment is, that the Fine be engrossed *in Part*, yet if he will, he may have *all the Fine* engrossed. *Mich. 42 Eliz. Cro. Eliz. 692. Wakeford versus Hodgson.*

10. Tenant for Life, Remainder to an Infant in Fee, join in a Writ of Error to reverse a Fine; it shall be reversed as to the Infant only. *Ivory versus Fryes. 1 Leon. 155.*

11. If a *Dedimus potestatem* be awarded against two, and one of them takes the Caption of the Fine, which is afterwards drawn up in the Common Pleas, yet the Party may have a Writ of Error, because the Caption was without Warrant, being contrary to the Record, for the *Dedimus* is Parcel of the Record; but If such an erroneous Caption be taken on a *Dedimus*, and the Fine is drawn up not as upon a *Dedimus*, but as a Fine acknowledged in Court, in such Case it shall not be avoided for Error in the Caption. *Yelv. 33. Arundell versus Arundell. 2 Cro. 11. S. C.*

12. The Writ of Covenant was returnable *Octab. Pur'*, and dated 23 January; the *Dedimus potestatem* bore Date the same Day, and the Judge certified the Caption on the 14th of February, which was two Days after the Term, and the Fine was *hac est finalis Concordia facta, &c. in Octab. Pur'*, and afterwards it was recorded in *Easter-Term*; and yet this was adjudged a good Fine. *Hutt. 135. Sir R. Champenoon's Case.*

13. One Alexander Gillibrand being seised in Fee of Lands, &c. B. G. procured another Man to take upon him the Name of the said Alexander, who was then beyond Sea, and to acknowledge a Fine of the Lands to the said B. G. which was accordingly done; for which Offence each of the said Persons were fined in a very great Sum, in the Star-Chamber, but no Sentence to take the Fine from the Roll, or Damages to the Party grieved. *12 Rep. 123. Moor 630. S. C. that a Vacat was made of the Fine.*

14. The Writ of Covenant and the *Dedimus potestatem* were, that a Fine should be of the Manor of R. and of twenty Acres of Land, and 40 s. Rent in R. and the Concord was, *quod cognovit Manerium & Tenementa præd' cum pertinentiis esse jus, &c.* leaving out the Rent, and so it varies from the Writ of Covenant and *Dedimus*; and this upon Error brought was assigned for Error; but adjudged it was not Error, because the usual Course of the *Fine-Office* is, that where a Fine is levied of a Manor, and a Rent, &c. if the Rent is under 5 l. yearly, they never mention it in the Fine, but if 'tis 5 l. or more, then they mention it in the Concord; another Error assigned was, that the *Dedimus* was directed to Roger Manwood, who was not then a Knight, and the Caption was taken by Roger Manwood Knight, and so certified by him; but this was not allowed, because it was expressly against the Judge's Certificate. *Arundell versus Arundell. 2 Cro. 11. Antea 2. S. P.*

15. The Conuser levied a Fine of a Manor, and of several Acres of Land, naming them, to the Value of twenty Marks *per Annum* so that the King's Silver was 40 s. for the Whole, and the Clerk to whom it was paid entered it thus; (*viz.*) B. G. *dat. Domino Regi 40 s. pro licentia concordandi in placito conventionis* of so many Acres, leaving out the Manor, upon which a Writ of Error was brought, and the Transcript of the Record being removed in the King's Bench; it appearing to the Judges of the Common Pleas, upon Examination, that the King's Silver was paid for the Whole, they amended the Record, it being but the Misprision of the Clerk. *5 Rep. 43. Bohun's Case.*

16. Error to reverse a Fine levied by Charles Earl of Devonshire; the Writ was brought by the Plaintiff, as Cousin and Heir of the Earl, and a *Sci. fa. ad audiend' Errores*, and did not shew in either of those Writs, *how he was Cousin to the Earl*; adjudged good, for the first Writ is only a Commission to hear Errors, and needs not such Certainty, and the *Sci. fa.* is founded upon it, in which 'tis not requisite to shew any Title, unless 'tis in some Special Case varying from the Common Form; and tho' in some Writs and Cases 'tis shewed, *How Cousin*, as in *Vernon's Case*, yet 'tis not necessary so to do. *Mich. 14 Jac. Sir Richard Champenoon versus Sir William Godolphin.*

17. A Writ of Error was brought to reverse a Fine levied in Lancaster by Tenant in Tail; the Defendant in the Writ of Error pleaded in Bar, that the Tenant in Tail had suffered a Recovery, in which he was vouched, and thereupon he appeared, and vouched the Common Vouchee; and upon Demurrer, the Question was, whether the Issue in Tail was not barred by the Coming in of the Tenant in Tail as Vouchee, to bring this Writ of Error to reverse an erroneous Fine which he had levied; and adjudged, that he was barred. *Moor 367. Barton versus Lever & al.*

18. Writ of Error to reverse a Fine, and the Error assigned was, that the Ancestor of the now Plaintiff in Error, who levied this Fine, died between the *Teste* and Return of the Writ of Covenant; the Defendant pleaded, that after the Death of him who levied the Fine, the Father of the now Plaintiff entered on Parcel of the Lands, and made a Feoffment in Fee to B. G. and upon Demurrer to this Plea, it was adjudged for the Defendant, and that the Plaintiff was barred of this Writ of Error, by the Entry of his Father, and his Feoffment of Parcel; for where a Man

hath a *Right of Action* to recover the Land, and 'tis suspended or extinguished as to Parcel, 'tis extinguished as to the Whole; but if he hath an actual *Right* to the Land it self, he may release or suspend it as to Part, and it shall remain good for the Residue. *Moor* 413. *Wright* versus *Mayor of Wickham*. *Postea* (E) 2. S. C.

19. Tenant in Tail of a Messuage and Lands called *Estons*, lying in L. levied a Fine thereof by the Name of a Messuage, and 200 Acres, &c. lying in *Effington*, *Eston* and *Chilford*, and the Jury found, that there was not any *Vill*, *Hamlet* or *Lieu conus*, by the Name of the Messuage or Tenement called *Estons*, out of the Vill or Hamlets, and that none of the said Tenements were in *Effington* or *Chilford*; it was objected, that a Fine cannot be of Lands in a Vill or Hamlet, by the Name of a *Lieu Conus*, for the Vill being the Principal, ought to be named; but adjudged, that the Fine being an amicable Assurance, ought to be taken favourably; and since 'tis recorded, it shall be good. *Cro. Car.* 196, & 201. *Fawely* versus *Eston*.

20. In a Special Verdict in Ejectment, the Case was, a Fine was levied of Lands in the Parish of *St. Inderion*; the Cognitor had Lands in *Portgwyn*, and the Jury found, that *Portgwyn* had a *Tythingman*, but that the *Constables* of *St. Inderion*, did exercise their Authority in *Portgwyn*; the Question was, whether the Lands in *Portgwyn* passed by this Fine; and this depended upon another Question, whether *Portgwyn* was of it self a Parish, because it had a *Tythingman*, or whether it was a Vill or Hamlet in the Parish of *St. Inderion*; adjudged, that if it had been found, that they had distinct *Constables*, and could not interfere in their Authority, that then they might be distinct Parishes; but here 'tis found, that the *Constables* of *St. Inderion* did exercise their Authority in *Portgwyn*, therefore it must be a Vill in *Inderion*, and a Parish may contain many Villages; and if a Fine is levied of Lands in the Parish, it passes whatsoever is in the Villages. 1 *Vent.* 170. *Waldron* versus *Rufearitt*. 2 *Mod.* 234. S. P. 2 *Vent.* 31. S. P.

21. Tenant in Tail, Remainder to *Hugh* in Tail, Remainder to *Wm.* in Tail, Remainder over in Fee, &c. the Tenant in Tail and his Wife and *Hugh*, who was the next in Remainder, join in a Fine, and on the last Day of *January* 3 *Car.* the Writ of Covenant was brought, and the Caption was 2 *Feb.* following, and so the Fine went on, and 5 Years and more passed, then a Writ of Error was brought to reverse it, and the Error assigned was, for that the Tenant in Tail having Issue, died before the Return of the Writ, or the King's Silver entered; so that the Estate-Tail descended on his Issue, and by Consequence *Hugh*, the next in Remainder had nothing at the Time of the perfecting the Fine, and thereupon he alledged Diminution in the Record, before the Chief Justice of *Chester*, (this Fine being levied there) and afterwards before the Pronotary, who returned no Diminution on the Record; for that the King's Silver was entered on a *Paper-Book* in the Office, &c. without shewing for what; and thereupon the Defendant demurred, and the Plaintiff joined in Demurrer; it was insisted, that this was no Entry of the King's Silver, it being in Paper, and all Records ought to be in Parchment; 'tis true, if a * Feme sole brings a Writ of Covenant which is taken by *Dedimus*, (as in this Case) and before the Return of the Writ she marries, the Fine shall go on and bind her, because the Marriage was her own Act; but in the Principal Case, the Death of the Tenant in Tail was by the Act of God, and as to the five Years passing that shall not hinder where the Fine it self was erroneous; and of this Opinion were two Judges, and so was the Chief Justice; but he held, that the Entry of the King's Silver could not come in Question; for to proceed on a Fine after the Death of the Cognitor, and before the Return of the Writ, is Building without a Foundation; that in all Fines the Writ of Covenant is the Foundation; that where the King's Silver is entered, and the Fine engrossed, the Fine is good, tho' one of the Parties die; that even in the Principal Case, if the Tenant in Tail had not died, the King's Silver might be paid; and if not, yet there was a Composition for it, and in favour of Common * Assurances, it shall be presumed to be paid; so Judgment was, that the Fine shall be reversed in the Whole. 2 *Sid.* 54, 92. *Row* versus *Eveling*.

22. Writ of Error to reverse a Fine, and one of the Parties to the Fine was omitted in the Writ; whereupon the Plaintiff in Error moved for Leave to quash it; but it was denied, because the Court cannot take Notice of any Thing but what is of Record; however they made a Rule, that the other Side should shew Cause, why the Plaintiff might not discontinue, tho' Writs of Error are seldom discontinued. 5 *Mod.* 67. *Winchurst* versus *Mafely*.

23. Upon a Writ of Error in *B. R.* to reverse a Fine levied in *C. B.* the Transcript only, and not the very Record of the Fine, is removed; but if *B. R.* adjudge it erroneous, then a *Certiorari* goes to the Chirographer to certify the Fine it self, and when it comes up 'tis actually cancelled. 1 *Salk.* 341. *Fazacharly* versus *Baldo*.

24. Upon a Writ of Error in *B. R.* to reverse a Fine in *C. B.* the Fine was affirmed, upon which Affirmance a Writ of Error *coram vobis residen'* was brought in *B. R.* it was objected, that it would not lie, because the Transcript only of the Fine was removed, like Error in the Exchequer-Chamber, where the Transcript only goes up, and if the Writ abates, a Writ of Error *coram vobis residen'* doth not lie; which is very true; but the Reason is, because they have Authority only to reverse or affirm, and not because they have only a Transcript; adjudged, that the Writ of Error *coram vobis residen'* would lie. 1 *Salk.* 37. *Winchurst* versus *Bellwood*.

25. Adjudged, that *B. R.* will not reverse a Fine without a *Sci. fa.* returned against the Tertenants, for the Conusees are but nominal Persons; 'tis true, this is not strictly required by Law, but 'tis the Course of the Court. 1 *Salk.* 339.

* Dyer
246.

Farmer's
Case.

* Dyer.
Carrell's
Case.

(D)

Where Levying a Fine makes a Forfeiture, where not; and where the Entry for such Forfeiture is good.

1. **T**ENANT for Life, Remainder in Tail; the Tenant for Life levied a Fine *come ceo*, to the Use of himself and his Heirs; adjudged, this was a Forfeiture; afterwards the Tenant for Life, and he in Remainder, joined in a Feoffment, and made a Letter of Attorney to make Livery; adjudged, this was a Discontinuance, for 'tis first an Entry for the Forfeiture, then 'tis a Feoffment of him in Remainder; and lastly, the Confirmation of the Tenant for Life. *Dyer* 214. *Pasch.* 16 *Eliz.*

2. Husband and Wife, *Tenants in Tail*, had issue two Sons, and they made a Feoffment in Fee to the Use of the *Wife for Life*, and after her Decease, to the Use of the Heirs of the Body of the Husband begotten, Remainder in Fee to *W. R.* afterwards the Mother and her youngest Son levied a Fine with Warranty against her and her Heirs, and the Conusees in that Fine, rendered to the Son an Estate *for sixty Years*, rendering Rent, and then granted the Reversion to the Mother and *the Heirs of her Body*, of the Body of her Husband begotten, Remainder in Fee to *W. R. the eldest Son entered*, the Mother died, and then the youngest Son claimed this Lease; adjudged, that he had no Title to it, because by the Entry of his elder Brother, as for a Forfeiture at least all the other Estates are avoided. *Hill.* 2 *Mar.* *Dyer* 111. *Coward's Case.*

3. Where Tenant for Life, of full Age, and he in Remainder being an Infant, levy a Fine, which is afterwards reversed by Reason of the Infancy, in such Case the Infant shall not enter for the Forfeiture, because he assented to it by joining in the Fine. 2 *Leon.* 108. *Piggott versus Russell.*

4. Tenant for Life made a Lease of Part of the Lands, to hold the same *at Will*, and being in Possession of the Residue, he levied a Fine of the Whole, with Proclamations; the Lessor entered for the Forfeiture, on the Land which was leased at Will, and this he did in the Name of the Whole, and adjudged good for the Whole; but where a Disseisor maketh a Lease of Part, and continueth in the Possession of the rest, and the Disseisor enters on that which is in his Possession in the Name of the Whole, that Entry is not good for that Part which was in Lease, because the Lessee was in it by Title; but in the other Case, where the Tenant for Life leaseth Part at Will, and afterwards levies a Fine, that is a Determination, and by Consequence the Lessee hath no Title to that Part, and then the Entry is good for the Whole. 1 *Leon.* 51. *Porter versus Steddall.*

5. Tenant for Life, Remainder for Life, he in Remainder for Life levied a Fine *sur Cognissance de droit come ceo*, as if he had a Fee-simple; the Conusee brought a *Quid juris clamat* against the Tenant for Life, who not appearing, he was adjudged to attorn to the Conusee; adjudged, that by this Attornment, the *Tenant for Life* had not forfeited his Estate, because it was by Compulsion of the Court, and that the *Remainder for Life* had not forfeited his Estate, by Levying the Fine, because it was no *Discontinuance*, for nothing passed but what he might lawfully pass; but the *Chief Justice* and another Judge were of a contrary Opinion as to this Point, for that the Forfeiture is not only where there is a *Discontinuance*, but where the Party doth any Act upon Record, in order to disinherit him in Reversion. *Cro. Eliz.* 751. *Holt versus Lyfter.*

6. Agreeable to the Opinion of the Chief Justice, &c. was this Case, *ff.* Tenant for Life, Remainder for Life, Remainder in Fee to one *Braybrook*, he in Remainder for Life coming into Possession by the Death of the Tenant for Life, levied a Fine *sur Cognissance de droit*, &c. adjudged, that by this Fine of the Remainder-man for Life, the Remainder in Fee was not touched or discontinued; yet because he had done as much as he could in order to dispose the Fee-simple by the Fine, he did thereby take that upon him, which amounts to a Forfeiture. 1 *Leon.* 46. *Braybrook's Case.*

7. *Tenant for Life*, Remainder in Fee, the *Tenant for Life* made a Lease for four Years in *Moor March*, 20 *Eliz.* and afterwards granted the Lands to *B. G. habendum from Midsummer next ensuing, for Life*; the Lessee for four Years attorned, and after the Expiration thereof *B. G.* entered and made a *Lease at Will*, and the Tenant for Life levied a Fine *come ceo* to the Lessee at Will; adjudged, that when *B. G.* entered by Colour of the Grant made to him by the Tenant for Life; he was a Disseisor, because an Estate of Freehold was granted to him to commence *in futuro*, which is contrary to the Rules of Law, for an Estate of Freehold cannot commence *in futuro*; and if the Fine had been levied to him, the Remainder Man might have entered for a Forfeiture, and so he may, as 'tis levied to the Lessee at Will. 2 *Rep.* 55. *Buckler's Case.*

8. Tenant for Life, Remainder in Tail, Remainder in Fee; the Tenant for Life bargained and sold the Lands to one, who, before the Statute 14 *Eliz. cap.* 8. suffered a Common Recovery, in which the Tenant for Life was vouched, and he vouched over the common Vouchee, &c. thereupon he in Remainder entered for a Forfeiture; and adjudged he might, because the Recovery suffered by the Tenant for Life made a Forfeiture of his Estate, for he did as

much as he could do, to disinherit him in the Remainder in Tail. 1 Rep. *Sir William Pelham's Case*.

9. Tenant in Tail, upon Condition, that if he or any of his *Heirs* shall alien or discontinue the Lands, &c. that then the Donor may re-enter, he had Issue two Daughters, and died, one of the Daughters levied a Fine *come ceo*; adjudged, this is a Forfeiture of their Estate, and that the Donor might enter, because both of them are as but one Heir. 1 Leon. 292.

10. The Father having two Sons, made a Feoffment in Fee to the Use of himself for Life, afterwards to the Use of his youngest Son for Life, Remainder to the first Son of his youngest Son, who should have Issue Male of his Body, and to his Heirs for ever; Remainder in like Manner to the Daughter, Remainder for Want of such Issue to the right Heirs of the younger Son for ever; the Father died, the eldest Son had Issue a Son and died; the youngest Son had likewise Issue a Son, who died without Issue, and then his Father levied a Fine of the Lands, and the Son of his elder Brother entered on the Conusees for a Forfeiture; adjudged, that this Remainder to the first Son of the youngest Son, who should have Issue Male, is a contingent Remainder, and the Remainder to the right Heirs of the youngest Son vested in him, therefore his Levying the Fine was no Cause of Forfeiture. Pasch. 7 Car. Cro. Car. 265. *Brereton versus Nicholls*.

T. Jones
65.

11. In a Special Verdict in Ejectment, the Case was, Tenant for Life, Remainder for Life; the Tenant for Life levied a Fine to him in Remainder for Life, and to his Heirs, and this was *Sur Cognissance de droit*, &c. adjudged, that both their Estates are forfeited, the Tenant for Life by Levying the Fine, and the Remainder for Life by accepting it. 2 Lev. 202. *Smith versus Abell*.

(E)

Where the Pleading a Fine shall be good, where not.

1. ERROR to reverse a Fine, brought by one as Cousin and Heir of the Conusor, and a *Scire facias ad audiend' Errores*, and did not shew in either of the said Writs, how he was Cousin and Heir, and this was pleaded in Abatement of the Writ; but adjudged well enough without shewing it, for the *Scire facias* is only a Commission to hear Errors, and needs no such Certainty, and the Writ of Error is founded upon it, and therefore 'tis not necessary to shew the Title in that Writ. 2 Cro. 160. *Champernoon versus Godolphin*.

2. Writ of Error to reverse a Fine levied by his Ancestor, of twenty Acres of Land; the Defendant pleaded, that the Plaintiff, after the Death of his Ancestor, did disseise him of the Land, and being in Possession by Disseisin, made a Feoffment thereof to B. G. the Plaintiff replied, that he did enter upon the Defendant, *Abique hoc*, that he made a Feoffment to B. G. and upon this they were at Issue; and the Jury found, that the Fine was levied of twenty Acres, and that the Plaintiff was in Possession of the Whole by Disseisin, and being so possessed, made a Feoffment of six Acres, Part thereof to B. G. adjudged, that this Feoffment was only a Bar to the Reversal of the Fine as to the six Acres; and that it might be reversed as to the Residue, for Error. Owen 21. *Wright versus The Mayor of Wickham*. Moor 413. S. C. Antea (C) 18. S. C.

3. *Formedon in Descender* was brought by the Issue in Tail; the Tenant pleaded in Bar, and confessed the Estate-tail, but said, that before the Death of the Tenant in Tail, B. G. was seised of the Lands in Fee, and levied a Fine to him with Proclamations, and the five Years were passed without Entry or Claim; it was adjudged, that upon this Plea it shall be intended, that B. G. was in by Disseisin, and being so in Possession, levied the Fine, which shall be a good Bar to the Issue. 18 Car. March Rep. *Taylor's Case*.

4. The Issue in Tail being Privy, as Heir to his Ancestor, who levied a Fine, is estopped by the Statute 27 Ed. 1. (which took away Exceptions against Fines levied) to plead, that *partes finis nihil habuerunt*; and by the Statute 4 H. 7. he cannot make any such Averment. 3 Rep. 88.

5. By the Statute 1 R. 3. 'tis enacted, That all Conveyances made by *Cestui que Use* shall be good against him and his Heirs; now, since this Statute, Fines levied by *Cestui que Use* are as good and effectual as if levied of immediate Possessions and Seisins; and by the Statute 32 H. 8. cap. 36. Fines levied by Tenants in Tail of a Possession, Reversion or Use, shall be a good Bar to the Entail; now, by the Statute 4 H. 7. cap. 24. which tells us, who shall be concluded by a Fine levied; there is a Saving to that Person who is not Party or Privy to the Fine, and that he may plead to avoid it, that none of the Parties, nor any to their Use, had any Thing in the Land at the Time of the Fine levied, and this proves, that the antient Form in Pleading a Fine was, *Quidam finis se levavit*, without alledging a Seisin in Fee in the Cognisor. See 2 Lutw. 1608. in *Walters and Hodges's Case*.

(F)

Of fines sur concessit.

1. **T**ENANT for Life, Remainder in Tail, he in Remainder levied a Fine to the Tenant for Life, and to her Husband *sur concessit tenementa*, &c. to him and his Wife, for the *Life of the Wife*, and after Proclamations made, the Conusor died; adjudged, this Fine was no Discontinuance to bar the Estate-tail, but only during the Life of the Tenant for Life; and after that is determined, the Estate-tail is neither barred or altered. 2 Cro. 40. *The Earl of Rutland's Case*. Moor 747. S. C. By the Name of the Lord Rosse versus *The Earl of Rutland*.

2. In a Special Verdict in Ejectment, the Case was, the Husband being seised in Right of his Wife, of a Reversion in Fee expectant upon the Determination of a Term for Years, settled the Tenements to the Use of his Wife *Bridget*, for Life, Remainder to *Francis Leigh*, an Infant, and *Elizabeth* his Wife, and the Heirs of *Francis* and *Elizabeth* to be begotten, *Remainder to the Husband for Life*, Remainder to the right Heirs of his Wife *Bridget*; afterwards the Husband and *Bridget* his Wife, by Fine *sur concessit*, did grant the said Tenements & totum & quicquid habent therein, *ad terminum Vitæ ipsorum Willielmi* (the Husband) & *Bridgettæ* & eorum diutius Viventis, &c. with Warranty, and this was in Trust for the Purchaser of the Inheritance; the Lessee for Years attorned, and afterwards, in the same Term, the Father of *Francis Leigh*, and *William* and *Bridget* his Wife levied a Fine *sur cognisance de droit* to the *Earl of Salisbury* the Purchaser; this Warranty of the Father descended on *Thomas Leigh*, who was the Son and Heir of *Francis*, who was Son and Heir of him who entered into this Warranty; and the Question was, whether he was barred by it; and this depended upon the Operation of the Fine *sur concessit*; for if it enured as a Grant of the Estate in Possession of *William* the Husband and *Bridget* his Wife, then it displaces the Remainder to *Francis*, and makes Room for the Warranty to bar, but if it pass only the Estate of *Bridget*, the Wife in Possession, and the Remainder of *William* for Life, only as a Remainder, and not in Possession, then it doth not divest the Estate of *Francis* in Tail, and so 'tis not barred by the Warranty: The Court inclined, that it passed the whole Estate of *William* and *Bridget* in Possession, and not by Fractions. 2 Lev. 1154. *Piggot versus Lord Salisbury*. 2 Mod. 109. T. Jones 68.

(G)

Of fines sur Cognisance de droit, what passes by them, what not; and of Lands in several Tails.

1. **I**N every Fine there are five Parts: ff. The Original Writ, for there must be an Original Writ on every Fine. (2.) There must be a Licence to agree, upon which a Fine is due to the King, and that is called the King's Silver, which must be entered on the Writ of Covenant, &c. (3.) The Concord it self, which is the Foundation of the Fine; and if upon that the King's Silver is entered, and the Conusor should die before the Fine passeth the other Offices, 'tis still a good Fine. (4.) The Note of the Fine, which is often taken for the Concord, but is only an Abstract out of the original Writ and Concord, which remains with the Chirographer. (5.) There is the Foot of the Fine, which includes the whole Fine, as the Day, Place, and before whom the Fine was acknowledged, and this is contained in the Indentures of the Fine, which, when delivered, then the Fine is said to be engrossed, and not before. 5 Rep. *Tey's Case*.

2. Lessee for Years died Intestate, and afterwards a Fine with Proclamations was levied of the Lands held by this Lease, and the Conusor, and those claiming under, enjoyed it under this Fine above fifty Years; and then he who had the Right of Administration to the first Lessee, supposing that the Term for Years was not bound by this Fine, because it was not a Freehold or Inheritance, and by Consequence not within the Statute 4 H. 7. took out Administration; and two of the Judges held, that he had a good Title, but one of them afterwards altered his Opinion; and he, with the Chief Justice *Anderson* held, that the Statute did extend to bind the Right of a Term for Years, if the Lessee was in Possession before the Fine levied. Goldf. 171. *Coot versus Atkinson*.

3. *B. G.* who was a Debtor to the Queen, covenanted to convey Lands to the Lord Treasurer, &c. to the Use of the said *B. G.* and his Heirs, until Default of Payment, &c. and after such Default to the Use of the Queen, her Heirs and Successors, until the Debt should be paid out of the Profits, &c. and after the Debt paid, then to the said *B. G.* his Heirs and Assigns for ever, and he levied a Fine to the aforesaid Uses, and afterwards he bargained and sold the Lands to another; the Debt was not paid; the Queen seised the Lands, and granted them to *R. W.* quousque, the Debt should be paid, and afterwards it was paid by Perception of the Profits; adjudged, that notwithstanding the Bargain and Sale made by *B. G.* he should have his Lands again, because at that very Time when he made it, he had an Estate, but it was determinable upon Non-payment of the Debt, and after the Debt paid, then a new Estate was limited to him, (*viz.*) an absolute Fee-

Fee-simple to him and his Heirs; so that by the *Bargain and Sale*, the determinable Fee-simple passed, and the absolute Fee could not, because it was not then in Being, for that was to arise upon the Payment of the Debt, which was not paid at the Time of the Bargain and Sale; but if the Conveyance had been by Fine or Feoffment instead of the Bargain and Sale, then this Possibility of an absolute Fee had passed to the Vendee by the forcible Operation of such Conveyances. *Mich. 28 Eliz. 1 Leon. 33.*

W. Jones 300.
Cro. Car. 269, 276.
S. C. 4. Tenant in Tail of Lands called *Eftons*, levied a Fine of Lands in *Eftlington* and *Efton*, whereas the Lands called *Eftons* lay in another *Parish*; adjudged, that the Lands called *Eftons* did pass, tho' the *Parish* in which they lay was not named, because this being an amicable Assurance, would pass Lands in a *Lieu connus*. *Godbolt 440. Evelynus Efton.*

5. There were two Towns *A.* and *B.* in one *Parish*, likewise called *B.* a Fine was levied of Lands in *B.* not distinguishing the Town of *B.* from the *Parish* of *B.* and whether the Lands in *A.* should pass, was the Question; adjudged they should not, for both *A.* and *B.* were distinct Towns, and tho' the *Parish* of *B.* might comprehend both, yet the Lands in *A.* shall not be comprised in the Fine levied of Lands in *B.* generally, unless *A.* had been an Hamlet of *B.* and the Fine had been levied of Lands in the *Parish* of *B.* and then the Lands in both the Towns had passed. 2 Cro. 120. *Storke versus Fox.* See Recovery. (E) 4.

* See Recovery. (A) 3. 6. In Trespas, the Question was, whether a Fine *sur Cognissance*, &c. could be levied of a Close by a *Lieu connus* in a Town, without mentioning the Town, * Vill, or Hamlet where it lies; and adjudged, that it might, because 'tis but an amicable Agreement between the Parties. 2 Cro. 574. *Monk versus Butler.*

7. Where the Cognisor is to pass the Manor of *D.* to *B.* the Cognisee, by a Fine executory, and he levy a Fine to him by the Name of the Manor of *D.* and of so many Acres of Land in *Dale* and *Sale*, being the Towns in which the Manor lieth, and afterwards the Cognisor purchaseth other Lands in these Towns, the Fine shall not be executed of the new purchased Lands, but shall extend only to these Lands which he had an Intent and Power to pass. *Poph. 104. Kelley's Case.*

8. Lease for Years, to commence after the End or Determination of a former Lease then in Being; the first Lease ended, the second Lessee did not enter, but he in Reversion did, and afterwards levied a Fine with Proclamations, and the five Years passed without Entry or Claim of the second Lessee; adjudged, that he was barred now by the Fine, and bound by the Statute 4 H. 7. for that Statute mentions Interests to be barred by Fines, and the Lessee in the principal Case had an Interest in the Lands. 5 Rep. 123. *Saffin's Case.*

1 And. 285.
Cro. Eliz. 917.
Moor 337.
Yelv. 124.
Owen 70.
S. C. 9. The Bargainor by Deed of *Bargain and Sale*, conveyed the Reversion of certain Lands in *Whitchurch* and *Goring*, to one *Libb* and his Heirs, after a Term for Years then in Being, and before the Inrolment he levied a Fine of the same Lands, to the same *Libb* and his Heirs; and after the Fine was levied, the Deed of *Bargain and Sale* was enrolled, pursuant to the Statute within the six Months; adjudged, that tho' the Deed was delivered before the Fine was levied, yet *Libb* the Conusee shall be in by the Fine, and not by the Deed, because the Fee-simple passed to him by the Fine, and shall not afterwards be devested out of him by the Enrolment, since it was absolutely established in him by the Fine; 'tis true, the Inrolment shall relate to the Delivery of the Deed, but that is to prevent and protect the Estate from all intermediate Incumbrances, but never to devest any Estate lawfully settled in the Bargainee before that Time. 4 Rep. 70. *Hinde's Case.*

10. Lessee for Years assigned over his Lease to another in Trust for himself, and afterwards purchased the Inheritance; then he levied a Fine with Proclamations, and the Trustee did not claim the Lease within five Years; adjudged, that by this Fine and Nonclaim, the Interest of the Lessee was barred, tho' he had the Possession only under the Trustee, for the Trust is included in the Fine. Cro. Car. 77. *Isham versus Morrice.*

March 94.
W. Jones 456. 11. Tenant for Life, Reversion in Fee to an Ideot, whose Uncle levied a Fine, with Proclamations, and having Issue *R.* who had Issue *B. S.* he died, and afterwards the Ideot died without Issue, and then *B. G.* entered as Heir to him; it was adjudged that he might, and that he was not barred by this Fine of his Grandfather; for tho' there was a Necessity of naming him in deriving the Descent of the Inheritance to *B. G.* his Grandson, who was Son and Heir of *R.* who was Son and Heir of the Grandfather, who was Uncle and Heir of the Ideot, who was last seised of the Inheritance; yet this was not a naming him by Way of a Title, but by Way of Pedigree, for he made no Claim from him, but from the Ideot who was last seised, &c. Cro. Car. 514. *Edwards versus Rogers.*

12. Tenant for Life, Remainder to the Heirs Males of his Body, Reversion in Fee to the elder Brother of the Tenant for Life; he levied a Fine with Warranty to *B. G.* and afterwards died without Issue Male, leaving Issue only one Daughter, then the elder Brother died without Issue; adjudged, that this Fine and Warranty shall make a Discontinuance of the Fee, and devest him in the Reversion of it in whom it was placed, and gain a new Estate and Fee to the Cognisor, upon which the Fine and Warranty shall enure, and by Consequence bar the Daughter; for the Warranty did not immediately descend upon her, but upon the elder Brother, who had the Right in Reversion; yet when he died without Issue, it then descended on her as Heir to her Uncle, and by Consequence she is barred by the Fine. Cro. Car. 111. *Salvin versus Clerke.*

13. Tenant for Life, Remainder for Life to his Brother, Remainder in Tail to their Nephew; the two Brothers intending to bar this Entail to their Nephew, one of them, who was the Tenant for Life, made a Lease for Years of the Lands, and agreed with the Lessee, that he should make a Feoffment, who did it accordingly; afterwards both the Brothers released to the Feoffee with Warranty, both which Warranties descended upon their Nephew, who was their Heir, and also the Remainder Man in Tail; but adjudged, that both the Warranties commenced by Disseisin, because the Feoffment was made by Covin; then it was moved, that if the Nephew, not knowing of this Disseisin, had levied a Fine to a Stranger, whether that should bar his Right, and enure to the Benefit of the Disseisor; and adjudged, that it should not, but it should enure to the Benefit of the Cognisor, that is, to his own Benefit; for otherwise a Disseisin being made in a Secret Manner, might be a Means to disinherit any one who should levy a Fine for the Benefit of himself, or of his Wife and Children. *Cro. Car. 347. Fitzherbert versus Fitzherbert.*

14. Husband and Wife seised of a Rent-Charge in Fee, in Right of the Wife, levied a Fine of it to two Conusees, and to the Heirs of one of them, to the Use of both of them, and their Heirs for ever; adjudged, that they were Jointenants of the Rent, for otherwise there would be a Fraction of the Estate, (*viz.*) one would be in by the Common Law, and the other by the Statute of Uses. *Hutt. 112. Parnell versus Bridges.*

15. In a Special Verdict in Ejectment the Case was, there is a *Parish* called *Ribton*, and a *Vill* called *Ribton*, but not co-extensive with the *Parish*; Tenant in Tail bargained and sold his Lands in the *Parish*, but out of the *Vill*, and covenanted to levy a Fine, and suffer a Recovery to the Uses in the Deed of the Lands in the *Parish*, which was afterwards suffered of the Lands in *Ribton*, and the Question was, whether the Lands in the *Parish* did pass or not; it was argued, that it did not, because where a *Place* is named in a Recovery (as in this Case *Ribton* was named) it shall be intended a *Vill*, and tho' it appears by this Deed, that the Lands in the *Parish* should pass, yet that Intention shall not carry the Words farther than they are contained in the Record; and tho' the Deed, the Fine and Recovery make but one Conveyance, yet each has its several Effect; but adjudged, that since Common Recoveries are become the Common Assurances of Men's Estates, they shall have a favourable Construction; but this Case was the stronger, because the Jury found, that the Tenant in Tail had no Lands in the *Vill*, therefore this Recovery would be void, if it did not pass the Lands in the *Parish*. *2 Vent. 31. Sir John Otway's Case. 1 Mod. 78. 1 Vent. 143. S. P. 2 Mod. 333. See 2 Cro. 120. Storke versus Fox.*

16. In a Special Verdict in Ejectment the Case was, Tenant in Tail of Lands in *Shrewsbury* and *Cotton*, which said *Cotton* was within the *Liberty of Shrewsbury*, suffers a Common Recovery of all his Lands within the *Liberty of Shrewsbury*, and whether the Lands in *Cotton*, which was a distinct *Vill*, but within the *Liberty*, &c. shall pass, was the Question; it was admitted they would pass in a Fine, but not in a Recovery, because there more Preciseness is required; besides there is no *Præcipe* to recover Lands in a *Liberty*: *Sed per Curiam*, there is no Difference as to this Matter between a Fine and Recovery, they are both Common Assurances, and both may be of Lands in a *Lieu connu*. *2 Mod. 47. Lever versus Hosier.*

1 Mod.
206. By
the Name
of Jones
v. Waite.

(H)

Of fines sur Grant and Render.

1. A Fine was levied of an Advowson *sur Cognissance de droit tantum*, with a Grant and Render of the next Presentation to the Conusor, and of the second Presentation to the Conusee, and so to present by Turns; and this was held good. *9 Eliz. Dyer 259.*

2. *Assise* for a Rent-Charge, in which the Case was thus, (*viz.*) Husband and Wife were seised of two Manors, and they by Fine conveyed the same (*inter alia*) to the Conusee, by the Name of two Manors, &c. and he by the same Fine rendered back to them an yearly Rent of 50 *l.* and to the Heirs of the Wife, and also rendered the two Manors to them for their Lives, Remainder over in Tail; the Husband and Wife died, the Rent descended to the Plaintiff as Son and Heir of the Wife, and he had Judgment in the *Assise*; and upon a Writ of Error brought, the Error assigned was, that the Fine was pleaded of the two Manors (*inter alia*) by which it may be reasonably intended, that other Lands passed besides the Manors, and therefore the *Assise* brought against him alone, who was Tenant of the Manors, is not good, because all the Tenants of the Lands ought to be named; this was adjudged a material Exception; the second Error was that the Grant of the Rent was void, because the Land was granted at the same Time, and to the same Person, and the Grantee cannot have both; but as to this it was adjudged, that the Law shall marshal it so as to make the Grant of both to be good; for in the first Place the Rent shall pass, and then it shall be as a Purchase of the Remainder of the Land in Fee, which shall not extinguish the Rent. *Cro. Eliz. 226. Garnon versus Weston.*

3. In *Replevin*, the Case was, B. and G. levied a Fine of the Place where, &c. *sur Cognissance de droit come ceo*, and the Conusee by the same Fine rendered back the Lands to B. in Tail, reserving a * Rent to himself; and also, that if the Tenant in Tail should die without Issue, then the Lands should remain to G. the other Conusor in Fee; afterwards B. the Tenant in Tail died
levied by Fine levied by the Tenant in Tail, but remains as a collateral Charge on the Land distrainable of Common *Right.* *2 Lev. 30.*

Moor
575 S. C.
* This
Rent will
not be bar-
red.

without Issue; it was a Question, whether the *Rent* and the *Reversion* passed, it being by one *Fine*; and adjudged, that both did pass, and that it should enure as several *Fines*; but where a Gift is made in Tail, *rendring Rent* to the Donor, the Remainder over in Fee, this being a Deed, is a good Reservation of the Rent, and the Remainder only, without the Rent, shall go to him to whom 'tis limited over. *Cro. Eliz.* 727. *White* versus *Gerish*.

4. Husband and Wife levied a *Fine* to the Conusee, who by the same *Fine* granted and rendered to them, and to the *Heirs of the Husband*, and rendered other Part of the Lands to the *Wife in Tail*, Remainder over; now there being a plain Variance in this Case, for after the *whole* was rendered to the *Husband in Fee*, then *Part* to the *Wife in Tail*; the Heir of the Husband brought a Writ of Error, and assigned this Variance for Error; but adjudged, that there is no Occasion of a precise Form, in a Render upon a *Fine*, because 'tis only an amicable Assurance upon Record. 5 *Rep.* 38. *Tey's Case*.

5. Adjudged, that where the King is Tenant in Tail by the Gift of any of his Ancestors, being Subjects, he may upon a *Fine* by Grant and Render, bar the Estate-Tail; but in such Case it would be necessary for the Conusee to have likewise a Grant from the King by express Words, to enter upon the Lands, because the *Fine* upon a Grant and Render, being only Executory, it may be a Question, whether the Conusee may enter upon the Possessions of the King, without such a Grant. 7 *Rep.* 32. *Case of Fine levied by the King*.

6. In Replevin the Case upon the Pleadings was, a Feoffment was made, *rendring 3 l. per Ann'* Rent, with a *Clause of Distress*, and the Feoffor covenanted to make a farther Assurance of the Land; afterwards he levied a *Fine* to the Feoffee, with a Render of 3 *l.* Rent; adjudged, that he might avow for the old Rent upon the Feoffment, notwithstanding the *Fine*; and that the Render is not a Grant of a new Rent, but a *Confirmation* of the old. *Moor* 298. *Sherrot* versus *Holloway*.

7. A *Fine* upon a Grant and Render was levied in the Reign of *Ed.* 4. and a *Sci. fa.* brought, and Judgment given, and a *Writ of Seisin* awarded, but *not executed*; afterwards another *Fine sur Cognissance de droit come ceo* was levied of the same Lands, and five Years passed, and the Writ of Seisin of the first *Fine* being not executed, another *Sci. fa.* was now brought to execute it; to which *Sci. fa.* the *Fine sur Cognissance de droit* was pleaded in Bar; and the Question was, whether it should bar it, or not; it was insisted, that it should not, because the first *Fine* was Executory, and in *Custodia Legis*, by which 'tis preserved, and a *Fine sur Cognissance* cannot affect a Thing executory; for the Estate ought to be turned into a Right, otherwise it cannot be barred by such *Fine*; but the Estate of him in this first *Fine* is not turned into a Right by the second *Fine*, and by Consequence not barred; besides, the Statute 4 *H.* 7. is a general Law, and in the affirmative, and therefore shall not take away the Statute of *W.* 2. which gives the *Sci. fa.* but the Court inclined, that the second *Fine*, and five Years passing, was a Bar to the first *Fine* not being executed. *Pasch.* 18 *Car.* *March* 194. *Apfley* versus *Bois*.

8. *W. H.* was seised in Fee, as Heir on the Part of his Mother, and he and his Wife levied a *Fine* to *W. R.* and *L. R.* with Warranty, and they by the same *Fine* did grant and render the same Lands to the Husband and Wife in Tail, Remainder to the *Heirs of the Husband*; they both died without Issue; adjudged, that the Conuses had once the Estate in them, and that the *Fine* and Render was a Conveyance at Common Law; and if so, then the *Render* made the Conusor a new Purchaser, and by Consequence the Lands shall go to the Heir of the Part of the Father. 1 *Salk.* 337. *Price* versus *Langford*.

(I)

Of the Uses of a Fine, where well limited, where not.

1. **H**usband and Wife levied a *Fine* of the Lands of the Wife, and he alone declared the Uses of the *Fine*, this shall bind the Wife, if her Dissent does not appear; because it shall be intended, that she did consent, if the contrary doth not appear; but if the Husband declare one Use, and the Wife another, they are both void, because the Husband, tho' he is *sui juris*, hath no Estate in the Land, and the Wife, tho' she hath the Estate, yet she is not *sui juris*, but under the Power of her Husband, and in such Case the Use shall follow the Ownership of the Land. 2 *Rep.* 59. *Beckwith's Case*.

2. The Father covenanted with *B. G.* that in Consideration of a Marriage between his Son and the Daughter of the said *B. G.* that before such a Day he would levy a *Fine* of certain Lands, which should be to the Use of the Son and Daughter in Tail, &c. the *Fine* was acknowledged accordingly; the Father died; adjudged, that the Deed did not mention any *Marriage had* between the Son and Daughter, yet the Estate-Tail was executed in them before the Marriage had, because the *Fine*, without any Consideration, doth carry the Uses, and they are perfected by the *Fine*, tho' the Consideration is executed afterwards; but without a *Fine*, such a Consideration would not have raised an Use, for in such Case the Marriage must be had, and the Consideration executed before any Use could arise. 1 *Leon.* 138. *Stephen's Case*.

3. In Covenant, &c. the Plaintiff declared, that the Defendant had bargained and sold to him (the Plaintiff) *four Messuages*, by the Name of all his Lands in *H.* and did covenant to levy a *Fine* of them for farther Assurance (but in Fact the Covenant was to levy a *Fine of all his Lands*

Lands in H.) and sets forth, that he tendered a Fine to the Defendant to be levied by him, of all those *four Houses* comprehended in the Deed; the Defendant pleads, that at the Time of the Covenant, he was seised of two Houses, &c. and that the other two descended to him afterwards, upon the Death of his Ancestor; and traversed, that he was seised of the said Lands *modo & forma*; and upon a Demurrer the Defendant had Judgment; for that the Plaintiff had declared, that the Defendant was seised, and sold him *four Messuages*, and that he tendered him a Fine of so many; and the Defendant pleaded, that he was seised of two, and no more, and so would have the Fine extend beyond the Covenant; and therefore he might well refuse it when tendered. 1 *Roll. Rep.* 103, 117. *Wilson versus Welch.*

(K)

Levied by Husband and Wife.

1. **W** Here the Caption of a Fine is taken of a *Feme sole* upon a *Dedimus*, and she marries before the Day of recording it; yet adjudged, that the Fine shall be engrossed and recorded, as the Fine of a *Feme Sole*, because she had done all towards passing the Fine, which was in her Power to do, and it shall bind her and her Heirs; and by the Opinion of some, her Husband shall be bound by this Fine, because the Marriage was the Act of both; but if she had died before the Return of the *Dedimus*, then the Writ of Covenant had abated, because her Death was by the Act of God. *Mich. 7 Eliz. Dyer* 246.

2. Upon a Writ of Error to reverse a Fine levied by Husband and Wife, for the Non-age of the Wife, they shall have present Restitution; for when they join in a Fine of the Lands of the Wife, all the Estate passeth from her, and the Husband is joined only for Conformity; and therefore the Law permits the whole Estate to be restored to her, tho' her Husband is living. *Mich. 31 Eliz. Worley versus Charnock, cited in 2 Rep. 77. in the Lord Cromwell's Case.*

3. The Husband alone levied a Fine *with Proclamations*, of the Lands of his Wife, and died, and five Years passed without Action or Entry by the Wife; adjudged, that she is barred by the Statute 4 *H. 7.* and that she is not aided by the Statute 32 *H. 8.* because that Statute doth not mention *Fines with Proclamations.* 6 *Ed. 6. Dyer* 72. 8 *R.p.* 72. in *Greenly's Case.* 5 *Eliz. Dyer* 224. *S. P.* 2 *Rep.* 93. *Bingham's Case.*

4. In a Special Verdict in Replevin, the Case was, a *Feme Covert* alone declared to the Uses of a Fine intended to be levied by her Husband and her self, of her own Lands; and before the Fine was levied the Husband alone declared other Uses; it was agreed on all Hands, that the Uses declared by the Wife were void, and that the Uses declared by the Husband were only good against himself during the Coverture, and no longer. 2 *Rep.* 56. *Beckwith's Case.* *Moor* 196. *S. C.*

5. The Wife was an *Infant*, and her Husband and she levied a Fine of her Lands, which was exemplified; they were both brought into Court by Rule, upon the Complaint of him in Remainder; and all this Matter appearing, the Fine was vacated in *C. B.* and the Exemplification was brought into Court and delivered up; the Vacat was *quoad* the Wife only, and he in Reversion was ordered to bring an Information against the Commissioners, who took the Caption of the *Dedimus*, &c. 3 *Lev.* 36. *Hutchinson's Case.*

6. *Formedon in Remainder*, the Case was, there were three Sisters, the eldest was Tenant in Tail, as to a *fourth Part* of the Lands, Remainder to the other two in Fee; the Tenant in Tail married, and then she and her Husband joined in a Fine *sur Cognissance de droit come ceo*, &c. to the Use of them both, and to the Heirs of the Body of the Wife, Remainder in Fee to the right Heirs of the Husband; and this was with *Warranty against them*, and the Heirs of the Wife, who afterwards died without Issue; and then the two Sisters brought a *Formedon* against the Husband, who pleaded this Fine and *Warranty*; and upon a Demurrer, it was objected against the Form of Pleading this Fine, which was of a *fourth Part, without saying into how many Parts to be divided*; but adjudged, that 'tis good in a * Fine, being a Common Assurance, but not in a Writ; then as to the Matter in Law, whether this Warranty was a Bar to the Demandants; and adjudged, that it was, because the Husband warranted during his own Life only, and took back as large an Estate as he warranted; so that the Warranty as to him, was destroyed as soon as created. 1 *Mod.* 181. *Fowle versus Doble.*

7. The Husband and Wife covenanted to levy a Fine of the Lands of the Wife, to the Use of the *Heirs of the Body of the Husband on the Wife to be begotten*, Remainder to the Husband in Fee; they both died without Issue; and in Ejectment the Question was, whether the Heir of the Husband, or the Heir of the Wife, should have these Lands; and adjudged, that the Heir of the * Wife had the Title, because this Limitation to the *Heirs of the Body of the Husband*, is merely void; for taking it as a *Remainder*, there is no precedent Estate of Freehold to support it, for here can be no Estate for Life to the Husband by Implication, because the Estate was the Wife's Estate, to which in Law he is a Stranger; and taking it as a *Springing Use*, then it must be *Executory*, because 'tis to arise after a *Dying without Heirs of his Body*, which the Law will not expect; but a Feoffment to the Use of *T. P.* and the

1 *And.*
164.
4 *Leon.*
88. *By the*
Name of
Blithe v.
Colgate.

* 1 *Leon.*
114.

4 *Mod.*
153.

* *This*
Judgment
affirmed in
Parlia-
ment.
Cases adj.
104.

Heirs of his Body, to commence four Years from thence, or to commence after the Death of T. P. without Issue, if he die without Issue within twenty Years, is good, as a Springing Use, because the whole Estate remains in the Feoffor till that Time. 2 Salk. 675. *Davis versus Speed*.

Fishing. See *Trespass*. (K) 37.

Forcible Entry and Detainer.

Indictments and Convictions therein, good. (A) | Indictments and Convictions therein, not good. (B)

(A)

Indictments and Convictions, good. See *Justice of Peace*. (A) per totum. Postea (B) pl. 12.

1. **T**HIS is an Offence punishable by the Statute 8 H. 6. either by Indictment or Action; and it lies where a Man is put out of his *Freehold of Lands or Rent* with Force, or where he is put out peaceably, and kept out by Force. He who brings this Action must be expelled, therefore a Reversioner cannot have it, for he may be disseised, but cannot be expelled; and the Plaintiff shall recover Damages and treble Costs; but if the Defendant hath been in peaceable Possession for three Years, then he may keep any one out by Force; the Action is seldom brought, but the Indictment often. *Dyer* 141.

2. Indictment upon the Statute 8 H. 6. reciting, that where any one is expelled and disseised, &c. to which it was objected, that the Statute was misrecited; for 'tis if any one is expelled or disseised, &c. but this Exception was disallowed; for Words in the *Disjunctive* shall be expounded in the *Copulative*; especially in this Case, for if he be not expelled and disseised, the Indictment is not good. *Mitch.* 36 *Eliz. Cro. Eliz.* 307. *Hall versus Gawen*.

3. Indictment for a Forcible Entry upon Lessee for Years, the Reversion being in the Goldsmiths Company of London; setting forth, that the Defendant *expulit & disseisavit*, the Company, &c. & *quendam*, B. G. *tenentem expulit*; it was objected, that one might be disseised, who was not in Possession; but 'tis absurd to say, that one may be expelled, who was not at that Time in Possession, and here 'tis plain, the Company were not in Possession, and yet the Indictment is, that the Defendant *expulit* both the Company and their Tenant; but adjudged, that the Possession of the Lessee is the Possession of those in Reversion. 29 *Eliz. Godb.* 45.

4. Restitution upon an Indictment of Forcible Entry must always be made to him in Reversion, and not to the Lessee for Years, because he is the Person who is disseised, and therefore he ought to be restored, and then his Lessee may re-enter. 1 *Leon.* 327. *Sover's Case*.

5. Indictment for a Forcible Entry into a Close; it was objected, that this was uncertain, for there cannot be any Restitution awarded; it ought to be into a Close containing twenty Acres of Land, &c. more or less; but adjudged, that the Indictment was good; for an Ejectment will lie of a Close, *a fortiori* an Indictment will lie. *Pasch.* 32 *Eliz. Cro. Eliz.* 458. *Humphry's Case*. Ejectment. (A) 5.

4 Leon.
197.

6. Indictment upon the Statute; Exception was taken to it, for that it did not mention any *Freehold* in the Party grieved; but because the Words were *expulit & disseisavit*, it could not be true, unless the Party had a Freehold, whereof he might be disseised; then it was objected, that the Indictment was, *in unum Tenementum intravit*, which Word *Tenementum* is uncertain and too general; and so it was adjudged; but because it was *in unum tenementum & decem acras terræ* thereunto belonging, he was forced to answer as to the ten Acres. *Pasch.* 26 *Eliz.* 3 *Leon.* 101. *Wroth versus Capell*.

7. The Lessee for Years paid the Rent to him in Reversion for several Years; but before his Term expired, he took a new Lease from another, who, he conceived, had a better Title, and at the End of the Term, kept the Possession against his old Landlord by Force; adjudged, this was a Forcible Detainer, tho' no Person endeavoured to enter; because the Possession of the Termor was the Possession of him in Reversion. 2 *Cro.* 199. *Snigg versus Shirton*.

8. It hath been a Question, whether the Justices of *Oyer and Terminer*, or *Gaol-Delivery*, can make Restitution, upon an Indictment of Forcible Entry, because the Statute giveth that Power only to *Justices of the Peace*; but if the Indictment is removed into *B. R. coram Rege*, they may award Restitution. See 11 Rep. 65. *Dr. Foster's Case*. Moor 848. S. P.

9. Indictment on the Statute 8 H. 6. *Quare Vi & Armis & manu forti disseisiverunt B. G. &c. & adhuc extrateneant eundem B. G. contra pacem, &c.* it was objected against this Indictment, because 'tis said *disseisiverunt*, and did not say *expulerunt*; but adjudged, that every Disseisin implies an Expulsion. 2 Cro. 31. *Andrews versus Cromwell*.

10. Indictment upon this Statute, for expelling B. G. from his Copyhold; Exception was taken to it, because 'tis not said, he *disseised* him; but adjudged good in the Case of a Copyhold, because a Man cannot be *disseised* of such an Estate, for he hath no Freehold in it. *Popham* 205. *Ploydon's Case*.

11. Indictment upon the Statute, *Ad Session' Pacis, &c. per Sacramentum duodecim, &c. Juratorum existit presentatum*, and did not say, *Proborum & legalium hominum*; adjudged, they shall be so intended. 2 Cro. 41. *Bard's Case*.

12. Exception to the Indictment, for that the Inquisition was taken before IV. IV. and L. C. Justices of the Peace, and doth not say, *Necnon ad diversas felonias transgressiones, &c.* adjudged good, because Justices of Peace only have an Authority by this Statute, to enquire, &c. then it was objected, that the Entry was in *unum messuagium sive domum*, and so void for Incertainty; but adjudged, that an House and a Messuage are the same Thing. 2 Cro. 633. *Ellis's Case*.

13. Indictment for a Forcible Entry into an House, Parcel of the Manor of C. which was the Freehold of G. D. and of which House F. H. was Tenant by Copy of Court-Roll, and it was laid for *disseising G. D. and expelling F. H.* from thence; it was objected, that no Restitution could be awarded upon this Indictment, for that is only to be made in respect of the Freehold; and the Lord of the Manor, who hath the Freehold of this House, desires no Restitution; but adjudged, that Restitution shall be awarded to the Copyholder; for the Court ought to reform the Wrongs in their several Degrees, as they appear on the Record; and here 'tis plain, that the Copyholder was expelled wrongfully, therefore he ought to be restored; but if the Indictment had been only of *Disseisin*, there could be no Restitution, but at the Prayer of him who had the Freehold. *Yelv.* 81. *Sir And. Nowell's Case*.

14. Indictment, &c. for Entering into an House *existen' solum & liberum Tenementum G. D.* which was found accordingly, and Exception was taken to it, because it did not set forth, that it was *adunc existen', &c.* but adjudged, that when it was found, that on such a Day he entered into the House *existens liberum Tenementum, &c.* the Word *Existens* must necessarily refer to the Day of the Entry. *Yelv.* 27. *Fenton's Case*. See *Postea* (B) pl. 2. *contra*.

15. Indictment against Two, for that they on such a Day and Year, at R. *intraverant in unum Messuagium existen' liberum Tenementum cujusdam B. G. & ipsum a libero Tenemento suo injuste & sine judicio disseisiverunt, & ipsum sic inde expulsum extra possessionem inde Vi & Armis & manu forti extratenuerunt & alia, &c.* it was objected, that in all Indictments on the Statute 8 H. 6. the Entry ought to be laid *pacifice*, or with Force; but in this Case it was neither, and yet adjudged good, for where the Entry is generally laid, it shall always be intended *pacifice*, and Force must always be expressed, because it shall never be intended. 2 Cro. 19. *Fitzwilliam's Case*. 2 Cro. 151. *Ford's Case*. S. P. See pl. 23. Yelv. 32.
Palm.
196.
Cro. Eliz.
915.

16. Indictment for a Forcible Entry on Tithes, it was objected, that an Assise was the proper Remedy in such Case; but adjudged, that the Indictment lay for a Forcible Entry, as well on Tithes, as for a Rent, and Restitution was awarded to the Party. Cro. Car. Mich. 6 Car. 146.

17. The Defendant was indicted for Entering into a Manor, &c. and did not say * *Manu forti*; adjudged good, for 'tis sufficient, if *extratenuit manu forti*. Hill. 2 Car. Litch 224. *Beverly's Case*. * Mod.
Cases 96.
The
Queen v.
Dyer S.P.

18. Indictment on the Statute 8 H. 6. for that *quidam vocatus Captain Scornfeild and G. Street, &c.* on such a Day, into such a House *intraverunt*, and from that Day to such a Day, C. S. &c. *sic disseisi' & expuls. manu forti extratenebant*; the principal Objection against this Indictment was, that the Jury found only, that they *intraverunt*, but did not shew how, either *pacifice* or with Force; but it was adjudged, that the Indictment was good, for 'tis not material, whether the Entry was peaceably or with Force; for in either Case it must be before the Forcible Detainer, and that is an Offence punishable by the Statute; and as to *Fitzwilliam* it was never adjudged, for there were two Judges against Two, that the Indictment was good. Palm. 194. *The Lord Salisbury versus Sir Anthony Ashley*.

19. *Certiorari* to remove a Conviction of Forcible Detainer by the View of the Justices, &c. upon the Statute 15 R. 2. the Record returned was, *pl. Questa est nobis I. W. vidua quod quidam pacis, &c. perturbatores in domum mansionalem existen' liberum tenement'*, and did not say *adunc existen'*; 'tis true, if the Indictment had been for a Forcible Entry, it must be *adunc existen'*, because Restitution is to be awarded; but for a Forcible Detainer there is no Restitution; but the Offenders being convicted upon the View of the Justices, are to be fined and imprisoned; therefore in this Case *existen' liberum tenementum* shall be referred to the Time of the Complaint. 1 Vent. 23. *The King versus Sirjeant*.

20. In the Case between the Parties last mentioned, the Indictment was for a Forcible Entry *vid. 414.* and Detainer; and the Jury found, that as to the Detainer with Force, *Etia' Veri*, but as to the

Entry with Force *Ignoramus*; the Indictment was quashed, because they ought to find all or none. *The King versus Serjeant.* 1 *Vent.* 25.

1 Lev. 95. 21. It was moved to quash an Indictment for a Forcible Entry into a Church, because those Indictments are only by Statutes, and not by the Common Law, and the Statutes mention *Messuages or Tenements*, so that a Church can never be intended by those Words; but adjudged, that Statutes which are made for quietting Possessions shall have favourable Constructions, and therefore shall extend to Churches, tho' a *Vi Laica removenda* is the proper Remedy, but that will not restore the Party to the Possession. *Sid.* 101. *The King versus March*, reported by *Levinz* by the Name of *The King versus Larking*.

22. Indictment for a Forcible Entry; the Defendant pleaded the Statute of Limitations, (*viz.*) *That he was in Possession for three Years, &c.* and upon Demurrer to this Plea, for that the Defendant did not set forth by what Title he was possessed, adjudged, that it was not necessary, because 'tis not the Title, but the Possession, which is material. *Sid.* 149. *The King versus Burgesse*. See *Lodge versus Fry*.

23. A Conviction for a Forcible Entry cannot be quashed upon a Motion after a Fine is set, for then the Defendant must bring a Writ of Error, if there is any Error to be found. 2 *Salk.* 450. *The King versus Layton*.

24. The Caption of an Inquisition for a Forcible Entry was, *Juratores jurat' & onerat' super sacramentum suum dicunt*; it was objected, that it doth not appear to what they were sworn, for it should have been *Ad inquirendum pro Domina Regina pro Corpore Com'*; 'tis true, Inquisitions had been quashed for this Reason; but since this was a particular Offence at the Suit of the Party, given by the Statute, the Court would not quash it; 'tis true, in the Caption of Indictments at the Quarter-Sessions, it may be necessary to say *Ad inquirendum pro Domino Rege pro Corpore Com'*, because the Commission of the Justices of Peace is so, and therefore the Jury must inquire according to that Commission; but here their Commission is by a particular Statute; so the Reason is not the same. *Mod. Cases* 95. *The Queen versus Watton*.

(B)

Indictments and Convictions, not good.

1. **T**ENANT for Life, Remainder for Life, Remainder in Tail, Remainder over in Fee; the two Tenants for Life made a Lease to *Martin for Life*, with a Letter of Attorney to make Livery, which was done accordingly; the first Tenant for Life died, then the Tenant in Tail entered for a Forfeiture; and adjudged, that his Entry was lawful, to avoid the Estate of the second Tenant for Life, who was *Particeps criminis* in joining with the first Tenant for Life in the Lease to *Martin*. 1 *And.* 45. *Martin versus Savery*.

2. Indictment upon the Statute 8 *H. 6.* setting forth, that the Defendant such a Day entered with Force into such Land, *being the Freehold of B. G.* and with Force expelled him, and because it was not alledged, that it was *ad tunc the Freehold, &c.* (*viz.*) at the Time of the Entry, the Indictment was adjudged ill. 2 *Cro.* 214. *Sir Nicholas Point's Case*, and 609. *Bridge's Case*. *S. P.* 1 *Bull.* 177. *More versus Langford*. *S. P.* and 23 *H. 7.* *Kellway* 98. *Williams versus Skidmore*. *Yelv.* 27. *Fenton's Case contra*, for the Word *Existens* shall refer to the Time of the Entry.

3. In an Indictment, the Statute was misrecited, for that the Fine was alledged to be given *dicto Domino Regi*, and by the Statute 'tis given *Domino Regi*, without *dicto*; adjudged a good Exception. 1 *Bull.* 218. *The King versus Cole*. *Cro. Eliz.* 697. *Eden's Case*. *S. P.*

4. The Indictment was *fortitudine & potentia magna*, but did not say *manu forti*, and for that Reason it was quashed. 2 *Bull.* 258. *The King versus Cox*.

5. Indictment upon the Statute, to which an Exception was taken, that it did not set forth in whom the *Freehold* is, for the Word *Disseise* being in the Statute, therefore the Indictment should be, that the Defendant entered and *disseised* the Plaintiff; and 'tis for this Reason, that Tenant by *Elegit*, or by Statute-Merchant cannot maintain an Indictment on this Statute, without shewing an Entry and Expulsion of himself, and a *Disseisin* of him in Reversion; the Indictment was quashed. *Trin.* 13 *Jac.* 3 *Bull.* 71.

6. The Indictment was for a Forcible Entry into the Lands, &c. *ad tunc & adhuc existens liberum Tenementum G. D. & cum extraxerit & disseisivit*; adjudged, that there was a double Repugnancy in this Indictment, for if it was *adhuc existens*, the Freehold of *G. D.* then he was not held out of it with Force, for the Word *Albuc* must refer to the Time of the Indictment brought, and if he was not held out by Force, then he could not be disseised. *The King versus Skeats*. 3 *Bull.* 421.

7. The Indictment was, for that the Defendants forcibly entered upon the Possession of *F. H.* the Tenant of *G. D.* and disseised the said *G. D.* & *sic disseisitum extraxerunt*, and did not set forth, that the Tenant was amoved or expelled, and for that Reason the Indictment was quashed; for the Possession of the Lessee or Tenant is the Possession of him in Reversion, and unless he is turned out, there cannot be a Disseisin of him who hath the Freehold; but if the Indictment had not expressed, that *F. H.* was the Termor, but generally, that the House was in but recited Expulsus seu disseisitus, and for that Reason quashed. 1 *Roll. Rep.* 406.

The Statute 8 *H. 6.* is Expulsus & disseisitus,

his Occupation, then it had been sufficient to say, that *G. D.* was disseised. *Yelv.* 165. *FreeStone* versus *Shellitoe*.

8. The Justices of Peace certified to *B. R.* that complaint being made unto them, that *S. R.* and *T. S. &c.* had riotously made a Forcible Entry into an House in *London*, they went thither in Person, and found it to be true, and thereupon they removed the Force, and fined the Defendant 20*l.* it was objected, that this Certificate was ill, because it did not shew the Time when the Complaint was made, and for that Reason it was set aside, for 'tis in the Nature of an Indictment, and ought to be certain. 2 *Roll. Rep.* 39.

9. The Defendant was convicted upon the Statute 8 *H. 6.* for a Forcible Entry into certain Lands, *existen' liberum tenementum* of the Lord Mountague, quashed, because it did not set forth, that it was *ad tunc existen' liberum tenementum*. 2 *Roll. Rep.* 65. *Ailing's Case*.

See 3
Bulst. 61.

10. Indictment for a Forcible Entry made on a Lessee for so many Years, if *B. G.* shall so long live; Exception was taken to it, for that it did not appear, that the Lessee had any Title at the Time the Force was supposed to be committed, for it was not averred, that *B. G.* was then living, and for this Reason the Indictment was quashed. *Style* 147. *The King* versus *Bray*.

11. Adjudged, that a Man cannot be indicted for entering into his own Lands with Force, or holding the same forcibly against a Condition, upon the Statute 15 *R. 2.* because it ought to be *Ubi ingressus non datur per legem*; and a Man may enter lawfully on his own Lands, and may detain with Force against any other who pretends to have Common there; and this Statute extends only to those who enter unlawfully, and turn others out of their lawful Possession. *Mich.* 13 *Car. Cro. Car.* 349. *Sidenham* versus *Parry*.

12. Indictment, setting forth, that *E.* was seised of Lands *ut de libero tenemento pro termino Vitæ & seisinam suam præd' continuavit quousq; S. & alii, pacifice intraverunt supra possessionem suam existen' liberum tenementum suum, & eum * ad tunc & ibidem Vi & Armis disseisiverunt contra pacem, &c.* quashed for the Repugnancy, it being *pacifice intraverunt, & cum ad tunc & ibidem Vi & Armis disseisiverunt*. *Allen* 49. *Simonds's Case*.

* Ad tunc
& ibid'
left out,
and yet
good. 4
Mod. 248.

13. Indictment for a Forcible Entry and Detainer, and the Jury found a peaceable Entry and Forcible Detainer; and it was moved, that Restitution might not be granted, because Part of the Indictment was found to be false; but adjudged, that since the Jury have given a Verdict as to both, that there is enough found to grant Restitution; it had been otherwise if they had found no Verdict as to the Detainer. *Sid.* 97, 99. *The King* versus *Sadler*. *Sid.* 414. *The King* versus *Serjeant* contra.

14. The Father and Son were convicted upon the View of two Justices of Peace for a Forcible Detainer, and were committed, and Restitution given to *Sir William Smith*; and upon an *Habeas Corpus* brought, they submitted themselves to a Fine, but to moderate it appeared by Affidavits, that the Father had been in Possession thirteen Years, and was then in the peaceable Possession of the Lands, and that *Sir William Smith* pretending a Title by a Grant from the Duke of *York*, as of Lands of one of the Regicides, got two Justices of the Country, by whose Contrivance he got into Possession; the Court fined the Defendants 3*s.* 4*d.* but ordered an Information against *Smith* and the two Justices, who might punish the Force upon View, but cannot meddle with the Possession. *Sid.* 156. *The King* versus *Chaloner*.

15. Indictment for a Forcible Entry in *unum Messuagium vel domum mansionalem* (and other Lands and Tenements) *ten' ad voluntatem Domini secundum consuetudinem*, quashed, because it doth not set forth for what Estate, for the Statutes 8 *H. 6.* and *R. 2.* extend only to Freeholders, and the Statute 1 *Jac. 2. cap. 9.* to Leases for Years and Copyholds; but this doth not appear to be Copyhold, because he doth not set forth, that he held by *Copy of Court-Roll*. 1 *Vent.* 89. 1 *Mod.* 71, 73. *S. P.*

16. The Defendant was indicted for a Forcible Entry into a Messuage, Passage, or Way, and it was *quod cum* he was possessed *de quodam termino*, but did not say *Annorum*, and for that Reason, and likewise because the Word * *Passage* is neither Land or Tenement, but only an Easement, the Indictment was quashed. 1 *Mod.* 75. *The King* versus *Holmes*. **Yelv.* 169.

17. Indictment for a Forcible Entry into a Copyhold, and for that the Defendant ejected & disseisvit the Party; it was quashed, because it being in the Case of a Copyhold, it ought not to be disseisvit. See 21 *Jac. cap. 15. Raym.* 67. *The King* versus *Hardy*.

18. Indictment for Forcible Entry; the Defendant pleaded in Bar to the Restitution the Statute 31 *Eliz. cap. 11.* that *T. P.* is Tenant in Possession for Life, and so had been for three Years and more before the Indictment, and that the Defendants, as Servants to him, entered, as they well might; adjudged upon Demurrer, that this Plea was ill, because the Defendants did not set forth, that they were in Possession for three Years before the Indictment found. *Raym.* 84. *The King* versus *Burgefs*.

19. The Defendants were indicted for a Forcible Entry before the Justices, and they offered to traverse the Force, but the Justices refused it, and granted Restitution; but this Indictment being removed, it was quashed, upon Affidavit of the Refusal of the Traverse, and a Re-restitution granted, because the first Finding the Indictment, is only in Nature of a Presentment by the Jury, which may be traversed, and presently tried; and if no Force is found at the Trial, then no Restitution is to be granted. *Sid.* 287. *The King* versus *Parker*. See 2 *Salk.* 588.

20. Indictment for a Forcible Entry into the Lands of *T. P.* quashed, for that it did not set forth what Estate *T. P.* had in those Lands; 'tis true, there was the Word *Disseisvit*, by which a

Fres-

Freehold might be intended, but that is not sufficient; 'tis like the Case, where the Indictment set forth, that *T. P.* was possessed *pro quodam Termino*; now, tho' it might be intended, that by the Word *Possessed*, a Term of Years was meant, yet that Indictment was quashed. 1 *Vent.* 306.

21. An Inquisition of a Forcible Entry was quashed, for that it did not set forth, that the *Tenant of the Freehold* was put out, but only that the *Lessee for Years* was expelled; now, by the Statute 8 *H. 6. cap. 9.* Restitution was to be granted only where the *Tenant of the Freehold* was put out; and the Statute 21 *Jac. cap. 15.* makes no Alteration of that Law, but gives Restitution where Lessee for Years is put out; therefore it should have been, that the *Tenant of the Freehold* was disseised, and the *Lessee for Years* expelled. 4 *Mod.* 248. *The King versus Waite.*

22. Adjudged, that where an Inquisition for a Forcible Entry comes into *B. R.* by *Certiorari*, there can be no Writ of Restitution, if the Defendant traverses the Force, or pleads that he hath been in quiet Possession for three Years before the Force, because these must be tried first. 1 *Salk.* 260. *The King versus Harris.*

23. Inquisition of a Forcible Entry, for that the Defendant and others entered into a Messuage of *W. R. &c. & cum disseisit' & expulsi.* did hold forth; it was objected, that it did not appear what Estate *W. R.* had in this Tenement, and so he might be *Tenant at Will*, which is not within any of the Statutes; and the Word * *Disseisit'* doth not import, that they had a Freehold; besides, *Disseisit' & expulsi.* is not a positive Allegation of a Disseisin and Expulsion; the Word *Possessionari'* hath been held ill, and so is *Disseisivit.* 1 *Salk.* 260. *The King versus Dorney.*

24. Upon the Return of an *Habeas Corpus* it appeared, that the Defendant *Layton* was convicted by Sir *O. B.* Lord Mayor of *London*, upon View, by Virtue of the Statute 15 *R. 2. cap. 2.* for a *Forcible Detainer* of the Prison of the *Fleet*, and that he was committed until delivered by Course of Law, and until he paid a Fine of 100 *l.* set upon him; it was objected, that it should appear upon the Conviction, that the Defendant had not been three Years in Possession, upon the Statute 8 *H. 6. cap. 9.* but adjudged, he that would have the Benefit it, must plead his Possession, and that must be where the Estate was continuing; and tho' the Conviction was upon View, yet 'tis traversable by him who had been three Years in quiet Possession, as well as upon a finding by Inquisition. 1 *Salk.* 353. *The King versus Layton.*

3 Leon.
102.
Palm.
277.
Allen 49.
1 Vent.
306.

2 Cro.
199.
31 Eliz.
cap. 11.

Foreign Lands.

(A)

Where governed by our Laws, where not.

1. **T**Here being a Difference between the Earl of *Derby*, and the Sons of the last Earl, it was referred by the Queen to be heard before the Lord Keeper and the Judges: The Case was, King *H. 4.* having the *Isle of Man* by Conquest, did, by Letters Patents, grant the same to Sir *John Stanley*, and his Heirs, in which Grant it was ordered, that the said *Isle of Man* should be conveyed, according to the Common Law of the Land; afterwards this *Isle*, by several Descents, came to Earl *Ferdinand*, who made a Deed with Covenants, upon good Consideration to raise *Uses*, and by his Will devised this Island, &c. it was objected, that this Island did not pass by the Letters Patents, because it was no Part of *England*, but that it came to the King by Conquest; but adjudged, that it did pass by Letters Patents under the Great Seal, for it could pass by no other Way, unless by Act of Parliament; then the Question was, whether it should be governed by the Laws of this Land, (*viz.*) if the Statutes made here should bind them; it was agreed on both Sides, that no Man had any Inheritance in this *Isle* but the Earl and the Bishop, and that they are governed by Laws of their Own, and not by our Laws; whereupon it was held, that the Statute 27 *H. 8.* of *Uses*, and the Statute of Wills, did not bind in the *Isle of Man*, nor any other Statutes made in *England*, without express Words, and 'tis the same (as to this Matter) as *Ireland* is, which Kingdom and People are governed by their own Laws and Statutes. 2 *And.* 115. *The Earl of Derby's Case.*

Foreign Plantations, Places and Kingdoms.

(A)

1. **I**N False Imprisonment, the Defendant wade a Special Justification, for that the King by Letters Patents, dated 28 *Octob.* 32 *Car.* 2. did appoint him to be Captain General, and Chief Governor of *Barbados*, by which Letters Patents he appointed twelve Men to be of the King's Counsel during Pleasure, of which the Plaintiff was one; that the Defendant had Power to appoint a Deputy-Governor, and that he did appoint the Plaintiff so to be, during his (the Defendant's) Absence, and that he (the Plaintiff) being so appointed, did *male & arbitrarie* execute the said Office; that when the Defendant returned to *Barbados* he called a Council before the Plaintiff was charged with Male Administration, and sets forth wherein, &c. upon which it was then ordered, he should be committed to the Provost-Marshal, until he was brought to a General Court of *Oyer and Terminer*, by which Court he was again committed; and upon Demurrer to this Plea, it was held ill, because the Plaintiff is answerable to the King alone for Misbehaviour in his Government, &c. But this Judgment was reversed in the House of Peers, for that the Court had Power to commit, and the King is not restrained by the Laws of *England* to govern this *Island* by any particular Laws, and therefore not by the Common Law, * *but by what Law he will*; for these *Islands* were gotten by Conquest, or by some of his Subjects going in Search of some Prize, and Planting themselves there; therefore the Plaintiff being committed by an Order of Council, this Court will intend that his Commitment was legal. 3 *Mod.* 159. *Witham* versus *Dutton*. 2 *Salk.* 666. *Smith* & *Brown*.

2. One *Hutchison* killed Mr. *Colson* in *Portugall*, for which he was tried there and acquitted, the Exemplification of which Acquittal he produced under the Great Seal of that Kingdom; and the King being willing he should be tried here, referred it to the Judges, who all agreed, that the Party being already acquitted by their Law, could not be tried again for the same Fact here. 3 *Keb.* 785. *Mr. Hutchison's Case*.

Foreign Plea.

(A)

1. **T**HE Defendant covenanted to pay so much Money, if such a Ship did not return, and the Plaintiff brought an Action of Covenant, which he *laid in London*; the Defendant pleaded, that the Ship did return to such a *Place in Cornwall*; and upon a Demurrer to this Plea, the Plaintiff had Judgment, because this being a Foreign Plea, and Transitory, the Defendant ought to have pleaded to that Place where the Plaintiff had alledged in his Declaration, *viz. at London*; 'tis true, the Defendant may plead a Foreign Plea in a Matter not Transitory; but then he must swear to it. *Sid.* 234. *Collins* versus *Sutton*.

2. Debt upon Bond brought against the Defendant in *B. R.* who pleaded, that at the Time of exhibiting the Bill, he was an Inhabitant in the *County Palatine of Chester*, (*viz.*) *apud Nantwich*, and notoriously known there; but this being taken to be a Foreign Plea, the Party should have sworn to it, which not being done, the Plaintiff signed his Judgment; but it was set aside, because this is not a *Foreign Plea*; 'tis true, 'tis a Plea to the Jurisdiction of the Court, and so is Antient Demesne, and every Plea of Privilege; but they are never put in upon Oath. 5 *Mod.* 335. *Cholmondeley* versus *Broom*.

Forfeiture.

Of Estates for Life and Years, in Lands | Where Lands shall not be forfeited. (B)
or Offices. (A) | In Treason, Felony, &c. (C)

(A)

Of Estates for Life and Years, in Lands or Offices.

1. **F**EME Covert conveyed her Lands held *in Capite*, to the Use of her self for Life, Remainder in Tail to her Husband; adjudged this shall not be taken to be an *Advancement* within the Statute 32 H. 8. because a Wife shall not be intended to advance a Husband; and if he alien those Lands, 'tis no Forfeiture, for 'tis not within the Statute 11 H. 7. 19 Eliz. Dyer 354.

Damages
(H) 1. S.
C.

2. Lessee for Years, Reversion in Fee to the Plaintiff, to whom the Tenant for Years attorned; and in an Action of Debt brought against him for Rent arrear, he pleaded, that before the Plaintiff had any Thing in the Reversion, it was granted to him, the said Defendant in Fee, and pending this Suit, the Plaintiff entered on the Land, as forfeited; and adjudged, that this Entry was lawful, because the Defendant, who had only a Lease for Years, claimed a Fee-simple in the Reversion. *Goldf. 40. Dixey versus Spenser. Moor 211. S. C. Postea 9. S. C.*

3. The Lessor make a Lease to another and his Assigns, for his own Life, and for the Lives of his two Sons, and afterwards granted the Reversion for twenty-one Years; adjudged, this was a good Lease for three Lives, and if he grants it over to another, for any of the three Lives, 'tis no Forfeiture of his Estate. *Goldf. 157. Roffe versus Ardwick. Moor 398. S. C. by the Name of Roos versus Ardwick.*

4. Tenant for Life, Remainder in Tail to his Son; the Tenant for Life made a Lease for Years to B. G. upon Covin, and agreed with the Lessee, that he should make a Feoffment to another, which was done; and then the Father, who was Tenant for Life, as aforesaid, released to the Feoffee, with Warranty, and died; this Warranty descended upon the Son; but because it commenced by Disseisin, it was adjudged no Bar to the Son; and if the Father had been Living, it had been a Forfeiture of his Estate for Life, of which his Son, being the Issue in Tail, might have taken Advantage. 5 Rep. 97. *Fitzherbert's Case.*

5. A Jointress married again, and she and her Husband made a Feoffment in Fee to B. G. and his Heirs, of the Jointure-Lands, *habendum* to him and his Heirs, *to the Use of the Wife for her Life only*; adjudged, that this was a Forfeiture of her Jointure; for the Estate and the Use of Lands are several Things, and here by this Feoffment the Fee-simple passeth to the Feoffee, and the Remainder of the Use likewise; for tho' the Use is afterwards limited to the Wife for Life, yet the Law limits the Remainder to the Use of the Feoffee. 1 Leon. 125. *Peirce versus Hoe. Godb. 141. Egerton's Case.*

6. Tenant by the Curtesy made a Lease for Years, upon Condition to have the Reversion in Fee, which Condition was performed; adjudged, that if Livery be made upon the Conveyance, 'tis a Forfeiture, because when the Condition is performed, the Fee-simple passeth *ab initio*; but if Tenant in Tail make a Lease, with a Condition to have a Fee-simple, and dieth, in such Case the Condition cannot be performed, because 'tis hindered by the Descent of the Estate upon the Issue in Tail. 8 Rep 73. *in the Lord Stafford's Case.*

7. Feoffment in Fee, upon Condition, that the Feoffees should regrant the Lands to the Feoffor, and his Wife in Tail, Remainder to his own Right Heirs, which was done accordingly; the Husband and Wife had Issue a Son, and then the Husband died; the Son, who was the Issue in Tail, levied a Fine in the Life-time of his Mother, who was Tenant in Tail, and this was to Sir George Brown, and his Heirs; the Mother afterwards made a Lease for three Lives, without reserving any Rent, and therefore not warranted by the Statute 32 H. 8. adjudged, that this Lease for three Lives was a Discontinuance, and within the Statute 11 H. 7. and so a Forfeiture of her Estate; and that Sir Geo. Brown the Conusee might enter for the Forfeiture, because the Estate-Tail was barred by the Fine levied by the Issue in Tail, and the Remainder in Fee passed by it to the Conusee; so as he had the Remainder in him at that very Time when the Discontinuance was made by the Tenant in Tail, in making a Lease for Lives not warranted by the Statute, -because no Rent was reserved, and then he is within the very Words and Intent of the Statute to enter for a Forfeiture. 3 Rep. 50. *Sir Geo. Brown's Case. Cro. Eliz. 513. S. C. reported*

ported by the Name of *Lyuch* versus *Spencer*. *Moor* 455. *S. C.* *Dyer* 148. *Pennicock's Case*, where the Opinion of *Dyer* is contrary to *Sir Geo. Brown's Case*.

8. In Ejectment, the Case was, Tenant for Life made a Lease for Years, and afterwards granted the Lands to *T. S. habendum* after the Determination of the Lease for Years, to him, during the Life of the Lessor; afterwards the Lessee for Years was turned out, and the Tenant for Life was disseised of his Freehold, and being so disseised levied a Fine, &c. to the Disseisor, and thereupon he in Reversion in Fee entered for a Forfeiture; it was insisted, that this was no Forfeiture, because at the Time of the Fine levied, the Cognisor had nothing in the Land, and by Consequence he who hath nothing, cannot forfeit; but adjudged, that it was a Forfeiture, for every particular Tenant ought to maintain his own Estate, and in doing that he maintains the Estate of him in Reversion, out of which the particular Estate is drawn; and for that Reason he ought not to do any Act by which he in Reversion may receive any Prejudice: Now by levying this Fine the Tenant for Life did not maintain but destroy his own Estate; and therefore he in Reversion may take Advantage of it, and enter upon the Disseisor, (who was the Cognissee) and had the Land by *Tort* during the Life of the Tenant for Life. 2 *And.* 29. *Buckley* versus *Hardy*.

9. In Ejectment, the Case was, the Testator devised his Lands to *Robert* his youngest Son for ever, and after his Decease, the Remainder to his Heir Male for ever, and died; the Son made a Lease to *B. G.* for three Lives; adjudged, that if by this Devise the Son took only an Estate for Life, then his making a Lease for three Lives had been a Forfeiture of his Estate for Life; but it was resolved to be an Estate-Tail in him, and so the Lease good. 1 *Bull.* 219. *Whiting* versus *Wilkin*.

10. Tenant in Fee-simple made a Lease for Years to *Spencer*, rendring Rent, and afterwards by Bargain and Sale, conveyed the Reversion to the Plaintiff, who brought an Action of Debt against *Spencer* for the Rent in Arrear; the Defendant pleaded, that after the Lease, and before the Grant of the Reversion to the Plaintiff, the said Tenant in Fee bargained and sold the Land to him; and upon a Special Verdict in an Assise of fresh Force, in which all this Matter was found, the Question was, whether *Spencer* had forfeited his Lease or not; and adjudged, that it was forfeited. *Moor* 211. *Sir Wolston Dixie's Case*. *Antea* (A) 2. *S. C.*

11. In Replevin, &c. the Case was, Tenant for Life, Remainder in Tail, Remainder in Fee; the Tenant for Life, and the Remainder Man in Tail, joined in a Fine *Sur Cognissance de droit*, &c. and afterwards that Remainder Man died without Issue in the Life-time of the Tenant for Life; the Question was, whether the Remainder Man in Fee might enter for a Forfeiture; adjudged, that the Levying a Fine by the Tenant for Life, was no Forfeiture of his Estate for Life, because he parted with no more than his Estate for Life, which could not be prejudicial to any Man; 'tis not like the Case of Tenant for Life, Remainder for Life, Remainder in Tail, Remainder in Fee to the first Tenant for Life; where, if the Tenant for Life join with him in the first Remainder, either in the Fine or Feoffment, by the Words *Dedi, concessi & confirmari* in Fee, executed by a Letter of Attorney, this is a Forfeiture of both their Estates for Life, and he in the next Remainder may enter; for 'tis the Feoffment in Fee of the first Tenant for Life, and the Confirmation of the second Tenant for Life, and so their Estates are extinguished in Fee granted by them, which is a Wrong done to the Remainder Man in Tail, and tends to his Disinheritance; and therefore he may enter. 2 *And.* 66. *Gardner* versus *Brydon*.

12. In Ejectment, the Case upon the Pleadings was, Lessee for Life bargained and sold the Lands to *W. R.* and his Heirs; and afterwards he suffered a Recovery to the Use of the Bargainor; adjudged this was a Forfeiture of the Estate for Life. *Moor* 271. *Page* versus *Griffith*.

13. Inquisition out of Chancery finds, that the *Warden of the Fleet* had voluntarily permitted two Persons in Execution to escape, and this Prosecution was at the Suit of one *Col. Lug- 3 Mod. 335.* *ron*, with an Intent to procure a Grant of the Office from the King; an Exception was taken to this Inquisition, for that it did not find what Estate the *Warden* had in the Office; 'tis true, these Voluntary Escapes made a Forfeiture of the Office; but yet, if the Fee thereof be in another, and the *Warden* hath only an Estate for Life, (as in Truth he had no more) then the Forfeiture of an Office for Life is a Forfeiture to him in Reversion, and not to the King; so was the Forfeiture of the *Lady Broughton* of the Office of Keeper of the Gate-house *Westminster*, a Forfeiture to the *Dean and Chapter*, and not to the King; and for this Reason the Lord Keeper quashed the Inquisition. 3 *Lev.* 288. *The King* versus *Maulorve*. See *Poph.* 119. *The Earl of Pembroke's Case*. See *Woodward* versus *Fox*.

14. In Ejectment upon a Trial at Bar, and in Evidence to the Jury, the Court held, if Tenant for Life make a Bargain and Sale in Fee, and afterwards suffer a Common Recovery, tho' it happen afterwards to be reversed for Error, that this is a Forfeiture of the Estate for Life. *Sid.* 90. *LeStrange* versus *Temple*.

15. The *Lady Broughton* had a Lease for Years of the Gate-house Prison at *Westminster*, from the *Dean and Chapter*, who were Owners of the Inheritance; and in an Information brought against her for extorting several Sums from the Prisoners, she was found guilty, and fined 500 l. and tho' this was a Forfeiture of the Office it self, yet they only seised it, and put in another at the Nomination of the *Dean and Chapter*. 2 *Lev.* 71. *The Lady Broughton's Case*. Raym. 216.

16. Devise of Lands to her Executors to pay 500 *l.* out of them to her Son: Provided, that if his Father did not give a sufficient Release to the Executors of all the Goods and Chattels remaining in such a House, then the Devise of this 500 *l.* should be void, and it should go to the Executors; the Testatrix died, a Release was tendered to the Father, who refused to execute it, then the Son exhibits a Bill against the Father, and against the Executors for this 500 *l.* and to compel the Father to Release: The Lord Chancellor *Finch* decreed the Money to be paid to the Son, tho' the Executors in their Answer insisted to have it as forfeited to them, upon the Refusal of the Father to execute the release, and said it was a standing Rule in Equity, that a Forfeiture should not bind where the Thing might be done afterwards, or a Compensation made for it; unless where there is a Devise over to another Person upon the Forfeiture of the first. 2 Vent. 352. *Cage versus Russell*.

(B)

Where Lands shall not be forfeited.

1. THE Testator being seised in Fee, devised his Lands to his youngest Daughter in Tail, Remainder to his eldest Daughter in Tail, with divers Remainders over; Proviso if either of them willingly agreed to do any Act, whereby the Lands should not come to them in Remainder, that then the Estate limited to them should cease, &c. the youngest Daughter married, and then she and her Husband suffered a Recovery to them and their Heirs; adjudged, that this being incident to an Estate-Tail, could not be barred by any Limitation or Condition; and therefore her suffering a Recovery, was no Forfeiture of her Estate. 11 Rep. *Portington versus Rogers*.

2. King H. 8. by Letters Patents, granted the Manor of *Blechingley* to Sir *Nicholas Carew* and his Wife, and to the Heirs of their two Bodies; they had Issue *Francis*, and afterward Sir *Nicholas* was attainted of Treason and executed, his Wife surviving; after whose Death the Question was, whether *Francis* should have the Manor, by Virtue of this Entail, or the King, by Virtue of the Attainder; and it was held, that the King should have it as forfeited, tho' it was argued for *Francis*, that his Mother surviving, he is inheritable to the Manor by Descent from her, and might claim it *per formam Doni*; and tho' the Blood between his Father and him is corrupted, yet 'tis not so between his Mother and him. 1 And. 39. *Lord Effingham versus Carew*.

(C)

In Treason, Felony, &c. See Remainder. (F) 7.

1. A Grant was made to the Father and Son, of a Park-Keeper for their Lives, and to the Survivor, with a Fee of 3 *l.* 10 *s.* the Father was afterwards attainted of Treason, and executed, and then the Son moved the Court of Exchequer, that his Deed might be allowed and enrolled, in order to recover the Arrears of the said Fee for three Years then behind, which was done accordingly; and adjudged, that the said Fee and Office was not forfeited by the Attainder of the Father; for it being inseparably incident to the Person, it cannot be assigned over, and what cannot be assigned over, cannot be forfeited. *Plow. Com.* 379, *Sir Henry Nevill's Case*.

2. A Rent was granted *pro consilio impendendo*; the Grantee was afterwards attainted of Treason, and committed to the Tower, and the Grantor having Occasion for his Advice, could not have Access to him; adjudged, that this Rent was not forfeited by the Attainder, because it was a Thing which was incident to the Cause, (*viz.*) to the giving Counsel, which could not be assigned over. 6 H. 8. *Dyer* 2. *Empson's Case*.

3. Lessee for Years assigned his Term to another in Trust for himself, and afterwards he was attainted of Felony; adjudged, that the Trust was forfeited to the King; but all the Judges held, that a Trust in a Freehold is not forfeited upon an Attainder of Treason. 14 Eliz. *Armstrong's Case*.

4. The Husband, seised of Lands in Right of his Wife, was attainted of Felony, and the King upon Office found, seised the Lands, and afterwards granted the same to another in Fee; adjudged, that this Grant was good to pass the Estate to the Grantee, during the Coverture; the King having gained such Estate by the Forfeiture, and was entitled to it by Office found. 1 Rep. 48. in *Aiton Wood's Case*.

5. Adjudged in the Marquess of *Winchester's Case*, that a Right of Action concerning Inheritances is not forfeited by an Attainder of Treason, but Right of Entry is, and so are Bonds, Statutes, Recognizances, &c. and all Things in Action. 3 Rep. 3. *Marquess of Winchester's Case*.

6. In Treason or Felony, the Defendant may sell his Goods, be they Chattels real or personal, *bona fide*, before Conviction, for his Maintenance in Prison; for the King hath no Interest till Conviction. 8 Rep. In *Sir Gerrard Fleetwood's Case*.

7. If a Man pawn Goods for Money lent, and afterwards is outlawed or attainted of Felony, ^{1 Roll.} the King is not entitled to the Goods by Forfeiture, until the Money is paid to him to whom ^{Rep. 133.} they were pawned; so if Lessee for Years is distrained for Rent arrear, and afterwards is attainted of Felony done by him before the Distress taken, the King shall not have the Distress as a Forfeiture, until he satisfies the Party who distrained. ^{3 Bullst. 17.} In *Waller versus Hungar's Case*.

8. King James granted a Lease to Sir John Dacomb and others, &c. in Trust for the Earl of S. who was afterwards attainted of Felony; the Question referred by the King to all the Judges was, whether this Trust was forfeited, and they all agreed, that it was; and that the Executors of Sir John Dacomb should be compelled to assign the Residue of the Term to the King. ^{2 Cro. 512.} *The King versus Executors of Sir John Dacomb in Canc.* See *pl. 11. contra.* See *The King versus Holland.*

9. Archbishop Cranmer being seised of the Reversion in Fee of Lands, upon the Determination ^{2 Leon. 5.} of a Lease then in Being, granted the said Reversion to Trustees, to the Use of the Archbishop ^{Dyer 110.} for Life, &c. Remainder for twenty Years, to the Use of his Executors, Remainder over, &c. the ^{Yelv. 9.} Archbishop was attainted of Treason, and Anno 3 & 4 Mariae was burnt; and all his Lands and ^{1 And. 19.} Chattels being given to the Queen by the Act of Attainder, she became possessed of this Term for twenty Years in Remainder, which she granted to the Defendant; but adjudged, that this Term of twenty Years was never in the Archbishop to forfeit, but only an Authority to name Executors, in whom the Term was to vest by Way of Purchase; and because he could not make Executors, being himself attainted, this Term of twenty Years did never arise. *Moor 100. Cranmer's Case.*

10. Francis Throgmorton, Anno 26 Eliz. was attainted of Treason, committed by him Anno 18 Eliz. and between the Time of the Treason committed and the Attainder, one Scudamore, who married his Sister, levied a Fine to the said Throgmorton, &c. to the Use of Scudamore and his Wife, and to the Heirs of the Husband; and afterwards he sold the Lands by a Deed of Bargain and Sale and Fine, to one Pymb, who was advised to petition the Queen to make his Title good, because the Use which should raise the Estate to Scudamore and his Wife, was destroyed by the Attainder, and therefore the Estate remained in the Cognisee, which was forfeited. *Moor 196. Pymb's Case.*

11. Upon a Bill in the Exchequer to discover the Profits of a real Estate forfeited by the Defendant's Son, who murdered his own Brother, which Profits were received by the Father; it ^{Hardr. 405.} was held, that a Lease for Years in Trust for the Son was forfeited by this Felony; but it was doubted, whether an * Inheritance in Trust would be forfeited: Afterwards, upon an Information exhibited by the Attorney General against Sir George Sands, a Case was made and stated, ^{2 Cro. 512, 514.} which was thus: Sir Ralph Freeman purchased Lands for the Term of ninety-nine Years in his own Name, and afterwards he purchased the Inheritance of the same Lands in Trust, &c. then ^{1 And. 294.} he devised the said Lands to his Grandsons, who were the Sons of Sir George Sands, and directed his Trustees to make Conveyances accordingly, and died; Sir George Sands, at that Time, had two Sons George and Freeman Sands, and Freeman killed George, for which Murder he was attainted and executed, no Conveyances being yet made by the Trustees pursuant to the Will of Sir Ralph Freeman; the Questions were, whether the Term for Years, and whether the Inheritance in Trust were forfeited to the King; those who argued that both were forfeited, tell us, that a Trust is a Right in Conscience to take the Profits, and follows the Nature of the Land; that 'tis an Interest annexed in Privy to an Estate in Lands, and that the Common Law takes Notice of it; that the Term for Years in this Case doth not attend the Inheritance, but is distinct, and stands by it self, and so 'tis forfeited; for 'tis not merged in the Inheritance conveyed to the Defendant, Sir George Sands, in Trust as aforesaid, because he hath it as Administrator *in auter droit*; and after the Death of his Son George, this Trust is in him for his Son Freeman, the Felon; and if so, then the Trust of this Term is forfeited to the King: But adjudged, that neither the Trust of the Inheritance or Term are forfeited; for if the Trust of the Inheritance was forfeitable, the King must be in Possession by Escheat, and that he cannot be, because there can be Escheat only for Want of a Tenant, and here the Feoffee is Tenant; besides, the Trust, either of a Fee-simple or Fee-tail, is not forfeitable at Common Law for Felony, but by the Statutes 26 H. 8. cap. 10. and 33 H. 8. cap. 20. both are forfeitable for * Treason; now, as to the second Point, whether the Lease is forfeited; and adjudged that it was not; the Reasons were, that a Trust is the same that an Use was before the Statute 27 H. 8. and it shall go with the Inheritance; for 'tis the Intention of the Party that creates and governs both Uses and Trusts, and therefore this Lease must attend the Inheritance, because it appears that the Parties intended it should; and if so, then 'tis no more than a Shadow, and cannot go to the Felon, but to the Administrator of George; and if it should be forfeited, it must be as being a Chattel in the Felon, which it never was, because it was designed in the first Place for George, who was his elder Brother; and it being to attend the Inheritance, he might have disposed thereof as Heir, which he hath not done, therefore it shall go to his Administrator; but if it was not a Chattel in George, it can never be so in the Felon, but must still attend the Inheritance which the Felon hath as Heir to his Brother; for he was not the first to whom it was limited, but his Brother George, so that the Felon takes it as Part of the Inheritance, and having no other Interest in it, 'tis not forfeitable, for 'tis not drowned in the Inheritance, but preserved in Order to protect it from mesne Incumbrance; 'tis true, if this Lease had been † assigned, and severed from the Inheritance, it

^{† See pl. 8.} *Whether that Lease was originally created or assigned.*

might have been forfeited, but so long as 'tis attendant on it 'tis otherwise; and in most Cases where Leases for *Years in Trust* have been forfeited, apparent Frauds have been the Ground of such Forfeitures; as for Instance, in *Sir Walter Raleigh's Case*, (*viz.*) Queen *Elizabeth* purchased a *Lease for Years*, and gave it to *Sir Walter Raleigh*, afterwards she purchased the Inheritance, and intending to give him that likewise; he, to prevent the Lease being merged, assigned it to his Son, being a Child of six Years old, then the Queen conveyed the Inheritance to the Father, who settled it on his Son; and *Anno 1 Jac.* the Father was attainted of Treason; now it was held, that the Lease assigned to his Son was forfeited, because the Father himself took the Profits after the Assignment, so that there was Fraud apparent, &c. *Hardr. 488. Attorney General versus Sir George Sands.*

12. The *Trust of a Term* was upon the Marriage of *Whaley*, conveyed to *W. R.* and others, till *Whaley* should pay so much Money, and afterwards in *Trust* for him and his Wife and Children; *Whaley* was afterwards attainted of Treason; and by the Statute *Car. 2.* all the Estates and Trusts of and for such Persons, are given to the King; the Wife paid the Money; and all this Matter being found in a Special Verdict in Ejectment, it was adjudged, that this Trust was not forfeited, because the Wife was in the Nature of a Purchaser. *Sid. 260. Whaley versus Anderson.*

Forgery.

See *Indictment.*

(A)

1. **T**HIS is a fraudulent making and publishing false Writings, to the Prejudice of the Rights of other Men, and is punishable at the Common Law, either by Action, or by the Statute 5 *Eliz.* by Indictment; the Words are, *If any one shall forge any Deed, to the Intent that the Estate of Freehold or Inheritance of any Person, in or to any Lands or Tenements, Freehold or Copyhold, or Right, Title, or Interest of any of, in, or to the same, or any of them, may be molested, &c.*

Another Clause is, *That if any Person plead, publish, or shew forth, &c. to the Intent to have or claim any Estate of Inheritance, Freehold, or Lease for Years shall be claimed, &c.*

2. There was Grandfather, Father, and Daughter; the Lands descended to the Father, and he made a *Lease for 100 Years*; the Daughter, to avoid this Lease, forged a Will made by the Grandfather, by which he gave the Lands to the Father for Life, Remainder to the Daughter in Fee; the Court seemed to incline, that this was not within the Statute, for an *Estate for Years* was not such an *Interest or Title* as is intended by the Statute by such a forged Will or Deed; besides, the Defendant did not *claim the Lease*, for her Intent was to defeat it; and this being a Penal Statute, shall not have an equitable Construction. *Godbolt 62. Sturgies's Case. See 4 Leon. 25. Newman versus Sheriffe. S. P.*

3. Writ of Forger of false Deeds, in which the Plaintiff declared, upon the Forging an Indenture, containing, that a certain *Abbot of Gloucester*, demised the Site of the Manor of *R. & terras dominicales, &c.* upon Not guilty pleaded, a Lease was given in Evidence, supposed to be made and forged, containing, that the Abbot leased the Site, &c. *& omnes dominicales terras, &c.* excepting two Closes; and adjudged, this was good Evidence, for 'tis not necessary to construe the Words *Terras dominicales* in the Declaration, to be *omnes terras dominicales*, for then it would not agree with the Lease in which some are excepted; and those which are not excepted are *Terra dominicales*, and so the Declaration and Lease agree. *1 Leon. 139. Atkins versus Hules.*

4. Adjudged, that if one writeth a Will of a sick Person, who becomes afterwards speechless, and then he inserts a Clause in it, without any Warrant, that the same is not Forgery of the Will, within the Statute 5 *Eliz.* *Pfich. 12 Eliz. Dyer 288.*

5. The Defendant was sued in the Star-Chamber for forging a Customary of a Manor, of the Customs and Usage of the Copyholders there, and put several Seals to it; adjudged, that this was a Forgery within the Statute, by the Word *Writing*; and the Court said, the King might pardon the corporal Punishment. *Dyer 322. Taverner's Case.*

6. The Prosecutor delivered 1000*l.* to a Vintner to put out at Interest, he spent the Money, and delivered several Bonds, which he pretended to have taken for the Money, in which several Men were bound, who were of known Ability, and every Bond was sealed, and the Vintner's Name subscribed as a Witness, all which Bonds were forged; adjudged, that tho' there were several Bonds, yet the Offender should lose but one Ear, for it shall be taken as one Forgery, because done at one Time; and that the Party grieved should recover his Damages. *2 Brownl. 50. Andrews versus Ledfam.*

7. Information against the Defendant for Forgery, for publishing a forged Deed, knowing it to be forged; adjudged, upon a Conference with the Judges of *B. R.* to whom one of the Barons of the Exchequer was sent, that no Person who is, or may be a Loser by the Deed, or who may receive any Benefit or Advantage by the Verdict, being found against the Defendant, shall be a Witness for the King. *Hardres* 331. *Watts's Case*.

8. Debt upon the Statute 5 *Eliz. cap. 14.* against an Attorney for forging a Bond, wherein the Plaintiff set forth the Statute, and that the Defendant had forged a Bond in his Name, which was transmitted into the Exchequer, and Process issued out of that Court against the Plaintiff, who was thereupon compelled to appear, and that his Costs amounted to 20*l.* and his Damages to 10*l.* and so demanded the Double, (*viz.*) 60*l.* which the Defendant had not paid. 1 *Lutw.* 61. *Collingwood versus Jefferies.* 3 *Lev.* 398. *S. C.*

9. Debt upon Bond of 10000*l.* conditioned to pay 5000*l.* to the Wife of the Plaintiff, within three Months after the Death of the Obligor; upon *Non est factum* pleaded, there was a Trial at Bar, and the Witnesses to the Bond were examined a-part, because it was suspected to be forged, and the Jury found *Non est factum*; whereupon the Defendant desired by his Counsel, that it might remain in Court, but that was denied. *Sid.* 131. *Guilliams & Ux' versus Sir John Hulle & Ux'.*

10. The Defendant was indicted for counterfeiting a Protection in the Name of *Sir Anth. Ashley Cooper*, who was at that Time a Privy Councillor, which he sold for 6*l.* and was found guilty of the Forgery and Extortion; it was insisted in Arrest of Judgment, that this was no Offence, because *Sir Anthony* was neither a Member of Parliament or Nobleman, and therefore the Protection was void; but the Defendant was fined 50*l.* and committed till he paid it. *Sid.* 142. *The King versus Deakins.*

11. The Jury found a Deed concerning an Estate of 2000*l. per Annum* to be forged; and it was ordered by the Court of Chancery, to bring it into Court, and Leave given, that *Phitten* might have a new Trial if he would, within a Year, which he had, and it was found forged, and thereupon it was by Order cancelled. *Sid.* 170. *Phitten versus Gerrard.*

12. The Defendant, who had 700*l. per Annum*, and was High Sheriff of the County of *Harrowick*, not long since was indicted and convicted of forging an Acquittance for 7*l.* he was fined 100*l.* and to be of the Good Behaviour for one Year. *Sid.* 278. *The King versus Ferrers.*

13. Indictment for Forging and Publishing a Deed at *C.* the Defendant was found guilty *de transgression & forgeria præd'*; it was objected, that this is insufficient, because nothing was found as to the Publishing; but adjudged, that *Transgression præd'* includes all. 2 *Lev.* 111. *The King versus Newman.* 2 *Lev.* 221. *S. P. The King versus Mariott.*

14. Information for a Forgery, the Case was thus: One *Marsh*, a Custom-house Officer, suspecting that some Wool would be transported, went to the Sea-side in the Night-time, where, in an Affray, he killed a Man, of which he was found guilty upon the Coroner's Inquest; afterwards the Coroner inserted the Names of two Persons, who, together with *Marsh*, were indicted upon the Coroner's Inquest for Murder; and it being tried at bar, they were all Three acquitted; but Two of the Jury on the Coroner's Inquest, made Oath, that they found the Indictment only against *Marsh*, and that the Coroner took the Indictment, it being in *English*, and told them it must be turned into *Latin*, which was done, and then he inserted the Names of two other Persons; this Information was tried at Bar, and he was found guilty, but having compounded with the Prosecutors, he was fined twenty Nobles, and no more. 3 *Mod.* 66. *The King versus Marsh & al'.*

15. Information against the Defendant, setting forth, that he did forge *Quoddam scriptum continen' in se scriptum obligatorium, per quod quidem scriptum obligatorium prædict' T. S. obligatus fuit*, he was found guilty; and it was moved in Arrest of Judgment, that *T. S. could not be bound*, if the Bond was forged: *Sed per Curiam*, the Defendant being found guilty of Forging a Writing, *continen' quoddam scriptum, &c.* that might be a true Bond. 3 *Mod.* 104. *Anonymus.*

16. The Defendant was indicted for Forging a Cocquet *pro quinq; Sarcinis lini, Anglice*, five Packs of Linen Cloth; and being found guilty, it was moved in Arrest of Judgment, that the Indictment was ill, because of the Incertainty, how much Cloth there was; but adjudged, that 'tis sufficient to describe the Thing containing, as *duas * Sarcinas Cannabi, Anglice* Two Bundles of Hemp; so Trover for a Study of Books hath been held good. *Mod. Cases* 87. *The Queen versus Brown.*

1 *Lev.*

303.

* 2 *Lev.*

125.

Formedon.

In the Descender. (A)
In the Remainder. (B)

In the Reverter. (C)
Pleadings therein, good, and not good.
(D)

(A)

In the Descender.

1. **W** Here a Remainder is once executed, in such Case the Demandant in a *Formedon in Descender* shall never mention this Remainder; but the general Writ in the Descender shall serve, and he shall count as of an immediate Gift, for he cannot have a *Formedon* in Remainder, when the Remainder is executed; and in this *Formedon in Descender*, the Demandant must make himself Heir to him who was last seised. 8 Rep. 86. *Buckmere's Case*.

2. In a *Formedon in Descender*, if the Demandant is barred, either by Verdict or Demurrer, yet the Issue in Tail shall have a new *Formedon*, because he doth not only claim as Heir to his Ancestor, but also *per formam doni*, for otherwise he might be barred by the false Pleading of his Ancestor, and that is prohibited by the Statute *Westm. 2. 6 Rep.* in *Ferrer's Case*. *Dyer* 188. *Sir Ralph Rowlett's Case*.

3. In this *Formedon* the Demandant must make himself Son and Heir, or Cousin and Heir to him who was last actually seised of the Estate-tail; for any other Seisin shall abate the Writ. 8 Rep. 88, in *Buckmere's Case*.

4. In every *Formedon*, there are two Things necessary; one is the Gift of the Donor, the other is Conveyance of the Estate to the Donee; and if either of these fail, the Writ is not good in Substance, nor helped by any Statute of *Jeofails*. *Goldf.* 126. *Dewmell versus Catesby*. *Jeofails*. (A) 1. S. C.

5. But yet in a *Formedon in Descender*, the Demandant made himself Heir to every one who had inherited the Estate-tail, tho' by the Register he should make himself Heir only to him who was last seised of the Estate-tail, yet the Writ was held good. *Hob.* 51. *Freak versus Binford*. 1 Mod. 219. S. P.

6. Land was given to Husband and Wife, and to the Heirs of their *two Bodies* begotten; the Husband made a Feoffment in Fee, and died, leaving Issue a Son of that Marriage; the Wife died without making any Entry; adjudged, that this Feoffment by the Husband made a *Discontinuance* of the Estate-tail, which might have been purged by the Entry of his Mother, but now it cannot be done after her Death, therefore his Entry cannot be lawful, because he must claim as Heir of their *two Bodies*, and he is prevented by the Feoffment to inherit as Heir to his *Father*; and if he should bring a *Formedon in Descender*, it must be, for that the Donor gave the Lands to the Husband and Wife, & *heredibus de corporibus eorum*, the Husband and Wife, *exeuntibus, & quæ post mortem prædicti* the Husband and Wife *præfui* B. G. *filio & heredi ipsorum*, the Husband and Wife, *descendere debent per formam doni*, which cannot be in this Case, because by the Feoffment he cannot inherit as Heir to his Father. 8 Rep. 71. *Greenly's Case*. *Antea* Baron and Feme. (F) 5. S. C.

7. *Formedon in Descender* by three Demandants, of Lands in Gavelkind; the Tenant pleaded a Warranty of their Ancestors, and that the Lands descended to them were Affets, and that they were bound by the said Warranty; they were at Issue, whether the Lands were Affets by Descent; and the Jury found, that their Father was seised in Fee of Gavelkind, &c. and that the Demandants were *by the Custom* Heir to him, and that he devised the said Lands to them, and to their Heirs, *equally to be divided* between them; adjudged, that they were in by the Devise and not by the Descent, because where *an Heir* takes a different Estate by a Devise from what he would have taken by Descent, there he shall have his Title by the Will and not by the Descent; now, in the principal Case, the Demandants were *Jointenants* by the Will, and the Whole shall go to the Survivor; whereas, if they take by Descent, they shall be Coparceners; therefore the Pleading the Warranty with Affets was adjudged to be no Bar. 1 Leon. 113. *Beare's Case*.

8. In a *Formedon in Descender*, the Demandant made his Title by B. G. who gave the Lands to W. R. and to the Heirs Males of his Body lawfully begotten; and shewed, that he was Son and Heir of P. R. who was Son and Heir of W. R. the Donee; it was adjudged, that the Writ was not good, because he ought not to mention every Heir from the Donee, but he is to make himself Heir to him who died last seised of the Estate-tail. *Hetley* 78. *Jenkins versus Dawson*.

9. *Formedon in Defcender*; it was objected againſt the Declaration, for that the Demandant (being Brother to the Tenant in Tail, who died without Iſſue) ſets forth, that the Lands belonged to him, *poſt mortem* of the Tenant in Tail, but did not ſay, that he died without Iſſue; the * Precedents are *quæ poſt mortem* of the Donee *reverti debent, eo quod* the Donee died without Iſſue; which is very true in a *Formedon in Reverter*, becauſe there the Eſtate-Tail being ſpent, the Donor may not know the Pedigree; and ſo it is in a *Formedon in Remainder*; but in a *Formedon in Defcender* 'tis ſufficient to ſay, that *per mortem* of the Tenant in Tail *deſcendere debet*, without ſetting forth, that he died without Iſſue; for if he had any Iſſue, then it could not deſcend to the Brother. 2 *Mod.* 94. *Anonymus*.

* Coke's
Int. 254.
Raſt. Ent.
541.

10. *Formedon in Defcender*; the Tenant after an *Imparlanſe* pleaded *Non Tenure* as to the *Whole*; and upon Demurrer this Plea was adjudged ill after a *General Imparlanſe*, as well as *Non tenure as to Part*. 3 *Lev.* 55. *Barrow verſus Haggett*.

11. In a *Formedon in Defcender*, the Tenant pleaded *Non tenure, as to Part, & petit judicium de Brevi*, as to that Part; as to the reſt he pleaded, that the Demandant had entered into it; the Plaintiff replied as to the *Non tenure*, that he the ſaid Demandant was Tenant of that Part of the Land demanded; and as to the *Entry* he demurred; the Objections to this Plea were, that it doth not appear when the Demandant entered; for if it was before the Writ brought, or *pendente Brevi*, or after the laſt Continuance, it ought to be ſo pleaded, as the Caſe is; beſides the Plea is repugnant, becauſe in the firſt Part of it the Tenant would have the Writ abate, as to Part of the Land, for *Non tenure*, and afterwards he would have the Writ abated as to the *Whole*, by Reaſon of the *Entry*; for ſo is the Law, (*viz.*) if the Demandant enter into Part, the Writ muſt abate for the Whole. 1 *Lutw.* 36. *Rep. Muſeley verſus Coldwell*.

12. In a *Formedon in Defcender*, the Demandant ſet forth, that *H. O.* being ſeiſed in Fee, made a Feoffment, &c. to the Uſe of himſelf for Life, Remainder to the Uſe of *E. V.* and *Ellen* his Wife, for their Joint Lives, and after their Deceaſe to the Uſe of the *Heirs of the Body of the Husband*, begotten on the Body of the Wife, that *H. O.* died, and that by Virtue of the ſaid Feoffment, the Husband and Wife were ſeiſed, that is to ſay, *the Husband in Fee-Tail, and the Wife of the Freehold, during their joint Lives*; that the Husband died, and then the Wife became ſole ſeiſed for Life, Remainder to *H.* her Son; that the Wife died, and then the whole ſurvived to her Son, and from him *jus deſcendit* to the Demandant, as Couſin and Heir of *E. V.* (that is to ſay) Son and Heir of *Hugh*, who was Son and Heir of *H.* (the Son) who was Son and Heir of *E. V.* on the Body of *Ellen* begotten; in this Caſe the Seiſin was alledged right, contrary to the Opinion of *Fitzherbert*, who held that Seiſin muſt be thus alledged (*viz.*) By Virtue whereof the Husband and Wife were ſeiſed together, and to the Heirs of the Body of the Husband, begotten on the Body of the Wife, and muſt not ſay that either of them were ſeiſed of a *Freehold for Life*, or of a *Fee-Tail*. 1 *Lutw. Rep.* 974. *Vaughan verſus Rowland*.

(B)

In the Remainder.

1. **I**N a *Formedon* in Remainder or Reverter, the Omiſſion of the eldeſt Son, or Iſſue inheritable in the Pedigree of the Donee, ſhall abate the Writ; but the Demandant need not mention any of them after the Words, & *quæ poſt mortem*, &c. for there 'tis ſufficient to ſay *Quæ poſt mortem* of the Donee, *ad ipſum remanere*, or *reverti debet*, as the Caſe is, *eo quod* the Donee died without Iſſue.

2. It will not lie of a Croft of Land; the proper Remedy in ſuch Caſe is by an *Aſſiſe*, and becauſe a *Formedon* is *Breve adverſarium*, therefore, where a Judgment was given in a *Formedon*, for a Croft, and for other Parcels of Land, it was reverſed for the Whole upon a Writ of Error; for it could not be reverſed for the Croft only, for the Reaſon before mentioned. 2 *Bulſt* 214. *Ellis verſus Wallis*. *Styles* 32. *S. P.*

3. *Formedon* in Remainder brought by *W. G.* of three Meſſuages, which the Donor gave to the Donee, and the *Heirs of her Body*, the Remainder to *B. G.* and his Heirs, which after the Death of the Donee and the ſaid *B. G.* *praſar* *W. G. ut filio & hæredi R. G. fratri & hæredi T. B. filio & hæredi B. G. remanere debent per formam donationis prædictæ, eo quod præd* (the Donee) *obit, ſive hæredi de Corpore ſuo*; the Tenant pleaded in Abatement of the Writ, that the Demandant ſhould have ſuppoſed the Meſſuages *poſt mortem* (of the Donee) and him in Remainder, *praſar* *T. B. ut Conſanguineo & hæredi B. G. remanere debent, &c.* but adjudged well enough, becauſe it appears by the Pedigree, that the Demandant was Couſin and Heir to *B. G.* *Hob.* 51. *Freak verſus Bruford*.

4. The Teſtator ſeiſed of Gavelkind Lands, and having Iſſue three Daughters, deviſed them to his eldeſt Daughter in Tail, Remainder of one Moiety to his ſecond Daughter in Tail, Remainder of the other Moiety to his third Daughter in Tail; and if ſhe died without Iſſue, the Remainder of her Moiety to the ſecond Daughter, and her Heirs; the firſt and ſecond Daughter died without Iſſue; the Heir of the youngeſt Daughter brought a *Formedon* in Remainder; it was objected, that becauſe the Eſtate came by ſeveral Deaths, and by Conſequence there were ſeveral Remainders, therefore the Demandant ought to have brought ſeveral *Formedons*; but adjudged,

judged, that because all the Remainders depended upon one Conveyance, and made at the same Time, therefore one *Formedon* was sufficient for all the Land. 8 Rep. 86. *Buckmere's Case*.

5. *Formedon* in Remainder; the Tenant pleaded in Abatement, that the Demandant at the Time of the Writ brought, *fuit & adhuc existit seifit'* of a Moiety of the Land in Demand; adjudged no good Plea; he ought to have pleaded, that he was *seifed in his Demesne as of Fee*, or as of a Freehold, and not to say, that he was seifed generally. *Winch 23. Gratwick versus Gratwick*.

6. Donee in Tail, the Remainder in Tail; the Donee discontinued the Tail in the Life-time of the Remainder, and died without Issue; he in the Remainder died, and his Son and Heir brought the *Formedon* as upon the immediate Gift of his Father, which was quite Wrong, because he was never seifed in his Life, the Estate-Tail being discontinued by the Donee; but if the Father had been seifed, the *Formedon* had been well, and he need not mention the first Gift to the Donee in Tail. *Mich. 11 Jac. 1 Brownl. 155*.

7. Tenant for Life, Remainder in Tail, who had Issue a Son and two Daughters; the Tenant for Life died, then the Father and the Son joined in a Feoffment, with Warranty; the Father died, the Son died without Issue, and the Daughters brought a *Formedon* in Remainder; the Tenant pleaded this Feoffment, with Warranty, pretending it was a *Collateral Warranty*, and if so, it had bound the Daughters; but adjudged, that it was a lineal Warranty; and so the Plea was no good Bar. *Trin. 16 Jac. Brownl. 153. Bishop versus Cofins*.

8. *Formedon* in Remainder, in which the Demandant declared, that *Anthony Barrow* was seifed for Life, Remainder to *Dorothy* and the Heirs of her Body, by the said *Anthony* to be begotten; *Et quod post mortem præd' Antonii & Dorothea & Aliciæ filia, &c. eidem*, (the Demandant) *remanere debet, &c.* the Tenant imparled specially, with *salvis sibi omnimodis, &c.* and demanded Oyer of the Original, and then pleaded in Abatement, that the said *Alice* had Issue *Lodowick* her Son and Heir, who survived her and *Dorothy, & hoc, &c. unde ex quo* the said *Lodowick* was not named in the Writ, he demanded Judgment of the Writ; and upon a Demurrer to this Plea, it was insisted for the Tenant, that the Omission of any Person, who had a Right, tho' he was never seifed, shall vitiate the Writ; and the Court was of that Opinion; then it was objected against the Plea, that a View had been in this Case, and that after a View, *nothing can be pleaded in Abatement*, except what arises upon the View it self; which is very true, but then it ought to have been pleaded; and 'tis not sufficient to bring the Writ of View into Court, and the Return thereof, unless entered on the Roll; but adjudged, that the Court may take Notice of a Record in the same Court, tho' not entered on the Roll, and without pleading it. 3 Lev. 218. *Binghurst versus Batt. See Dyer 216*.

(C)

In the Reverter.

1. **I**N a *Formedon* in Reverter, the Donor need not shew the Pedigree of the Issue of the Donee, nor who was last seifed, &c. because he is supposed to be a Stranger to them. 4 Eliz. *Dyer 216*.

2. Where the Demandant in a *Formedon* in Reverter is barred of a third Part by his own Shewing; as where he sets forth in his Count, that a Fine was levied of a third Part, &c. in such Case the Writ shall abate for the whole Land, because 'tis satisfied by his own Shewing in a very material Point. *Hob. 279. in the Earl of Clanrickard's Case*.

3. *Formedon* in Reverter by the *Earl of Clanrickard* and the Lady *Frances* his Wife, against the Tenant, of Lands which *Robert Earl of Essex* and the said Lady *Frances*, then his Wife, did give to *B. G.* to the Use of *Elizabeth Sydney*, Daughter and Heir of *Sir Philip Sydney*, and to the Heirs of her Body, and which after the Death of the said *Elizabeth, &c. ad præfatam Franciscam revertere debent*, not mentioning the *Earl of Clanrickard*, her present Husband, *eo quod, &c.* the Tenant pleaded in Abatement, that the said *Frances* at the Time of the Death of *Elizabeth*, was married to the Plaintiff; so that the Right of the said Lands, if she had any, did revert to her Husband and to her; whereupon the Demandants demurred in Law, and it was adjudged, that the Writ was good; 'tis true, if this had been a *Formedon in descender* upon a Descent to the Wife, in such Case the Descent must be made to the Wife alone; but where 'tis in the Reverter, as in the Principal Case, where nothing is vested, but the Right only returns, there it may be laid to return either to the Wife alone, as here, or to the Husband and Wife. *Hob. 1, 2. Earl of Clanrickard versus Sydney*.

4. In a *Formedon in Reverter*, the Case was, *Wm. Vesey* the Father, being seifed in Fee, devised his Lands to his eldest Son *John Vesey* and the Heirs Males of his Body; and for Default of such Issue, to *William Vesey* and the Heirs Males of his Body, being another Son; and for Default of such Issue, Remainder over, &c. The Father died, then *John* entered, and died without Issue Male, leaving two Daughters, *Elizabeth* and *Sarah*, the now Demandants; then *Wm.* the other Son entered, and in Consideration of a Marriage intended between him and *Anne Hewet*, he made a Feoffment to two Trustees, and their Heirs, *Habendum* to the Use of the said *William* the Feoffor for Life, then to *Anne*, his intended Wife, for Life, (who was now Tenant) Remainder to the Use of the Heirs Males of the said *William* and *Anne* in Special Tail, Remainder

to his own Right Heirs, with Warranty from him and his Heirs, to the Feoffees and their Heirs, and afterwards he died seised without any Issue; after his Death Anne his Widow entered, and had the Possession, and the Demandants Elizabeth and Sarah, the Daughters and Co-heirs of John, and Cousins and Co-heirs of William Vescey the Testator, brought a *Formedon in Reverter*; Anne the Tenant would rebut, and bar them of the Reversion, by this collateral Warranty of her Husband William Vescey, who was Tenant in Tail, as descending on them as Cousins and Co-heirs, who were likewise Cousins and Co-heirs of the Donor: The Court was divided, (*viz.*) the Ch. Justice Vaughan and Archer for the Demandants, who held this Warranty of the Tenant in Tail, tho' 'tis a collateral Warranty, will not bar the Donor and his Heirs of the Reversion; the Argument of the Ch. Just. is very long, but the Substance of it is thus; (*viz.*) There has been an Opinion prevailed, that by the * Statute *De donis*, tho' the *lineal Warranty* of a Tenant in Tail, shall be no Bar to the Issue in Tail upon a *Formedon in Descender*, yet a *collateral Warranty* of a Tenant in Tail is not restrained by that Statute, but is at large, as it was at Common Law before that Statute was made; but this seems to be plainly otherwise by the very Statute it self, which is, that the Will of the Donor expressed in his Deed, shall from henceforth be observed, *Ita quod non habeant illi, quibus tenementum sic datum fuit, potestatem alienandi tenementum sic datum, quo minus Ad exitum illorum, &c. remaneat post eorum obitum, vel ad Donatorem vel ad ejus hæredes si exitus deficiatur, revertatur*: Now by these Words 'tis plain, that it was no longer in the Power of the Tenant in Tail, by any Manner of Alienation, to prevent the entailed Lands from descending on the Issue in Tail, nor in Default of such Issue, to revert to the Donor and his Heirs; and this Restraint was equally and *pari passu* as well for the Benefit of one as the other, (*i. e.*) his lineal Warranty is restrained from hurting the Issue in Tail, and his collateral Warranty from hurting the Donor and his Heirs; tho' those Terms of Lineal and collateral Warranty were of no Use when this Statute was made, but invented many Years afterwards, to intricate that Law; for the Makers thereof intended to restrain the Donee from hurting the Donor, and the Issue in Tail, by any Manner of Alienation or Warranty, and not by distinguishing lineal and collateral Warranty; the next Question argued was, whether the Plea of the Tenant in Possession shall be admitted by Way of Rebutter to the Demandants, barely upon the Possession, without shewing, that this Warranty did extend to the Tenant as Heir or Assignee, &c. and the Ch. Just. held, it should not; 'tis true, my Lord Coke in * *Lincoln College's Case*, and in his * *Comment on Littleton*, tells us, it shall; * 3 Rep. 63. a. and his Reason is, because, the Tenant may defend his Possession, and that the Demandant cannot recover the Lands against his own Warranty; the Ch. Just. Vaughan admitted, that the Tenant in Possession might rebut the Demandant without shewing how he came to the Possession at the Time of the *Formedon* brought, for he may at that Time be in Possession of another Estate than that to which the Warranty is annexed; but yet he must shew, that at some Time, (tho' not at that very Time) the Warranty did extend to him; if this had been in the Case of a Voucher instead of Rebutter, the Tenant must have shewed a Privy of Estate (*i. e.*) the same Estate as well as the same Lands to which the Warranty is annexed, because the Demandant must necessarily recover, if the Land is not defended by the Warranter: Now if this be so, where a Man is warranted by Voucher, the Reason is the same, where he is warranted by Rebutter; the Difference only is, in the Case of Voucher, the Tenant is impleaded by a Stranger; but in the Case of a Rebutter, he is impleaded by the Warranter or his Heirs; therefore, if in a Voucher he must make his Title appear to be warranted, he must do the like in a Rebutter; 'tis true he need not shew the like Estate in the Land upon a Rebutter, as he must upon a Voucher, because he recovers in Value against the Vouchee: Upon the whole Matter, as 'tis unreasonable I should recover the Land which I have warranted to another, let his Title to it be what it will, at the Time of the *Formedon* brought; so 'tis as unreasonable, I should warrant Lands to one who had never any Right in my Warranty, which is this Case, because the Warranty was extinguished; for when the Feoffees were seised to the Use of William Vescey for Life, then to his Wife for Life, and afterwards to the Use of his Right Heirs, and by the Operation of the Statute 27 H. 8. the Possession is brought to those very Uses, the Warranty made by William Vescey to the Feoffees and their Heirs, is wholly extinct; for it could be in none but in William and his Heirs, who could not warrant to himself or themselves; for his Heirs in this Place take by * *Limitation*, and not by * *Litt. Sect. 743.* Purchase, because the *Freehold for Life being in William*, with Remainder over to his Right Heirs, he hath as great an Estate in the Lands as the Feoffees had, and if so, his Warranty is gone, and by Consequence the Tenant in Possession can have no Right to it. *Vaugh. 360. Bole versus Horton.*

5. *Formedon in Reverter*; the Tenant demurred to the Declaration, for that 'tis not said, that the Donor had taken the full Profits of the Lands, (*viz.*) *capiendo inde exples' ad valentiam, &c.* for where a *Fee-simple* is demanded, as 'tis always in a *Formedon in Reverter*, there the Taking the Profits must be alledged both in the Donor and Donee; but where an Estate-Tail is demanded, then it must be alledged in the Donee only. 1 *Lutw. 963. Hunlock versus Petre.* See (D) pl. 3. S. C. 3 Lev. 330.

6. But in a *Formedon in Descender*, wherein the Demandant set forth, that the Lands were in Lease to W. R. for his Life, and the Reversion was granted to the Father of the Demandant in Tail, there the Explees must be alledged in the Tenant for Life, and in the Donee in Tail, and not in the Donor, because a *Fee-Tail* was demanded; but 'tis not so in a *Formedon in Reverter*, because there a *Fee-simple* is demanded.

(D)

Pleadings therein good, and not good.

Cro. Car. 1. 517. **F**ormedon in Descender for twenty-three Acres in *H.* the Tenant vouched to Warranty *T. S. &c.* the Plaintiff counterpleaded the Voucher, that the Vouchee, nor any of his Ancestors *aliquid in tenementis prædicti*, (leaving out the Word *habuerunt*) the Vouchee joined Issue *quod habuerunt*, and at the *Nisi prius* the Plaintiff appeared, and the Defendant *licet solemniter exact non venit, sed defaultum fecit, Ideo prædicti* 23 Acres terræ capiantur in manus, & summon, &c. returnable 1 Michaelis & vic' non misit breve, and Summons in Nature of a *Petit Cape* returned;

and the Tenant did not appear, and the Sheriff returned *quod cepit in manus Domini Regis*, whereupon the Plaintiff had Judgment, which was affirmed in Error, tho' by leaving out the Word *habuerunt* there was no Issue joined, because the Tenants making Default, all the Pleading to the Counter-Plea of the Voucher was out of the Case. *W. Jones* 412. *Brookburt* versus *Tomlin*.

2. *Formedon* of the Manor of *Etwall cum pertin'*, &c. & de 35 Messuagiis, &c. the Tenant defendit *jus suum quando*, &c. and the said six Messuages, Parcel of the said Tenements in *Etwall superius petit'* are, and Time out of Mind have been, Parcel of the Manor of *Etwall* aforesaid; whereupon for that they are *Bis petit'* the Tenant *petit judicium de Brevis*; and upon Demurrer to this Plea, it was adjudged ill, because the six Messuages may be Parcel of the Manor, over and above the thirty-five Messuages, for the Manor might comprehend fifty Messuages; it should have been, that the six Messuages, Parcel of the thirty-five Messuages, are Parcel of the Manor, and then they might appear to be *Bis petita*. 3 Lev. 67. *Chetham* versus *Sleigh*.

3. *Formedon* in Reverter; the Tenant pleads *Non Tenure*; the Demandant replies, and maintains his Writ, that he is Tenant; and upon Demurrer to the Replication, it was insisted for the Tenant, that the Demandant cannot maintain this Writ, for no Damages are to be recovered, because upon such a Plea of *Non Tenure* he may enter; which is very true, if the Plea had been *Non tenure with a Disclaimer*, but not where *Non tenure* is pleaded, and no more; for in the last Case, nothing is disowned, but the Freehold, and 'tis probable he may have a Reversion in Fee; and if so, then upon the Plea of *Non Tenure* the Demandant cannot lawfully enter; but upon such a Plea with a Disclaimer he may, because the Tenant hath disclaimed the Whole. 3 Lev. 333. *Hunlock* versus *Petre*. See (C) pl. 5. S. C. See *Brownl.* 151. *Pitt* versus *Staples*, S. P.

4. *Formedon* in Remainder, (viz.) there were three Sisters, the eldest had an Estate-Tail of a fourth Part of 140 Acres in three Villis, the Remainder to the other Two in Fee; the Tenant in Tail married the now Defendant, and then they both joined in a Fine *sur Cognissance de droit*, &c. and declared the Uses to the Husband and Wife, and the Heirs of the Body of the Wife, Remainder in Fee to the Right Heirs of the Husband, with Warranty against them, and the Heirs of the Wife; she died afterwards without Issue, and the other two Sisters bring a *Formedon* in Remainder against the Husband, who pleaded as to 100 Acres, Part of the Lands in Demand, *Non Tenure*, and that such a Person was Tenant; and as to the Rest, he pleaded this Fine with Warranty; as to that Part of the Tenure the Demandant demurred, and as to the rest he made a frivolous Replication, to which the Tenant demurred, and it was objected against the Plea of *Non Tenure*, that the Demandant should have set forth in which of the Villis the 100 Acres were; besides, he who pleads *Non Tenure* in Abatement, ought to set forth who was Tenant *die impetrationis Brevis Originalis*; but adjudged, that the Tenant is not obliged to set forth where those Acres lie, to which he pleads *Non tenure*; neither is he obliged to set forth who was Tenant *die Impetrationis Brevis Originalis*; for 'tis sufficient to tell the Demandant who was Tenant generally, and that he himself was not Tenant *die Impetrationis*, &c. but that *W. R. eodem die* was Tenant, which is certain enough. 1 Mod. 181. *Fowle* versus *Doble*.

2 Mod. 94. 5. *Formedon* in Descender; the Tenant pleaded in Abatement, and excepted against the Count, for that it was the Right descended to him after the Death of *Leonard*, as Brother and Heir to *Leonard*, who was Son and Heir of the Donee, and did not alledge, that *Leonard* died without Issue; 'tis true, this might have been an Objection in a *Formedon* in Remainder or Reverter, but 'tis not in a *Formedon* in Descender; for in the last Case the Demandant is only to set forth the Pedigree, and therefore they do not mention, that the Person under whom they claim, died without Issue; besides in this Case the Demandant could not be Heir to *Leonard*, if he had left Issue. 1 Mod. 219. *Burrow* versus *Hagget*.

* 8 Rep. 86. Buckmerc's Case. 2 Brownl. 274. 1 Leon. 213. S. C. 6. *Formedon* in Remainder, setting forth, that the Issue in Tail is dead without Issue, but did not say, that * the Tenant in Tail is dead without Issue, for which Reason it was adjudged ill, because without that the Demandant cannot have any Remainder. 5 Mod. 17 *Herbert* versus *Morgan*.

Foreign Money and Land. See Bonds. (K) per totum.

Forrest.

Of a Forrest, and Grants thereof. (A) | Of the Officers of Forrests. (C)
Of Chases, Parks, and Warrens. (B)

(A)

Of a Forrest, and Grants thereof, &c.

A Forrest is a Place set a-part and privileged for Wild Beasts, and Fowls of the Forrest, there to rest, and be protected for the Pleasure of the King; and it consists of four Things, s. Vert, Venison, particular Laws and Privileges, and certain Officers.

1. **K**ING Henry the Eighth made a Lease of the Forrests of *Wayland* and *Suple*, in which the Lessee covenanted to keep 100 Deer there, during the Term demised, and to leave the like Number there at the End of the Term, and afterwards the King granted the Reversion to the *Lord North*; adjudged, that by the Grant of the Forrest, the Deer in it passed, and that the Grantee could not kill the Deer, because in such Case the Lessee would be disabled to perform his Covenant. *Dyer* 149.

2. Where the King granted the *Herbage Forrestæ suæ*, &c. and the Cattle of a Stranger were put in, the Grantee may either restrain them *Damage-feasant*, or he may have an Action of *Trespass Quare clausum fregit*, &c. but he cannot take the Fruit of the Trees, or cut them down. *Trin.* 11. *Dyer* 287.

3. By the Statutes 22 *Ed.* 4. *cap.* 7. and 35 *H.* 8. *cap.* 17. any Person having Woods in a Forrest, immediately after the same are cut, must enclose the Ground with sufficient Hedges to keep out all Manner of Cattle, in order to preserve the Springs; the Case upon these Statutes was, (*viz.*) the Owner of a Forrest, in which *G. D.* had Common appendant, &c. granted all the Woods and Underwoods to *F. H.* except the Soil on which the same did grow, with Liberty to enclose the Woods for the Preservation of the Spring, and to exclude *Beasts of the Forrest*, and other Cattle; the Question was, whether the Commoner, by this Means, and by Virtue of these Statutes was barred to have Common in these Woods; adjudged, that the Statute 22 *Ed.* 4. did not extend to the Woods of a Subject, as these were; for by the Common Law, he who hath a Wood in which another hath Right of Common, cannot enclose and exclude the Commoner; adjudged likewise, that the Words *Beasts of the Forrest* doth not extend to *Sheep*, but to *Buck*, *Doe*, *Roe*, *Hare*, &c. 8 *Rep.* 137. *Sir Fra. Barrington's Case*.

4. Adjudged, that the Appellation of Lands, by the Name of a *Forrest*, doth not make it so; tho' 'tis in Grants of Offices, and other Conveyances so called; but where a Forrest is, it must appear to be so on Record, as by the Eyres of the Justices, Swanimote-Courts, by the Officers proper to Forrests, as *Regarders*, *Verderors*, *Agistors*; and if there are neither such Court or Officers, the Place is only a *free Chase* and no Forrest; and he who hath any Freehold in such Place, may fell Timber and Wood upon it, leaving sufficient Covert for the King's Game, and may prescribe to cut it upon his own Inheritance, notwithstanding the Statute 41 *Ed.* 1. *Pasch.* 5 *Jac.* 2 *Cro.* 22, 155, in the Case of *Leicester Forrest*.

5. *Quo Warranto* by the King for the Forrest of *Cleve*; the Defendant pleaded a Grant of the Forrest from *H. 2.* under which, by several mesne Conveyances, he claimed, &c. adjudged, that no Subject can have a Forrest, because a *Justice-Seat* is incident to it, which is *inter jura Regalia*, and therefore when *Prince Henry* had a Forrest granted to him, there was a Power in the Grant given by the King to his Son, to make a Chief Justice in Eyre, and an Authority to keep Courts; and in the principal Case it was adjudged, that this Grant was void, and ought not to be pleaded, because being made by *H. 2.* it doth not appear, that it had been allowed in Eyre at any Time since; besides, where the King grants a Forrest to a Subject, 'tis no longer a Forrest but a *free Chase*, and the Grantee shall have no Swanimote-Court, without a Special Authority from the King. 2 *Bulst.* 295. *The King versus Bridges*. Pophe 150.
Palm. 60, 87.
1 Roll. Rep. 112.
194.
2 Roll. Rep. 189.

6. A Man was amerced and committed for putting his Sheep in a Forrest to feed there; and upon an *Habeas Corpus* it was adjudged, that by the Forrest Law a Man cannot have Common for *Sheep*, because they bite so close that they destroy the Vert; but it was a Question, whether he might be committed for refusing to pay an Amerciament set upon him in a *Justice-S. at.* 3 *Bulst.* 213. *Webb's Case*. 1 *Roll. Rep.* 411. *S. C.* Postea 24.

7. In *Webb's Case* before-mentioned, it was held, that by the Forrest Law a Man cannot have Common of Pasture in a Forrest for *Sheep*, because they bite so close that they destroy the Vert; but in the same Case, as 'tis reported in *Bulstrode*, my Lord Coke was of Opinion, that he might

have Common of Pasture *by Prescription* for Sheep in a Forrest; and that it was resolved by all the Judges, that he might have such Common by Prescription for Sheep in the King's free Chales; for tho' by the *Forrest Law*, Sheep are not commonable there, for the Reason before-mentioned; yet since most of the Statutes concerning Forrests are only declarative *Antiqui juris*, therefore a Man may *prescribe* against them as well as against the Common Law it self, upon a just and reasonable Cause; and such a Prescription may have a lawful Beginning by the King's Grant. 3 *Bulst.* 213. 3 *Lev.* 98. *S. P.*

8. Adjudged, that where a Man hath Common in a Forrest, and 'tis disforrested, that he shall still have Common, and that a common Person may have a Forrest by special Words in the Grant, as to make Verderors, and other Officers, and a Justice-Seat. *Poph.* 93. *Jennings versus Rock.*

Cro. Car.
67. S. C.

9. A Subject may have a Forrest, but not a *Justice-Seat*, and he may have a *Swanimote-Court*, and other Courts belonging to the Forrest, but he must have a Commission to keep them; but such a Forrest shall not be discharged of Tithes, as it shall when 'tis in the Hands of the King, for to be discharged of Tithes is only a personal Privilege, which extendeth to the Person of the King. *Hetley* 60. *Commins's Case.*

10. In a Special Verdict in Ejectment, the Question was, Whether a Prescription for Common of Pasture for all Cattle and Swine in a Forrest, at all Times in the Year, was good, but the Jury did not expressly find that it was a Forrest; adjudged, that the Prescription was ill. *Hardres* 87. *Woolridge versus Dovey.*

11. The Inhabitants of *Rodley* claimed Common by Prescription in the *Forrest of Sherwood*, in certain Lands there lately enclosed by the Grantees of the King; and the Lands of the said Inhabitants being now *disforrested*; the Question upon a Bill in the Exchequer was, whether by such *Disforresting*, the Common in the Forrest was gone; and this depended upon the Construction of the Statutes *Charta de Forresta & ordinatio Forresta*, and 34 *Ed.* 1. and by two of the Barons it was held, that it was gone by the express Words of the two last Statutes: But *Hale* Ch. Baron doubted, he held, that there were three Manner of Forrests, (*viz.*) Antient Forrests Time out of Mind, before *Charta Forresta*, which, in respect to *Magna Charta*, was called *Charta parva*; then there were *new Forrests* made in the Reigns of King *Henry II.* *Richard I.* and King *John*, and there is a third Sort of Forrests which may be termed partly antient and partly new, because the antient Bounds of the old Forrests have been enlarged by Taking in Lands which did not antiently belong to these Forrests; therefore when *Anno* 9 *H.* 3. those Lands were disforrested by *Charta de Forresta*, there was a Saving of the Right of Common in the Forrest to those who had been accustomed to have it; the Meaning of which is, that the Lands of several People had been wrongfully afforrested in the Reigns of those Kings, and added to their new Forrests, in Prejudice of the Owners, who might have a Right of Common in the Forrests before their Lands were taken in to them; therefore it was but reasonable, when their Lands were disforrested by that Act, that they should enjoy the same Right of Common in the Forrests as they were accustomed to have before they were disforrested; afterwards, by a *Perambulation* made *Anno* 12 *H.* 3. and by another *Anno* 10 *Ed.* 1. many Forrests were enlarged with Lands, to the Prejudice of the Owners; and by a *Perambulation* made *Anno* 28 *Ed.* 1. other Lands were found to be exempted out of Forrests which did antiently belong to them, and this was to the Prejudice of the King; and upon these Grievances on both Sides, *Anno* 33 & 34 *Ed.* 1. *Ordinatio de Forresta* was made, by which it was declared, by Assent of both Parties, that the Disforrestations made by those *Perambulations*, whether they were Right or Wrong, should stand, and that the Lands should be quite discharged of the Forrests; but then the Owners were not to have Common in the Forrests, unless they had such Common before their Lands were wrongfully afforrested; but if they were duly afforrested at first, and afterwards wrongfully disforrested by some *Perambulation*, then if the Owners will have them continue disforrested by Virtue of that *Ordinance of the Forrest*, the Common is lost: Besides, this Act *Ordinatio de Forresta* makes but a temporary Suspension of the Common Law, (*viz.*) so long as the Lands should continue disforrested; and now by the Statute 17 *Car.* 1. *cap.* 16. the Lands cannot be afforrested again; therefore if the Inhabitants of *Rodley* had Common by Prescription, it would be hard to take it away where 'tis due by Right. *Hardr.* 437. *The King versus Inhabitants of Rodley.*

Antea 6.

12. One *Webb* was fined by the Chief Justice in Eyre, for a Trespass done with his Sheep in a Forrest, and was committed for a Contempt, he refusing to pay the Fine; and this appearing upon the Return of an *Habeas Corpus*, it was objected, that it did not appear, that the Trespass was done within the Forrest, for it was within the *Doles* of the Forrest: *Sed per Curiam*, that shall be intended within the Bounds, &c. then it was objected, that 'tis not set forth before the Justice-Seat was held: *Sed per Curiam*, let it be kept before whom it will, since the Trespass was done within the Forrest, that is sufficient; the chief Question was, whether he might be lawfully committed for not paying the Fine, for if he could, he is not bailable. 1 *Roll. Rep.* 411. *Webb's Case.*

13. Case, &c. in which a Special Verdict was found, the Substance whereof was, that the Waste of *Almore* is in the *Forrest of Sherwood*, and that the Messuage-Lands, &c. mentioned in the Bar, are within the *Purlicus* of the said Forrest, that the *Archbishop of York*, and his Tenants, Time out of Mind, had Right of Common in the said Waste, for all commonable Cattle, &c. but they doubted whether he could prescribe to have such Common in a Forrest, as belonging to Lands in the *Purlicus*, and so made a general Conclusion; upon the arguing this Special Verdict, first

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there was an Exception to the Pleadings, that the Defendant in his Plea had set forth a *Prescription* in the Archbishop and his Tenants to have Common of Pasture in the Waste for all *Commonable Cattle*, levant and couchant on the Lands, which were within the *Purlicus* of a Forrest, and did not except *Sheep*, or the *Fence-Month*; now, by the Word *Commonable*, the Prescription is restrained to such Cattle which are *Commonable* in a Forrest, and by the Forrest-Law Sheep are not; therefore it was objected, that this Prescription was not good, without *excepting the Sheep*; but as for the *Fence-Month*, it has been held, that a Man may prescribe for *Common generally* in a Forrest, without excepting the *Fence-Month*. *Lutw. Abr.* 39. *Grammer versus Watson*. 3 *Lev.* 98. *Trigg versus Turner*, as to the *Fence-Month*. *Jones* 285. *Englefield's Case*. *S. P.* 3 *Lev.* 127. *Braybrook versus Carter*. *S. P.*

(B)

Of Chases, Parks and Warrens.

1. **W**HERE the King is seised of a Park, and grants the Herbage and Pannage thereof, and the Grantee surcharge it, so as the Deer have not sufficient Vert there, in such Case the Grant is void. *Dyer* 80. *Lord Willoughby versus Foster*.

2. The *Earl of Lancaster*, who was Lord of a Forrest, granted to one *Harrington* to make a Park within the Forrest of the Grantee, enclosing it so slightly that the Deer of the Forrest might get in; it was adjudged a Forfeiture of the Grant, and that the Lord might enter and take the Deer. *Bridgman* 27. *The King versus Sir John Byron*.

3. The Owner of the Soil in a Chase may have Common for his Sheep, and Warren for his Conies, either by Grant or Prescription, but cannot surcharge them, nor erect a new Warren without a Grant. 2 *Cro.* 22.

(C)

Of the Officers of a Forrest.

1. **A** Forrester, or other Officer, cutting down Wood not necessary for *Browse*, forfeits his Office, because 'tis contrary to his Trust, for the Destruction of the Vert is the Destruction of the Venison. See 9 *Rep.* 50. *Earl of Shrewsbury's Case*.

2. The Forrester cut down four Oaks, which were Timber; adjudged, that this was a Forfeiture of his Office at Common Law, as well in the Case of a Forrester as of a *Park-Keeper*; for the Forrester hath not only the Charge of the Game, but of every Thing within the Forrest which feeds the Deer; and by the Statute *de Charta Forestæ*, no Person shall cut Wood in the Forrest *nisi per visum Forresterii*, and therefore every voluntary Act done by an Officer contrary to the Duty and Trust of his Office, is a Forfeiture of it. *Poph.* 116. *Earl of Pembroke versus Sir H. Berkley*. *Goldf.* 130. *S. C.* *Postea Proviso.* (A) 7. *S. C.*

3. *Certiorari* to the Justices in *Eyre* to remove a Record into *B. R.* concerning the Forrest of *Pickering*, for cutting Wood in a Place where the Duke of *Newcastle* (who was Chief Justice in *Eyre*) claimed the Soil; it was objected against the Granting this Writ, that *B. R.* had no Jurisdiction, for they proceed there according to the Forrest-Laws, for Offences done in the Forrest; but ruled, tho' *Certioraries* may be granted, &c. yet it shall not in this Case, because it was an Offence which was presented, and punishable by the Regarders there; for by their Law, whoever is Owner cannot cut down his own Wood without Leave of the King, so they would not grant a *Certiorari* upon a bare Presentment, and before Conviction; but yet that should not conclude the Party's Right, but that he might have his Action at Common Law for the Trespass, or to recover his Right. *Sid.* 296. *Duke of Norfolk versus Duke of Newcastle*.

Founder and Foundation.

(A)

Of Colleges, Hospitals, &c. by the King, or by a common Person, &c.

2 And.
165.

1. **A** NNO 30 H. 8. The King translated the Priory and Convent of the Cathedral Church of *Norwich*, into the *Dean and Chapter*, and discharged them by their special Names, *Tam de habitu, quam de Regula*, and incorporated the said Dean and Chapter for ever; afterwards they Anno 2 Ed. 6. surrendered to that King their Church and Possessions, and he incorporated them by the Name of the Dean and Chapter *Sanctæ & individue Trinitatis Norwic' ex fundatione Regis* Ed. 6. and regranting the Church and Possessions to them by the Name of the *Dean and Chapter, &c.* omitting the last Words *Ex fundatione Regis* Ed. 6. Two Objections were made in this Case, one to the Translation, (*viz.*) that it was not good, because the Bishop, who was formerly the Founder, was not a Party to it, and without the Founder there could be no Translation: Secondly, As to the Regrant of the Church, it was wrong, because they were incorporated by the Name of the Dean and Chapter of the Holy and undivided Trinity of *Norwich, ex fundatione, &c.* and the Church and Possessions were regranting to them by the Name of the Dean and Chapter, &c. omitting *Ex fundatione, &c.* As to the first Objection, it was held, that the King was Founder; but suppose he was not, yet the Translation is good, for the Pope might discharge a Monk from his Profession, and therefore the King may do it by the Statute 25 H. 8. and this Translation is not prejudicial to the Founder, for he remains Founder still, and nothing is altered but the Habit and Rules; all Chapters were formerly Monks, and tho' they are now translated into Prebends or Canons, the Advowsons remain as before.

Then, as to the Objection, that the Regrant was void, because the Name of the Corporation was omitted, and if so, nothing was regranting, because the Name of the Founder is Parcel of the Corporation; but adjudged, that tho' they did surrender their Church to Ed. 6. their Corporation continued, and they still remained a Dean and Chapter of the Bishop, and this is meerly of Necessity, because of the Sects and Heresies in the Church, in which Cases the Dean and Chapter are of Council to assist the Bishop; they are necessary likewise, that the Bishop may consult with them in deciding difficult Points in Religion, for which Purpose every Bishop hath his *Cathedram*; they are necessary likewise to consent to every Grant made by the Bishop, in order to bind his Successors, for the Law doth not adjudge it reasonable to put so great a Confidence in him alone in temporal Affairs; besides, there was a Chapter before they had any Possessions; and since the Dean and Chapter are now the Council of the Bishop, they remain a Dean and Chapter as long as the Bishoprick continues, tho' they have no Possessions; and lastly, if by their Surrender, the Corporation should be dissolved, these Inconveniencies would follow, (*viz.*) the Bishop would be deprived of Assistance in his Episcopal Function, his Grants would not be confirmed, and which is worse, there would be no Bishops, because there would be no Body to chuse them; but after all, the Regrant made to them is good by the Statute 1 Ed. 6. *Of Confirmations.* 3 Rep. 74. *Dean and Chapter of Norwich's Case.*

2. *Pope Urban*, at the Request of the *Baron of Greystock*, founded a College for a certain Number of Priests, and assigned a Stipend to each of them; adjudged, this was only a College in Reputation, and was not given to the King by the Statute of Ed. 6. of *Chauntries*, because it was not a lawful Foundation, for the King only can be the Founder of a College; and yet we find, that a College in Reputation hath been given to the King by that Statute 5 Ed. 6. *Dyer* 81. 10 *Eliz.* *Dyer* 267.

3. The King may found and erect an *Hospital*, and give a Name to the House, tho' 'tis upon the Inheritance of another, or he license another to do it on his own Lands, which License being under Seal, cannot be countermanded; and the Words *Fundo, Creo, &c.* are not necessary in every Foundation, either of a College or Hospital made by the King; but 'tis sufficient if there be Words Equivalent; and when a Corporation is made by the King's Grant, and Power is given to them to chuse a Governor, they are a Corporation *in abstracto* presently, tho' not *in concreto* till a Governor is chosen; that as to the Foundation of a Corporation, College, or Hospital, the Words *Potestate, Potentia, sive nomine*, are sufficient, that *Quatenus ad capacitatem sive habilitatem*, the Incorporation of a College or Hospital is the *very Foundation*, but *Quatenus ad donationem*, he who endows it with Lands is the Founder, and that to the Erection of an Hospital nothing more is requisite, but the Incorporation and Foundation. 10 Rep. in the Case of *Sutton's Hospital.*

4. In a Writ of Intrusion into the *Parsonage of E.* the Plaintiff set forth, that the Collage of *St. Peter, &c.* was founded at *Westminster* in the Reign of Ed. 4. by the Name of *Dean and Chapter, &c.* and that the *Parsonage of E.* was appropriated to the said College, which was dissolved

ved by the Statute 1 *Ed* 6. and that the *Parsonage* came to the King, and that the Defendants intruded into the same, &c. they pleaded, that the College was founded by the Name of the *Dean, Canons and Fraternity*, who leased the *Parsonage* to *B. G.* under which Lease, by several mesne Conveyances, the Defendants claimed, and so justified *absque, hoc* that the College was founded by the Name of the Dean and Chapter of *St. Peter*, &c. *absque, hoc* that they took the Cattle at *Westminster*; it was objected against the Plaintiff, because a College was mentioned in the Information, and 'tis not shewed, who was the *Founder*; and an *Appropriation* was set forth, and 'tis not mentioned, who was the *Patron*; but adjudged, that it was sufficient only to alledge, that the *Parsonage* was appropriated to the College, and to shew how the College came to the Queen by the Statute; and 'tis not material to shew, who was the *Founder*; for whether it was the King or a Subject, (and one of them it must be) in both Cases the Possessions are given to the King; and as to the *Appropriation*, 'tis sufficient if 'tis set forth, that the Plaintiff claimed by it. 1 *Leon.* 37. *Lord Vaux's Case.*

5. The Pope by his Bull 3 *Sept.* Anno 15. *H.* 8. gave License to Cardinal *Wolsey*, to suppress several Monasteries therein named, whereof the Priory of *Canwall* in *Com. Stafford*, was one, so as the Cardinal had the King's Consent; afterwards the said Priory was suppressed by the Cardinal, with the Leave of the King, and the Monks were translated into other Monasteries, all which was found by Inquisition, &c. and that afterwards the Prior and Convent *spontanea voluntate*, surrendered the said Priory, and all their Lands, to the Cardinal; and that from the Suppression to the Inquisition, &c. there was neither Prior or Monck remaining, so that the Priory was wholly dissolved; and that the Prior and Convent were seised of several Lands, &c. but they could not find who was the *Founder*. King *H.* 8. Anno 17 of his Reign, gave all the Lands which he had by the Dissolution of Monasteries, to the Cardinal and his Heirs, who Anno 22 *H.* 8. was attainted in a *Præmunire*, and this Priory of *Canwall* seised into the King's Hands. Anno 27 *H.* 8. all the Monasteries which had not above 200 *l.* Lands of yearly Value, were by Act of Parliament given to the King; but the King had a Prior and better Title than by that Act; for upon the Relinquishment of the Priory, the *Founder* had a good Title to enter; and since the Inquisition could not find who was the *Founder*, it shall be intended that it was the King. *Moor* 282.

Franchises and Liberties.

See *Quo Warranto.*

(A)

1. **A** Writ *De nativo habendo* brought in *Bucks*, and removed by *Pone*, the Sheriff returned *Non est inventus*; then the Party prayed a *Latitat* to the Sheriff of *London*, who returned, that *London* was the most antient City of the Realm, &c. and that they had a Custom Time out of Mind, that if any Man dwelt in the said City for a Year and a Day, he could not be removed from thence by the Writ *De nativo habendo*, nor by any other Process thereon; and that the Party mentioned in the Writ had lived there four Years, and therefore he could not execute the Writ, *salvis libertatibus Civitatis præd'*; adjudged, that this was a good Return. 7 *H.* 6. 32.

2. Grants of Franchises made before the Time of Memory, in obscure and doubtful Words, ought to be allowed within Time of Memory in the King's Bench, or before the Barons of the Exchequer, or by some Confirmation on Record, and such Franchises shall not be allowed, if the Grant is produced, but only for such Part thereof which hath been so allowed or confirmed; but such antient Grants, even after such Allowance, shall be construed as the Law was when they were made, and not as it hath been since altered. Usage, which is Matter of Fact, will not support a Record, tho' such Usage was before Time of Memory; but Franchises granted within Time of Memory, are pleadable, without any Allowance or Confirmation; a Man may prescribe in Franchises granted before Time of Memory, if they are allowed or confirmed within Time of Memory; for such Antient Grants may be lost, and so may the Enrollments of them; and therefore upon an Allowance of them, 'tis but reasonable, that a Man may prescribe to the Franchises. 9 *Rep. Abbot of Strata Marcella's Case.*

3. Where any particular Person, City or Township, have Liberties or Franchises, if he or they abuse them, they may be seised as forfeited; therefore where a Prohibition was awarded out of one of the Courts at *Westminster* to the Bishop of *Norwick*, he excommunicated the Person who served him with the Writ; and thereupon he brought his Action against the Bishop; and it being found against him, it was adjudged, that his Temporalties should be seised until he absolved the Plaintiff, and satisfied the King for the Contempt of his Writ; so where the Bishop of *Dur-*
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ham committed one, who brought the King's Writ thither, he pretending to have such Privileges in that County. that the King's Writ ought not to come thither; and this being proved upon an Information exhibited against him, it was adjudged, that he should pay a Fine to the King, and that his Liberties should be seised, because *justum est quod punietur in eo quo peccat*; so where the Mayor and Jurats of Hythe, being one of the Cinque Ports, pretending, that their Liberties were infringed by bringing a *Certiorari* thither, and serving it on the Mayor, to remove an Indictment; they said in Contempt to the Writ, *That it was no Time for Green Plumbs*; (it being sealed with Green Wax) they were in Danger of loosing their Franchises for this Contempt. *Cro. Car. 183. Tindall's Case.*

4. No Man can claim to hold a Court of Equity by Prescription, because every Prescription is against Common Right, and a Court of Equity is founded upon Common Right. *Godb. 262. Mayor of York's Case.*

5. The King cannot grant to another any Power or Authority to make Strangers born to be Denizens here, because such Power is by Law inseparably annexed to his Person; for 'tis *inter insignia summæ potestatis*, to make an Alien born beyond Sea, a Subject of this Realm, and capable of Lands and Inheritances here; 'tis true, there have been several Antient Prerogatives divided from the Crown; as Power to pardon Murder, Manslaughter, Felony, to make Justices of Assize, and of the Peace; and therefore by the Statute 27 H. 8. cap. 24. these Prerogatives were resumed, and reunited to the Crown. 7 Rep. 25. in *Calvin's Case.*

Moor 417. S. C. 6. *Quo Warranto*, the Defendant claimed to be discharged from Purveyance; he pleaded, that *Ed. 4.* granted to the *Dean and Chapter of St. Paul's*, divers Liberties within the Manor of *R.* and amongst the Rest, to be discharged of Purveyance, *non obstante aliquo Statuto, &c.* which Manor was afterwards surrendered to the King; and that *Ed. 6.* granted the Manor, with all the Liberties, &c. which the *Dean and Chapter* had, &c. *non obstante aliquo Statuto & eo Warranto*; the Defendant claimed, &c. adjudged, that the Grant being general of *all Liberties, &c.* it shall be intended such Liberties which the *Dean and Chapter* then had, and which were not resumed by any Statute; but this Liberty was resumed by the Statute 27 H. 8. and shall not be revived by these general Words, but by a Special Grant of them, with an express *Non obstante* of that particular Statute. *Cro. Eliz. 513. Lord Darcy's Case.*

Frank-marriage.

(A)

1. **A** Gift in Frank-marriage was a Fee-simple before the Statute of *W. 2.* but since 'tis usually a Fee-Tail; such Gifts were Common when *Littleton* wrote; but my Lord *Coke*, who comments upon him, tells us, that in his Time they were *almost* grown out of Use, and chiefly served for Moot-Cases, and Questions in Law, which heretofore did arise thereon; but since his Time they are *quite* out of Use, and therefore I shall mention but one.

2. *John Harris* gave Lands in Frank-marriage to one *White*, by these Words, (*viz.*) *Dedi & concessi, &c. Johanni White in liberum maritagium Johanna filia mea*, in the genitive Case, *habendum dicto Johanni White & heredibus suis in perpetuum tenendum de capitalibus Domini feodi*, with Warranty to the Husband and his Heirs; adjudged, that this was a Gift in Frank-marriage, because the Words were *in liberum maritagium Johanna filia mea*; it should have been *cum Johanna filia mea*, in the ablative Case; and that it was not a Gift in Tail, but a Fee-simple. *Owen 26. Webb versus Potter. See Divorce. (C) 3. S. C.*

Fraud.

(A)

What shall be a Fraud within the Statutes 13 Eliz. cap. 5. and 27 Eliz. cap. 4. See *Evidence*. (B) 1.

1. **T**HE Defendant holding Lands of several Lords by *Heriot* Custom, made a fraudulent Gift of all his heriotable Cattle, being *twenty Horses*, to defraud one of the Lords; it was adjudged, that the Action would lie by the Intendment of this Statute for the Value of *all the Horses*; *contra per Manwood*, but for one Horse, he being damaged in no more, as being entitled but to one Heriot. *Dyer* 351.

2. In Ejectment, the Case was thus, (*viz.*) the Grandfather, in Consideration of the Marriage of his Son, made his Wife a Jointure, and covenanted to demise to him, the Tenements (for which the Ejectment was now brought) and accordingly did demise the Moiety thereof to him, to commence after his Death for 1000 Years, and the other Moiety for the like Term, to commence at a Day to come; in both which Leases there was a Proviso, that if the Son should die without Issue, or if *he should make any Lease*, upon which the antient Rent should not be reserved, then the Leases made to him should be void; the Son afterwards *assigned the Leases to the Use of R. R.* his Son, who was then an Infant, and this was for no other Purpose, but that the *Terms for Years* might not merge in the Inheritance, which might descend to the Infant, and that his Debts might be paid; the Grandfather died, and then his Son sold the Lands; adjudged, that the Vendees, who purchased it for a Valuable Consideration, shall avoid this Lease upon the Statute 27 *Eliz.* for tho' the Son had not the Inheritance in him at the Time he made the Assignment of these Leases, that being then in the Father; yet when he died, the Purchasers shall avoid the said Assignment. 6 *Rep.* 72. *Burnell's Case*.

3. Information against the Defendant, upon the Statute 13 *Eliz.* wherein the Plaintiff set forth, that he having a Plaint of Debt against *G. D. &c.* and an Attachment issuing out against him, which the Sheriff was ready to execute, he the said Defendant, in Disturbance of the Execution of that Process, did shew the Sheriff a Conveyance, by which he claimed the Goods as conveyed and sold to him by the said *G. D.* and averred the said Conveyance was fraudulent; adjudged, that 'tis an Offence within the Statute, the Words whereof are (*viz.*) *Delay, hinder, or defraud Creditors*; and here is an apparent *Delay*, by hindering the Sheriff to serve the Attachment. 1 *Leon.* 47. *Pendleton versus Gunston*.

4. The Lessor made a Lease for Years, which was fraudulent, and afterwards he made another Lease *bona fide*, reserving Rent; adjudged, that this Lessee shall not avoid the first Lease, because an Estate made by Fraud, shall be avoided only by him who had an *antecedent Right*; besides no Purchaser shall avoid a former Lease made by Fraud; but he was a Purchaser for Money, or other valuable Consideration paid or given, so that the Consideration of Natural Affection or Blood, will not do in such Case. 37 *Eliz.* *Upton versus Bassett*.

5. The Case was, that one *Babington* being seised in Fee, covenanted to make an Estate to the Use of himself and his Wife, and the Heirs of his Body, with several Remainders over, before the Feast of *Easter* next ensuing; and before that Day, he made a Lease to others for several Years, and afterwards he made an Assurance according to the said Covenant; the Question was, whether the Lease was fraudulent within the Statute 27 *Eliz.* and adjudged, that it was not, because that Statute was made for the Benefit of Purchasers, who had paid their Money, &c. 1 *And.* 233. *Beaumont versus Needham*.

6. A Debtor being sued by one Creditor made a Deed of Gift of all his Goods to another Creditor, and yet continued in the Possession of his Goods; the Creditor, who sued him, got Judgment, and a *Fi. fa.* to levy the Debt *de bonis & catallis* of the Debtor; adjudged, that the Gift was fraudulent, and within the Statute 13 *Eliz.* because the Debtor continued in Possession after the Deed of Gift; and because it was made pending the Action, and sealed privately; and therefore tho' the Consideration might be good, yet the Deed was not made *bona fide*. 3 *Rep.* *Twyne's Case*. *Moor* 638. S. C. by the Name of *Chamberlaine versus Twyne*.

7. A Man made a Voluntary Conveyance, with a Power of Revocation at or before *Michaelmas* next, &c. and before that Day came he sold the Lands for a Valuable Consideration; adjudged, that such a Conveyance, with a Power of Revocation, is within the Statute 27 *Eliz.* and shall be revoked by the Sale, and not be good against a Purchaser for a valuable Consideration. *Mich.* 43. *Eliz.* *Standen versus Bullock*.

8. The Intestate in Consideration of 20 *l.* paid to him by *G. D.* made a Deed of Gift to him of all his Goods annexed in a Schedule, and it was covenanted between them, that he and his Administrators should keep the Possession of them, but should deliver them to *G. D.* upon Demand; after his Death *G. D.* demanded the Goods of the Administrator, who refusing to

deliver them, he brought an Action of Debt against him; the Defendant pleaded the Statute 13 *Eliz.* of Fraudulent Gifts, and set forth, that on the second Day of *February*, the Intestate was indebted to several Persons, &c. and that on the 19th of *February* he made the Deed of Gift by Fraud and Covin between him and the now Plaintiff, to defraud his Creditors; and that notwithstanding the said Deed, the Intestate continued in the Use and Possession of the Goods during his Life; and that after his Death Administration, &c. was granted to the Defendant, &c. to which Plea the Plaintiff demurred, because the Defendant did not aver, that the Debts due to the Creditors were then unpaid; neither did he shew whether the Debts were due by *Specialties* or not; neither could the Defendant, who was only an *Administrator*, and no Creditor, plead the Statute, because the Statute makes the Deed of Gift void against Creditors, but not against the Party himself, or him who represents the Party. 2 *Cro.* 270. *Hawes versus Read.* 5 *Rep.* 33. *Read's Case.* S. C.

9. In an Information on the Statute, it was adjudged, that if one after *Marriage* voluntarily Assigns a Lease in *Jointure* to his Wife, without any Consideration of the Wife's Portion, or any other Recompence by her Friends, and takes the Profits himself, and afterwards sold it to one who had not any Notice of this Assignment; 'tis within the Statute, because voluntary, which shall be intended fraudulent; but if it had been in Consideration of a Portion, and for a Provision for the Wife, and he had taken the Profits, and then sold the Term, it had been otherwise. 2 *Cro.* 158. *Colville versus Parker.*

10. The Husband promised to assure his intended Wife 1000 *l.* per Annum, for her Jointure; they married, and afterwards he by Deed conveyed Lands of great Value to some Friends, in Trust for his Wife, for the Term of 100 Years, if she should so long live, to commence after his Death; which was thus endorsed, that the Intent was, that when there should be a Jointure of 1000 *l.* per Annum settled on her, that then the Lease should be void; adjudged, that this Lease being made in Pursuance of the first Promise, altho' he did not Promise to make a Lease, yet it was good, and not fraudulent, it being made on a good Consideration; and the Concealing it by the Wife did not make it ill. 2 *Cro.* 455 *Griffith versus Stanhope.*

11. On an *English Bill*, for Prifage of Wines (for which nothing is due, unless ten Tun is imported); the Case was, that Wines were imported in several Vessels and Parcels from the same Place, and at the same Time, and consigned to the same Merchant, and only nine Tuns and three Hogheads were imported in each Vessel; and this was adjudged to be a Fraud. *Hard.* 218. *Walker versus Topham.*

12. In Ejectment, there was a Trial at Bar, wherein the Son and Daughter of Sir *Anthony Bateman* were Defendants, who admitted, that Sir *Anthony* was a Bankrupt, but set up a Conveyance made by him for the Payment of 1500 *l.* a-piece to them, which Mr. *Russell* their Grandfather gave them, and to whom Sir *Anthony* was Administrator; and it was held by *Hale* Ch. Justice, that this Conveyance would be voluntary, unless they proved, that Sir *Anthony* had some Goods of *Russell's* in his Hands at the Time he executed it; which was proved, and so the Defendants had a Verdict. 8 *Mod.* 76. *Sir Anth Bateman's Case.*

13. Ruled by *Hale* Ch. Justice, that a Deed may be voluntary, and yet not fraudulent; as where a Father having a lewd Son, settles his Land so as he may not spend all; this is good, tho' there is no Consideration of Money. 1 *Mod.* 119. *Lord Tenham versus Mullins.*

14. One S. being seised in Fee suffered a Common Recovery to the Use of his now Cousin, the Wife of the now Plaintiff, and her Heirs, after his Death; and not long after he sold the same Lands to the Defendant, who was likewise his Cousin; but this was for a Valuable Consideration, the first Conveyance was kept private till the Death of him who made it; and adjudged, that it was fraudulent against the purchaser. *Sid.* 133. *Fitzjames versus Moyes.* See 5 *Rep.* 60.

15. The Father being seised in Fee, made a Lease of his Lands for twenty-one Years, in Trust for his only Daughter and Heir, to the Intent, that the Profits should be for her Maintenance, and to raise a Portion for her; and in case she married one *Poulton*, or any other Person, in the Lifetime of the Father, and with his Consent, then in Trust for the Husband, during the Residue of the Term; she did not marry *Poulton*, but the Plaintiff, which the Father disliked, but after some Time, was reconciled, and lived with them; adjudged, that this Conveyance to the Daughter before Marriage was voluntary and fraudulent, and void by the Statute, as to a Purchaser, which the Defendant was; but tho' it was void in the Creation, yet when the Marriage took Effect, it did not continue voluntary, but upon a Valuable Consideration, which a Marriage is always taken to be; and so it shall be in this Case for the Advancement of the Daughter, and this Provision was an Inducement to the Husband to marry her; so that tho' it was void in its Creation, and voidable by a Purchaser, yet it may be good against him by Matter *ex post facto*, and that the Disagreement of the Father was not material, for he may agree at any Time during his Life. *Sid.* 132. *Prodgers versus Langham.*

16. In Ejectment, the Case upon the Evidence was, that Sir *Robert Bell*, Anno 8 *Jac.* 1. settled in Marriage the Manor of *Brandon*, to the Use of himself for Life, then to his Wife for Life, for her Jointure; Remainder to their first and tenth Sons in Tail, Remainder to his own Right Heirs; and the Manor of *Beaupre* (now in Question) to the Use of himself and his Heirs; afterwards, 3 *Jan.* 11 *Jac.* he being indebted in 4000 *l.* and having no Issue, he and his Wife joined in a Fine, and sold the Jointure-Lands for Payment of his Debts; and on the same 3d of *Jan.* he

covenanted to stand seised of the Manor of *Beaupre* (now in Question) to the same Uses, as the Manor of *Brandon*; the Debts were paid, and about sixteen Years afterwards he contracted new Debts, for which he and *Sir Nath. Hobert* were bound; and he, to secure *Sir Nath.* Anno 13 Car. 1. made a Lease to him of the Manor of *Beaupre*, for 1000 Years; *Sir Nath.* paid several of the Debts, and entered by Virtue of this Lease; the Question was, whether the Settlement, 3 Jan. 11 Jac. was fraudulent, or not, *quoad* this Lease; it was objected, that there were no Articles, or any Agreement precedent to this Settlement, that it was made in Consideration the Wife joined in a Fine for the Sale of her Jointure, and therefore this new Settlement may be voluntary; besides, the Husband without the Wife might have destroyed all the contingent Remainders limited to the Sons (there being none born) nor any Trustee to preserve the Contingencies; so there could be no Consideration for this new Settlement, but only the Estate of the Wife for Life, and she is now dead; therefore all the Remainders to the Sons upon this new Settlement must be voluntarily: But adjudged, that the new Settlement was good, and not void as to this Lease for 1000 Years; for since it was made on the same Day that the old Settlement was destroyed, it shall be intended to be made in Consideration the Wife had joined in the Fine to destroy it; and this Consideration shall extend to all the Uses in the new Settlement; 'tis true, the Husband might have destroyed all the Limitations to the Sons, without the Concurrence of his Wife, but that Point was not so well known at that Time as it is now, therefore it shall not be presumed, that the Wife would part with her Right, unless the Husband would have made some other Provision for her and her Issue. 2 Lev. 70. *Scott versus Bell.*

17. In Ejectment, the Case was, the Father being seised in Fee, &c. in Consideration of a Marriage between his eldest Son and *M. S.* and of a Marriage-Portion, made a Settlement upon his said Son, and the Heirs of his Body, upon *M. S.* to be begotten, Remainder to his second Son in Tail, Remainder to his own right Heirs; the Father being at that Time in Debt, did, about three Years afterwards, sell these Lands for a valuable Consideration, and died; the eldest Son and his Wife both died without Issue; the Purchaser had Notice of this Settlement, and there was a Covenant in the Purchase-Deed to save him harmless from all Incumbrances, excepting this Remainder to the second Son, against which he took a collateral Security; and the Question was, whether this Remainder to the second Son was fraudulent, and void as to the Purchaser; it was insisted that it was, because the Consideration of the Marriage of the eldest Son, and the Portion paid, did not extend to the second Son; but adjudged, that it cannot be supposed, that the Father intended to deceive a Purchaser after an Estate tail limited to the eldest Son, which might continue for ever; besides, the Purchaser was not deceived, because he had Notice of the Settlement, and took collateral Security against this Remainder. 2 Lev. 105. *White versus Stringer.*

18. Tenant in Tail being of the Age of twenty Years, and no more, in Consideration of Marriage, and of a Portion, promised to settle his Estate upon him and his Issue, when he came of Age, and then he married, and about four Years after, being considerably in Debt, he alone, without his Wife, levied a Fine of all his Lands to the Use of Trustees and their Heirs, to sell all or any Part thereof for Payment of his Debts, Remainder to the Husband for ninety-nine Years, if he should so long live, Remainder to the Trustees and their Heirs, for the Life of the Husband, Remainder to the first and other Sons of the Husband in Tail, Remainder to the right Heirs of the Husband: Proviso, that he, with the Consent of the Trustees, might make Leases of all or any Part of the Lands, for any Number of Years, with or without any Rent; the Husband and the Trustees joined in the Sale of great Part of the Lands; and afterwards he being in Possession of the rest, sold 400 *l. per Annum* by himself alone, without the Trustees, which the Purchaser enjoyed several Years without Disturbance; afterwards he mortgaged the Manor of *Bolton*, and the Lands now in Question to *Gudgeon*, who entered and assigned to *Blackstone*; then the Mortgagor died, his Son and Heir entered and *Blackstone* brought an Ejectment, which was tried at Bar; and by the Direction of the Court this Settlement was found to be fraudulent and void against *Blackstone*, the Assignee of the Mortgagee, because the Mortgagor continuing in Possession, and selling 400 *l. per Annum* by himself, was a Badge of Fraud, especially since the Trustees had joined in the Sale of the other Part of his Estate: Secondly, the Proviso to make Leases for any Term of Years, with or without Rent, puts in his Power to defeat the whole Settlement; 'tis true, it must be by the Consent of the Trustees, but those were of his own Chusing; besides, the Wife not joining in the Fine, made the Settlement voluntary, and she is still dowable; and tho' the Husband promised to settle his Estate when he came of Age, upon himself and his Issue; yet that Settlement not being made till three Years, or more, after he came of Age, and when it was made, it not being directly according to his Promise, it shall not be presumed to be made in Pur-
suance thereof. 2 Lev. 146. *Lavender versus Blackstone.*

(B)

1. ONE seised in Fee of a *Reversion* expectant upon an Estate-tail, covenanted, in Consideration of Blood, to stand seised of the said Reversion to the Use of his Niece; and afterwards the Tenant in Tail, who was in Possession, died; adjudged in this Case, that by the Statute of *Marlbridge*, 'tis a plain Collusion for the Tenant in Tail to enfeoff his eldest Son, or his

collateral Heir apparent, but that no Collusion can be averred, where, upon an Estate for Life, or in Tail, the Remainder is limited or left in another; adjudged likewise, that if the Father makes a Feoffment to another, for the Advancement of his Daughters, or his younger Sons, or for Payment of his Debts, and afterwards enfeoffs his eldest Son, or Heir, this is no Collusion within that Statute, because he is bound in Law to make Provision for his Children; resolved also, that where there is Grandfather, Father, and two Sons, and the Grandfather (living the Father) conveyeth his Land to either of the Sons, this is out of the Statute 32 H. 8. because 'tis not a common or usual Thing so to do, and the Father ought to have the *immediate Care* of his Children; but if he is dead, then it belongeth to the Grandfather, and then if he convey any of his Lands to his Grandchildren, 'tis within that Statute; lastly, it was adjudged, that a voluntary Conveyance to the Use of any of the collateral Blood, and who is not Heir apparent, is not within that Statute, because it cannot be intended, that a Man will disinheret his Heir to defeat the King of Wardship. 6 Rep. 76. *Sir George Curson's Case*. See *Might's Case*.

2. Debt for Rent against an Assignee of a Lessee, who pleaded, that before the Action brought he assigned the Term to T. P. of which the Plaintiff had Notice; the Plaintiff replied, that the Defendant (the first Assignee) still kept the Possession, and that the Assignment by him made was by Fraud; and upon Demurrer to the Replication, it was insisted, that Fraud could not be averred in this Case, either by the Statute or Common Law; but adjudged, that Fraud might be averred. 1 Vent. 329, 331. *Knight & al' versus Freeman*. Raym. 303. S. C. *Jones* 109. S. C. in the Case of a Recovery by Default, Fraud may be generally assigned; so is *Plow. Com.* 47. In *Wimbish versus Talbois*, and 9 Rep. 110. a. In *Tresbam's Case*.

Game.

(A)

1. **O**NE Cole was brought before Richard Tracy, a Justice of Peace in Gloucestershire, upon a Warrant for Shooting with Hail-shot in an Hand-Gun, and upon Examination, he finding the Matter to be true, committed him until he should pay 10 l. one Moiety to the King, and the other to the Informer; and having made a Record of his Conviction, it was certified upon the Return of an *Habeas Corpus*, and adjudged, that if the Justice of Peace had pursued the Statute, no Court could discharge the Defendant. *W. Jones* 170. *Cole's Case*.

2. *Certiorari*, &c. to remove a Conviction before a Justice, &c. for carrying a Gun, not being qualified; and upon the Return it appeared to be taken before L. P. a Justice of Peace, without adding, *Necnon ad diversas Felonias, transgressiones, &c. audiend' assign'*, &c. adjudged, this had been a good Exception upon a *Certiorari*, to remove an Indictment taken at the Sessions; but not upon a Conviction of this Nature, because the Court can take Notice, that the Statute gives the Justices Authority in this Case. 1 Vent. 33. *Sid.* 419. S. C.

3. The Defendant was convicted before two Justices of Peace, upon the Statute 32 H. 8. cap. 6. for carrying a Gun, &c. which being removed by *Certiorari*, was quashed, because it was *coram nobis* L. D. and R. L. *Justiciariis Domini Regis ad pacem suam conservand'* leaving out the Word *Assignatis*. 1 Saund. 263. *The King versus Sanders*. 1 Vent. 39. S. C. *Sid.* 419. S. C.

Gaming.

See Statute. (D) 23.

(A)

Sid. 394. 1. **I**N Debt upon Bond, conditioned for Payment of 100 l. there was a Bill in Equity to be
1 Lev. relieved against this Bond, suggesting, that it was for Money won at Play; and upon an
2-4. Issue directed out of Chancery, a Special Verdict was found in *Wills*, that the Defen-
2 Mod. dant lost a Ring at play, of the Value of 20 l. which was delivered to the Winner, and
14. that at the same Time he lost 100 l. for which he gave this Bond; and the Question was, whe-
ther this was within the Statute 16 Car. 2. of Gaming, and adjudged it was not, but that the
Bond

Bond was good, for the Statute had no Regard to ready Money lost at Play, for if a Man loses 1000 *l.* in Ready Money, and at the same Time gives a Bond for 100 *l.* more lost at Play, the Bond is good. *Sid.* 394. *Danvers versus Thistlerwaite.* See 2 *Mod.* 279.

2. In Debt for 100 *l.* the Plaintiff declared upon Articles, purporting, that he and the Defendant should run a Horse-match for 100 *l.* and if the Defendant lost he should pay 100 *l.* &c. The Defendant pleaded the Statute of Gaming, by which 'tis enacted, that all Securities given for Money lost at Play, exceeding 100 *l.* shall be void; and then alledges, that in the Articles it was farther agreed between him and the Plaintiff, that the Defendant should run two, three, or four Heats more, for 20 *l.* each Heat, if the Plaintiff required it, so that the Whole amounted to more than 100 *l.* it was insisted for the Plaintiff, that this was not within the Statute, because the Agreement was made upon Deliberation, and precedent to the Money lost; besides, it doth not appear by the Declaration, that the Plaintiff required the Defendant to run for more than 100 *l.* but adjudged, that tho' the Security was given before the Running, it was within the Statute; and the Agreement being to run for more than 100 *l.* at a Time, was void *ab initio*, tho' the Plaintiff made no Request; for if a Debtor should contract to pay more Interest than the Statute allows, if the Creditor should require it, this is within the Statute of Usury, tho' the Creditor never requires it. 1 *Vent.* 253. *Hedgborough versus Rossenden.* 2 *Lev.* 92. *S. C.*

3. *Indebitatus Assumpsit* for 20 *l.* lost by the Defendant at a Play called Hazard; upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that the Consideration to raise this Promise cannot be good, because 'tis unlawful to play with Dice; but it was held, that to play at Dice was not unlawful in it self, tho', 'tis true, 'tis prohibited by several Statutes, but that is to certain Persons and at certain Places; then it was objected, that * *Indebitatus Assumpsit* generally was not good, for he ought to declare, that in Consideration he had promised to pay so much to the Defendant, if the Game went on his Side, the Defendant promised to pay so much to the Plaintiff, if the Game went on his Side; but adjudged that 'tis good enough to declare generally, and 'tis as well as an *Indebitatus Assumpsit pro opere & labore*; the Plaintiff had Judgment. 2 *Vent.* 175. *Sherborn versus Colebach.*

that 'tis good. See Statutes. (D) 23. that 'tis not good; * *Mod.* Cases 128. *S. P. contra.* See *Eggleston v. Lewin*,

4. In an Action of Debt for Money won at Play, the Case was, that the Defendant won 80 *l.* at one Meeting, for which the Plaintiff gave Security, and another Meeting was appointed, and at that Meeting the Defendant won 70 *l.* more, being in all above 100 *l.* and the Question was, whether this was within the * Statute made against Gaming, by which 'tis enacted, that if any Person lose above the Sum of 100 *l.* at any one Time or Meeting, upon Tick, &c. that all Contracts and Securities made for Payment shall be void; the Court was divided, but the better Opinion was, that it was not within the Statute, being not at one Meeting; tho', if it had been pleaded, that the second Meeting was to elude the Statute, it might have been otherwise. 2 *Mod.* 54. *Hill versus Pheasant.*

5. An Hundred Pounds was won at Play, and the Winner owing one Sharp 100 *l.* he the said Sharp demanded the Money; whereupon the Winner brought him to the other Person of whom he had won the Money, who acknowledged the Debt, and gave Sharp a Bond for Payment of the Money, who not knowing that the Money was won at Play, accepted the Bond, which being afterwards put in Suit, the Obligor pleaded the Statute against Gaming; the Plaintiff in his Replication discloses all this Matter, and sets forth, that 100 *l.* was justly due to him from the Winner, and that he was not privy to the Money won at Play, and that he accepted the said Bond *pro securitate* of his Debt: And upon Demurrer, *per Curiam*, this is not within the Statute, tho' it was pleaded, that the Bond was taken *pro securitate*, omitting the Words, for Satisfaction of a just Debt, and the Reason of *Ellis and Warne's Case* governed this Case. 2 *Mod.* 279. *Anonymous.*

6. *Assumpsit* for 20 *l.* won at Cards; after Judgment by Default, and Writ of Enquiry and Damages assessed, and the Judgment entered for the Plaintiff, a Writ of Error was brought in the Exchequer-Chamber, and the Error assigned was, that a general * *Indebitatus Assumpsit* would not lie for Money won at Play, but the greater Part of the Judges inclined, that it would. 3 *Lev.* 118. *Eggleston versus Lewin.*

* See Statutes. (D) 23. that 'tis not good. *Mod.* Cases 128. *S. P.*

7. But this was against the Opinion of the two Chief Justices *Holt* and *Pollexfen*, that an *Indebitatus Assumpsit* would not lie, for there must be some Work done, or some meritorious Action to maintain an Action of * Debt; 'tis true, a Cast of the Dice alters the Property of the Money, if 'tis staked down, because 'tis then a Gift on a Condition precedent, and an *Indebitatus Assumpsit* lies against him who holds the Wager, because 'tis a Promise in Law to deliver it if won; but in the principal Case there is no Consideration. 5 *Mod.* 13. *Walker versus Walker.*

* *Mod.* Cases 128. *Smith v. Airy. S. P.*

8. Two playing at Back-Gammon, one of them stirred his Man, but did not move it from the Point; and a Question arising between them, whether he was bound to play it, a Wager of 100 *l.* was laid, and referred to the Groom-Porter to decide; and now, in an Action brought for the 100 *l.* the Question was, whether this was within the Statute of Gaming, and adjudged that it was not, because it was not a Wager on the Chance, but on the Right of the Game. 1 *Salk.* 344. *Pope versus St. Leger.* See Variance. (B) 7. *S. C.*

3 Mod.
175.

9. The Lord Chandos lost Money at Play to one *Hussey*, and gave him a Bill for it, drawn on one *Jacob*, who accepted the Bill, but afterwards refused to pay the Money: *Hussey* brought an *Assumpsit* against *Jacob*, who pleaded the Statute 16 Car. 2. cap. 7. against Gaming; and upon Demurrer to this Plea it was insisted for the Plaintiff, that this was out of the Statute, because by the Acceptance of the Bill a new Contract was created, so that the Nature of the first Duty was altered; but adjudged, that all is founded on the illegal Winning, and therefore 'tis within the Statute, because, tho' 'tis in the Nature of a new Contract, yet 'tis for the Security of the Payment of that Money; besides, the Plaintiff was privy to the first Wrong, for he was the Winner; but if he had assigned the Bill for a valuable Consideration to a Stranger, it had not been within the Statute, because the Assignee had not been privy to the Wrong. 1 Salk. 344. *Hussey* versus *Jacob*.

10. Adjudged, that if *W. R.* lose 100 *l.* to one, and 100 *l.* to another, upon Tick, 'tis not within the Statute, because 'tis a several Contract; so if he lose 200 *l.* in Ready Money, and 100 *l.* more, for which he gives a Note, 'tis good, but not for more. 1 Salk. 345. In the Case of *Danvers* versus *Thistleworth*.

* 5 Mod.
351.
Stanhope
v. Smith.
S. P.

11. *Assumpsit* for 40 *l.* the Defendant pleaded, it was for Money won at Play, and that at the same Sitting, he lost also to *W. R.* 66 *l.* and upon Demurrer to this Plea the Plaintiff had Judgment, because losing more than 100 *l.* * to several Persons at one Sitting, is not within the Statute, unless they are Partners in the Stakes, for then, as to the Chance of the Game, they are but one Person in Law. 1 Salk. 345. *Dickson* versus *Pawlett*.

Gaol.

UPON Complaint of the Sheriff of *Yorkshire* to the Queen and Council, these Points were referred to the Judges for their Opinion:

(1.) Since the Assises had been usually kept in *York-Castle*, and the Queen had granted the Keeping of the Castle, and the Herbage there, to another, if the Assises might be still kept there, against the Will of the Patentee.

(2.) If the Queen grant the Custody of all Persons taken in *Yorkshire*, and to be kept in the Castle by the Patentee, whether he may have the Custody of them who are taken by the Sheriff.

(3.) If the Common Gaol of that County, Time out of Mind, had been in Part of the Castle, if the Patentee could hinder the Sheriff to have the usual Place for the common Gaol and Keeping the Prisoners.

To the first, their Opinion was, that the Assises might still be held in the Castle, as usual, because 'tis for the Service of the Queen in Execution of Justice; and the Common Law, together with their Commission, gives the Judges Power to appoint where the Assises shall be held.

To the Second, the Keeper of the Castle may not have the Custody of those Prisoners who are taken by the Sheriff alone, for he is the proper Officer to the Court out of which the Process issues, and chargeable to the Plaintiff, if he escapes.

To the Third, the Patentee cannot hinder the Sheriff to have the usual Place for the Common Gaol. See the Statutes 14 R. 3. c. 10. and 19 H. 7. c. 10. 1 And. 345.

Gavelkind.

(A)

1. **D**ONEE in Tail of Gavelkind Lands had Issue four Sons; adjudged, that all shall inherit; but if a Lease for Life is made of Gavelkind, Remainder to the right Heirs of *B. G.* who hath Issue four Sons, in this Case the eldest Son shall inherit the Remainder, because, in Case of Purchase, there can be but one right Heir.

1 Rep. 103, in *Shelley's* Case.

2. The Custom of Gavelkind is not altered, tho a Fine be levied of the Lands at Common Law, because 'tis a Custom annexed to the Land, and always runs with it; but 'tis otherwise of Lands in Antient Demesne. 6 E. 6. *Dyer* 72.

3. Gavelkind, &c. was devised to the Husband and Wife for Life, Remainder to the next *Heir Male* of their Bodies lawfully begotten, for ever; they had three Sons; adjudged, that the eldest Son should not have the Whole. 4 Mar. *Dyer* 133.

4. A Custom continued Time out of Mind, cannot be interrupted by the bare Alienation of the Tenure; and therefore, if Gavelkind Lands come to the Crown, and are regranted to *B. G. tenendum in Capite, &c.* the Land shall descend to all the Heirs Males, as Gavelkind. 4 & 5 Mar. Dallison's Rep.

5. Neither can Unity of Possession in the Lord of the Manor, alter the Nature of Gavelkind; and if the King purchase it and regrant it, 'tis still Gavelkind, and partable amongst the Heirs Males. 7 Eliz. Dyer.

6. In Dower for the third Part of the Lands, &c. the Tenant pleaded, that the Lands were Gavelkind, and that by the Custom she ought to demand Dower of a Moiety; adjudged, that she might have her Election to demand her Dower at Common Law, or by the Custom; tho' the Pronotaries were of another Opinion. Mich. 30 Eliz. 1 Leon. 62. Hill. 30 Eliz. 1 Leon. 133. 16 Eliz. Gellibrand versus Hunt, contra. Goldf. 108.

7. In Kent there is a Custom, that the Widow shall be endowed of a Moiety of Gavelkind Lands, and that she shall loose that Dower if she marry a second Husband; a Widow brought Dower for a third Part of the Lands of which her Husband died seised, &c. the Tenant pleaded, that she was dowable by Custom of a Moiety of the Gavelkind, and not of the third Part at Common Law, and this was adjudged a good Plea, and that she had not Election to have the one or the other. Moor 260.

8. Gavelkind Lands in Fee holden in Socage may be devised by the Custom, but then this Custom must be pleaded, and that the Lands were held in Socage; for tho' the Court may take Notice of the Custom of Gavelkind in Kent generally, without pleading it, yet they cannot judicially take Notice of this Special Custom of devising it, or that the Lands are holden in Socage, without pleading it specially. Cro. Car. 465, 511. Launder versus Brooks. Postea 10.

9. In Launder and Brooks's Case before-mentioned, the Question was, whether before the Statute 32 H. 8. which enables Men generally to dispose their Estates by Will, there was any Custom in the County of Kent to support a *Devise of Gavelkind Lands, tho' held in Socage; and it was insisted, that there was such a Custom; for Fitzherbert in his *Natura Brevium* tells us, that the Writ *Ex gravi querela* lies where a Man seised of Lands, &c. in Gavelkind, which Time out of Mind have been devisable by Will, and accordingly he having devised the same, and afterwards the Devisee is disseised, he shall have this Writ to compel the Execution of such Devise; and Mr. Lambard, in his Perambulation of Kent, tells us, that Lands held in Gavelkind may be given or sold; where by the Word *Given* he must intend by Will, and by the Word *Sold*, he must mean by Deed; and many Wills were produced out of the Register's Office of Canterbury and Rochester, to prove that Gavelkind Lands were devised in the respective Reigns of H. 6. Ed. 4. and H. 7. and some Verdicts were likewise produced, by which such Custom was found; and an antient Precedent was shewn out of Mr. Lambard's Book, which proves, that there was a Will of Gavelkind Lands before the Conquest; and upon a full Evidence. Anno 13 Car. 1. there was another Verdict for the Custom; and so it was adjudged in the present Case. * Post. pl. 14. S. P.

10. the Court cannot judicially take Notice of the Custom of Gavelkind, without pleading it; therefore it must be set forth in the Declaration; 'tis the express Text of Littleton, Sect. 265. and my Lord Coke commends him for saying, that this Custom must be pleaded. 1 Lutw. 236. Humphrey versus Bathurst. Antea pl. 8. contra.

11. In Ejectment for Lands in Kent, the sole Question was, whether these Lands, being Gavelkind, were devisable by Custom, or not; it was agreed on all Sides, that if Lands are alledged to be in Kent, it shall be intended, that they are Gavelkind, if the contrary doth not appear; and it was insisted for the Defendant, that Gavelkind Lands are devisable by Custom; and a Will was mentioned of such Lands made by Husband and Wife in the Reign of King Edgar, which is set forth in Lambert; and they produced six Verdicts for the Defendant, one of which was between Lander and Brooks, antea pl. 8, 9. But on the other Side, it was argued, that there were always Feoffments made to the Uses of Wills, and so there were to the Uses of those Wills in those Cases, where those six Verdicts were given, tho' they were not mentioned in the Wills themselves; and accordingly the Jury found, that there was no such Custom. 2 Sid. 153. Brown versus Brooks.

12. The Action was brought upon a Wager, whether the Manor of Farningham in Kent was devisable by Custom, or not; and the Jury found a Special Verdict, that Anno 2 Ed. 6. by Act of Parliament, the Lands of Sir Henry Isles were enacted to be as at Common Law; and they find, that Lands in Gavelkind are devisable; and the Question was, whether this Statute did take away all the other collateral Qualities of Gavelkind; as the Custom of devising, the Endowments of a Moiety, the being Tenant by the Curtesy without Issue, and other Customs incident to Gavelkind, as well as the Partibility; and adjudged, that it did not; for if the Parliament had intended to take away more, they would have mentioned them. Raym. 59, 76. Wiseman versus Cotton. Sid. 77, 135. 1 Lev. 79. Hardr. 325.

13. Adjudged, that a Rent granted in Fee out of Gavelkind Lands shall descend to all the Males equally, as the Land itself would have done out of which the Rent issueth; for 'tis of the same Nature with the Land it self. 2 Lev. 87. Randall versus Whittle. Randall versus Roberts. Noy 15. S. P. 1 Mod. 97. S. C. by the Name of Randall v. Jenkins.

14. The Father having Gavelkind Lands, had three Sons, one of them died, leaving Issue a Daughter in the Life-time of his Father; it was ruled, that this Daughter shall inherit the Part of

of her Father *jure representationis*, and yet she is not within the Words of the Custom; for that is that it shall be divided between the Heirs Males; but tho' she is no Male, yet she is the Daughter of a Male, and Heir by Representation. 1 Salk. 243. In *Clement and Sudamore's Case*.

Grants of the King.

Not good. (A)

Where the King's Grants are good. (B)

Grants contrary to the Statutes, good,
with a *Non obstante*. (C)

Grants, &c. how they must be pleaded.

(D)

What passeth by the King's Grants,
what not. (E)

How they must be construed. (F)

(A)

Not good.

1. **I**T was prohibited by several Acts of Parliament, that the Office of the *Almager* should be granted without a Warrant from the Lord *Treasurer*, certified to the Court of Chancery; *Queen Mary* granted the said Office *ex certa scientia*, &c. to *B. G.* for twenty-one Years, without any such Warrant; adjudged, that the Grant was void, there being no *non obstante* to any Statute; and so it had, if there had been a *non obstante* in the Grant. *Mich. 14 Eliz. Dyer 303.*

2. *Queen Mary* being seised in the Right of her Crown, of a Manor to which an Advowson was appendant; and the Church being then void, she *ex certa scientia* granted the Manor & omnes advocaciones eidem Manerio spectant, &c. but not mentioning the present Avoidance which was at that very Time when the Grant was made; therefore it was adjudged, that the next Presentation did not pass by such a Grant. *Passch. 13 Eliz. Dyer 300.*

3. The King made a Lease of *Richmond*, &c. with all Deodands which should happen within that Place; and afterwards he granted *All Deodands* generally to *Dr. Cox*, the Lord Almoner; the first Lease expired, and then the King made a new Lease to the first Lessee, as before; it was resolved, that he should have the Deodands, and not the Lord Almoner; for the Grant to him was void, because the Lease for Years, which was then in Being, was not recited in the Grant to him. *Mich. 6 Ed. 6. Dyer 77.*

4. *Queen Mary*, in a Grant by her made of the Custody of a Castle to one *B. G.* recited a Surrender to her made of a former Grant thereof, dated *Anno 32 H. 8.* when in Truth it was dated *Anno 33 H. 8.* afterwards *Queen Elizabeth*, *ex speciali gratia*, granted the said Office to *R. W.* adjudged, that by Reason of this Misrecital of the Date, the Grant to *B. G.* was void, notwithstanding the Act 34 *H. 8.* and other Acts of Misrecital. *Kemp versus Mackwilliams. Dyer 195. 1 Rep. in the Case of Alton Woods. S. P.*

5. One who had only a Lease of Lands for sixty Years, made a Lease of the same Lands for eighty Years, the Reversion being in the Crown; the first Term for sixty Years expired; then he who had the Term for eighty Years, of which sixty Years was expired, as aforesaid, perceiving he had no Title to hold it longer, surrendered the Term of eighty Years to the Queen, to the Intent she should make a new Lease to him for twenty Years, which she did, and in her Grant, she recited the Lease for eighty Years; and that in Consideration of a Surrender thereof, she *ex certa scientia*, &c. demised the same for twenty Years; adjudged, that it was void, because nothing was surrendered, but only in Shew and Appearance. 2 *Cro. 297. Barwick versus Gilson. S. P. Trin. 18 Eliz. Dyer 352.*

6. *H. 8.* being seised of a *Grange*, called *S.* in the Parish of *B.* in the County of *B.* to which several Lands did appertain, as well in that as another Parish, granted the same, with the Appurtenances in the Parish of *B.* and all other his Lands in the said Parish, not mentioning the other Parish; adjudged, that nothing passed in that other Parish; for the Statute 38 *H. 8. cap. 21.* doth not aid *no naming.* *Hill. 8. Eliz. Dyer 248.*

7. The King granted Leave to one to export Bell-Mettle, *non obstante* any Statute made or to be made; afterwards it was enacted, that no Person should export Bell-Mettle under a Penalty; adjudged this was a Revocation of the Grant, because the Grantee is virtually a Party to the Act, and the King cannot dispense with a Penal Law hereafter to be made; for if he grant, that such a Person shall be discharged of all Taxes granted or to be granted, 'tis void. *H. 33 H. 8. Dyer 52.*

8. The Act 4 H. 7. cap. 9. prohibits the Importation of *Gascoigne Wine*, but only in *English Ships*, and by English Mariners, under Pain of Forfeiture, &c. afterwards the King by Letters Patents to G. D. granted, that he might import 600 Tun of that Wine in *any Ship*, *non obstante* the Statute; and upon an Information brought in the Exchequer against the Assignee of the Patentee, he pleaded the King's Grant without a *profert hic in Curia Literas Patentes*; adjudged for that Reason the Plea was ill; but as to the Matter in Law, whether the Grant was good or not, the Court doubted. Mich. 34 H. 8. Dyer 54.

9. The Queen seised of a Rectory appropriate, granted *Advocationem Ecclesie*, &c. adjudged, that the Advowson did not pass; for by the Appropriation the Advowson was gone, and not in Being, and this Grant is not helped by the Statute 4 & 5 Mar. of Confirmation of the King's Grants, for that helps only *Misrecitals*, *Misnaming* or *Mistaking*; but here is no such Thing in Being as is pretended to pass by this Grant. 2 Leon. 80. *The Queen versus Lord Lumley*.

10. The Queen leased Lands, and afterwards she granted the Reversion to B. G. but *misrecited* the Name of the Tenant; then she made a new Grant to another, in which the Name of the Tenant was truly recited; and after that the Statute 18 Eliz. of Patents was made; adjudged it shall not revive the first Grant, because it was defeated before the Statute was made. Cro. Eliz. 808. *Child versus Lawes*.

11. The Queen being seised of the Advowson of the Vicarage of R. granted the Vicarage to B. G. adjudged, it did not pass; for by her Grant nothing passes but what she intended to pass, and the Vicarage is one Thing and the Advowson another, and every Thing must pass by its proper Name. Mich. 32 Eliz. 163.

12. King H. 7. was seised of the Manors of Ryton and Coudor in Shropshire, and he granted *totum illud Manerium* (in the singular Number) of Ryton and Coudor, &c. here the King was deceived in his Grant, taking them both to be but one Manor, when they were distinct Manors; so where Queen Elizabeth being seised of the Manors of Sapperton and Millburn in Lincolnshire, granted to him *illud Manerium de Millbourn cum Sapperton*; this was adjudged void for the same Reason, tho' both these Grants were made *ex certa scientia*, &c. and yet in the Case of a Common Person, such Grants had been good. See 5 Rep. 94. *Barwick's Case*.

13. The Chief Justice of the Common Pleas being dead, Queen Mary, during the Vacancy, granted the Office of *Exigenter of London* to B. G. adjudged, that the Grant was void, because the Office was incident to the Place of the Chief Justice of that Court. Dyer 175. *Scrogg's Case*.

14. The Queen granted the Office of Clerk of the County-Court to one Mitton for Life; adjudged, that the Grant was void, because the County-Court, and the entering Proceedings there, are incident to the Office of the Sheriff; and when the Queen appoints a Sheriff, who is an ancient Officer, she may determine his whole Office at her Pleasure; but she cannot abridge him of any Part, because 'tis an entire Office, and it would be very inconvenient, that the Grantee should have the Custody of the Rolls, and the Sheriff should be responsible for them. 4 Rep. 33. *Mitton's Case*.

15. The Queen seised of a great Waste, called *Ruddlestown*, in the Parish of *Chipnam*, granted a *Moiety of a Yard-Land* in the said Waste to the Mayor and Burgesses of *Chipnam*; adjudged, that the Grant was void for the Incertainty in what Part of the Waste they should have this *Moiety*, it being neither bounded, nor any wise described. 1 Leon. 30. *Sir Walter Hungerford's Case*.

16. the Queen granted to Darcy the sole Making of Playing Cards, and the sole Importation thereof for twenty-one Years, and prohibited all other Persons, &c. adjudged, that the Grant was void, because it was a Monopoly, and against the Interest and Liberty of her Subjects. 11 Rep. 87. *Darcy's Case*. Moor 671. S. C. By the Name of *Allen versus Darcy*.

17. A Man was disseised, and afterwards attained, so that a Right to his Lands came to the King by the Attainder, who after the Death of the Disseisor *ex gratia speciali, certa scientia & mero motu*, granted all the said Lands, Tenements, Rights and Hereditaments, which he had by the Attainder of the Disseisee; adjudged, that a bare Right did not pass by these general Words, but that there ought to have been a special Recital of it by express Words. 3 Rep. in *Marquess of Winton's Case*. 8 Eliz. *Cromer's Case*. S. P.

18. The Prior of W. being seised of the Rectory of L. leased the *Tithe Corn and Hay only*, for Years, rendring four Pounds Rent; the Priory being vested in the Queen by the Statute of Dissolution, &c. the Anno 37 of her Reign, leased the Rectory, and all the Glebe, with the Appurtenances usually let with the same heretofore, under the yearly Rent of 3 l. 16 s. 8 d. to hold the Premises under the said yearly Rent of 3 l. 16 s. 8 d. adjudged, that the Lease made by the Queen was void, because it was made without any Consideration; for it shall be intended, that her Meaning was to lease no more than what the Prior had leased before, and to have the same Rent which he had: Now the Prior leased only the *Tithe Corn and Hay*, but the Queen the whole Rectory; and the Prior had 4 l. per Annum for Part, when the Queen had but 3 l. 16 s. 8 d. for the Whole; so that 'tis plain she was deceived in her Grant; and so it was adjudged, Yelv. 43. *Chambers versus Mason*.

19. The King seised of a Manor in the Right of his Crown, *ex speciali gratia*, granted to B. G. *duas illas pceas terræ*, called N. and M. lying in W. now or late in the Tenure of R. W. &c. all which were * *a nobis concealata & detenta*: And it was found by Verdict, that the Ma-

* 2 And.
nor 19. S. P.

nor was, *not concealed or detained* from the King, but that it was *in onere & computo*; the Rents indeed of the said two Parcels of Lands were not paid to him; it was adjudged, that tho' the Grant was *ex certa scientia*, and tho' it was certain both in Respect to the Place where the Lands granted did lie, and also in Respect to the Tenure or Occupation, yet it was still made upon a false Suggestion of the Party, that the Manor was concealed from the King, when in Truth it was not; and therefore the Grant was void, and the Words *ex gratia speciali, certa scientia, & mero motu*, shall not help in such Case; for tho' the first imports that Grace and Favour which the King hath for the Grantee, and the next importeth the Knowledge which he hath of the Thing granted, which must be intended of the Truth, for that is the proper Object of Knowledge, and the last Words import the Bounty and Liberality of the King; yet all these Words are of no Manner of Effect, when the Grant is obtained upon a false Suggestion. 10 Rep. 109. *Legate's Case*.

20. An Incumbent was deprived for not reading the 39 Articles, but no Notice of it was given to the Patron by the Ordinary, and without such Special Notice, no Lapse can incur; and yet the Queen presented *ratione Lapsus*; adjudged, that her Presentation was void, because she was deceived in her Title. 6 Rep. 29. in *Green's Case*.

21. King James, Anno 9 of his Reign, granted to B. G. so many *Debts, Duties, Arrearages* and Sums of Money being on Record in any of his Courts from the last Year of H. 8. to the 14th of Queen Elizabeth, as shall amount to 1000 l. adjudged this Grant was void for the *Uncertainty* of what was granted; for the Words, *Debts, Duties and Sums of Money*, import nothing in certain; then the Word *Arrearages*, there is nothing to explain what shall pass by that Word, as whether the King intended Arrears of Rents, Reliefs, Tenths, or any other annual Payments due to him; for without such Explanation, the Arrears of those Things shall not pass. 12 Rep. 86. *Stockdale's Case*.

22. The Queen seised of the *Manor of Gascoine*, and of a Grange called *Gascoine Grange*, in D. granted all her Lands and Tenements in D. to the Grantee; adjudged, that the *Manor* did not pass. Godb. 136. *Giles versus Newton*.

* 4 Leon.
23. S. P.

23. The Queen granted to *Pelham*, that he shou'd not be Bailiff, Constable, or other * Officer or Minister, *licet eligatur*; adjudged, that this Grant shall not discharge him, if the Queen make him *Sheriff*, for the Word *Officer* in the Patent, shall not extend to *Royal Offices*. Godb. 21. *Pelham's Case*.

24. In the Exchequer the Case upon the Pleadings was, *Jf. Information of Intrusion, &c.* the Defendant pleaded, that he had a Lease of the *Manor* for twenty-one Years, which he surrendered to the Queen, and in Consideration thereof, she granted to him the *Manor, &c. habendum a die consecrationis* of the Patent, during the Life of W. R. and averred, that he was living; the Attorney General replied, that after the Lease of twenty-one Years was granted to the Defendant, he granted all his Interest in a Cottage, Parcel of the Manor, to J. J. and afterwards the Queen in Consideration of the Surrender of his Lease of the Manor, &c. made a Grant thereof to him *per auter vie*, and averred, that the Lessee *per auter vie* was dead; and upon Demurrer one Question was, whether the Grant made by the Queen was good; because it was in Consideration of the Surrender of the Lease for twenty-one Years, of the Manor, when Part thereof did not pass by the Surrender, because the Cottage, which was Parcel of the Manor, was before that Time granted to J. J. and adjudged, that the Queen's Grant was void, because she was deceived in the Consideration. Moor 393. *Berwick's Case*.

25. King H. 8. being Tenant in Tail of the Manor of *Abbotesly*, granted it to his Servant *Walter Welsh*, and to *Elizabeth* his Wife, and to the Heirs of the Body of the said *Walter*, and in the Patent it was recited, that the King was seised of the said Manor in Fee; and upon Demurrer it was insisted, that this Grant was void, or if not, it was good only during the Life of the King; because he having only an Estate-Tail himself, could grant only for his own Life; for he could not grant a greater Estate than he had; so that being *Non informatus*, or *misinformatus* of his Estate, he was deceived in granting it. Moor 413. *Welsh's Case*.

26. *Scire facias* by the Queen to repeal a Patent granted to *Cotton* and his Wife, Anno 25 of her Reign, reciting, that H. and G. were bound in a Bond of 1000 Marks to the Queen, which was forfeited; reciting also, that the Queen by Patent, Anno 33 of her Reign, had granted to *Cotton* and his Wife, the said Bond, and 1000 Marks so forfeited; reciting also, that *Cotton*, in the Name of the Queen, had recovered Judgment in the Exchequer, and that she should have Execution for the said 1000 Marks, and to the Intent that *Cotton* might have the said Bond, the Queen, by the said Patent Anno 35 of her Reign, reciting the Judgment obtained in the Exchequer, *ex certa scientia & mero motu*, granted him the said Bond, and the 1000 Marks, and all the Benefit and Advantage of the said Judgment, &c. in which Grant the Queen was deceived, because the Judgment was for 12 d. Costs and 12 d. Damages, as well as for the 1000 Marks; and the Grant of all the Benefit of the Judgment, extends as well to the Damages and Costs as to the 1000 Marks; and the Recital, that she had obtained Judgment for 1000 Marks, was not the whole Truth, because it was for more, (*viz.*) The Damages and Costs. Moor 448. *The Queen versus Cotton*.

27. Queen Elizabeth, Anno 19 of her Reign, granted the Office of Clerk of the Council of the Marches of Wales, for Life, and by another Grant Anno 25 of her Reign, she granted to the same Person of the Office of Secretary there; King James Anno 1, without reciting these former

former Grants made as aforesaid, granted the same Offices to the same Person, (*viz.*) to the Queen's Patentee for Life; adjudged, that this Grant was void, because it did not recite the former Grants of the Queen, and there was no *Obstante* to these Grants; afterwards King James, Anno 9 of his Reign, by another Grant, reciting that which was made by him, Anno 1, granted these Offices to B. G. for Life, when ever they should be void by the Death, Surrender, or Forfeiture of the Queen's Patentee; adjudged likewise that this Grant was void, because it recited that of 1 Jac. as good, when it was void; afterwards, by another Grant, Anno 14, reciting both the void Grants made by himself, but omitting the good Grants made by the Queen, he granted the said Offices to two more for their Lives, after the Death, Forfeiture, or Surrender of the Queen's Patentee, who was still living, and of B. G. *non obstante male recitando, &c.* adjudged, that this Grant was void, because it recited those Grants which were void, and omitted those which were good; and that such false Recitals, or false Suggestions shall not be helped by the *Non obstante* in the last Grant. *Cro. Car. 143. Lord Brook versus Lord Goring.*

28. The King granted a Parkership to T. S. with an annual Fee of 3 l. &c. and afterwards he sold the Park, and disposed all the Deer to another; adjudged, that by the Disparking, the Office of Keeper was gone, but that the yearly Fee still continued. *Hutton 86. Howard Sir Charles.*

29. King Ed. 6. by his Letters Patents *ex certa scientia & mero motu* granted to one Crouch, *Omnes terras dominicales Manerii de Willow*; adjudged, that the Copyhold Lands did not pass, and yet they are in Law Parcel of the Demesnes of the Manor. *Bridgm. 14.*

30. Indictment for a Battery at Canterbury, it being to be tried at Bar, a *Venire facias* was awarded to the Sheriffs of Canterbury to return a Jury, and thereupon a *Distingas*, in which the Sheriff returned, that Canterbury was an antient City and County, and that the King had granted them a Privilege to be exempted from serving on Juries out of their City, excepting only in Cases of Treason; adjudged, that the King might grant this Privilege to One or Two, but such a Grant to a whole County would be void, because there might be a Failure of Justice; but by the Grant in the principal Case, those of Canterbury are not exempted from serving on Juries in B. R. without there is an exprefs Clause to exempt them to serve *coram ipso Rege*. *Sid. 243. The King versus Percivall. Sid. 127. S. P.*

31. In a Special Verdict in an Action on the Case, the Jury found, that King Charles II. granted to the Plaintiff the sole Printing of Blank Writs, Bonds, &c. for the Space of thirty Years; that the Defendant was a Stationer, and that the Company of Stationers had constantly, for the Space of forty Years last past, before this Grant, printed Blank Bonds; the Question was, whether this Grant was good, exclusive of all others; it was not denied, but the King had a Prerogative in Printing, and that this was confirmed by Usage ever since * Printing was invented; but then it must be in such Cases where no other Person whatsoever can claim any Property in it; 'tis true, if printing Blank Bonds had been a new Invention, the Grant might have been good; but 'tis found, that the Company of Stationers have printed such Bonds for the Space of forty Years before this Grant; the Court inclined, that the Patent was not good. *3 Mod. 79. Earl of Yarmouth versus Darrell.*

1 Lev.
159.
Raym.
113.
Hardr.
389.

See Company of Stationers v. Seymour.
* Sole Printing is a Manufacture; 'tis an Art

and Skill which the King cannot restrain; but when 'tis of publick Concern, then the Prerogative may interpose.

32. Case, &c. in which the Plaintiff declared, that in the Reign of H. 4. there was a Society of Merchants-Adventurers in England, and that Queen Elizabeth did incorporate them by that Name, with Privilege to trade to Holland, Brabant, Flanders, &c. prohibiting all others not free of that Company, &c. and that the Defendant not being free of the Company, did trade there without their Leave, and imported Goods *ad damnum*, &c. the Defendant pleaded the Statute of Ed. 3. *That the Seas shall be open to all Merchants to pass with their Merchandize whither they please*; and upon Demurrer to the Plea, the Question was, whether the King had a Prerogative to restrain his Subjects from trading to particular Places; the Case was not adjudged, but the better Opinion was, that such a Grant is void, both at Common Law, and by several Statutes; such a Grant agrees with my Lord Coke's Definition of a Monopoly, which he tells us is an Allowance by the King's Grant to any Person, for the sole Buying or Selling any Thing, exclusive, and restraining all others of that Liberty which they had before; 'tis against the Statute, which gives Liberty to Merchants to buy and sell without Disturbance; and 'tis expressly against the Statute 21 Jac. cap. 3. which declares all such Letters Patents void; the Case of the East-India Company is not like this, because that Patent restrained the Subject from trading with Infidels, without Leave; if it had been to restrain them from Trading with Christians, it had been void. *3 Mod. 126. Merchant-Adventurers versus Rebow.*

9 Ed. 3.
cap. 1.
18 Ed. 3.
cap. 5.
25 Ed. 3.
cap. 2.

(B)

Where good.

1. A Rectory to which an Advowson of a Vicarage was appendant, but concealed, came to the Queen by the Attainder of B. G. which being found by Office, the Queen, for a valuable Consideration, *ex certa scientia, &c.* granted the Rectory & omnia hereditamenta, belonging

longing to the same, not mentioning the Advowson of the Vicarage *adeo plene, &c.* as the said *B. G.* had it; adjudged, that by these Words the Advowson of the Vicarage did pass, and that the Queen was not deceived in her Grant. *Pasch. 18 Eliz. Dyer 350.*

2. The King was seised of the Manor of *Torrington*, in which there was a Market held every Week on Saturday, and a Fair in *Vigilio Festi & crastino Sancti Michaelis*, and he incorporated the Town of *Torrington*, and *ex certa Scientia* granted to them to have a Market every Saturday, and two Fairs every Year, one in *Vigilio Festi & crastino Sancti Michaelis*, and the other on the Feast of *St. George the Martyr*; adjudged, that this Grant was void, for the King was not apprised of what he granted; for his Intention was, *ex speciali gratia & certa scientia* to grant a new Fair at *Michaelmas, &c.* and not to grant that Fair which they had before. *Dyer 276. The Case of Torrington.*

3. King *H. 8.* for a valuable Consideration, granted *ex certa Scientia, &c.* all those Messuages in the Tenures of *B. and R.* and lying in the Parish of *D.* when in Truth they did not lie there, but in the Parish of *S.* adjudged, that tho' the Messuages were in the Tenure of *B. and R.* yet because by the Grant they were restrained to a particular Place, where they were not, for that Reason the Grant was void. *2 Rep. 32. Doddington's Case.*

4. The Queen granted Lands reserving a *Fee-Farm* Rent, with a Condition of Re-entry for Non-payment, and afterwards the Queen granted this Rent to *B. G.* in Fee; the Rent was behind; adjudged, that the Queen could not re-enter, because that would be to defeat her own Grant, which would be an apparent Wrong to the Grantee. *Cro. Eliz. 69. Cranmer's Case.*

5. The Incumbent of a Church was made a Bishop, and the Queen granted, that he should hold his Benefice in *Commendam*; adjudged, the Grant was good, and that the Queen had this Prerogative at Common Law, which was not taken away by any Statute. *Cro. Eliz. 542. Armiger versus Holland. Moor 542. S. C.*

6. So where the Tenure was mistaken, and the Parish was right, the Grant was held void; as for Instance, the Queen being seised of the Rectory of *L.* had a Portion of Tithes out of it, and she *ex certa scientia, &c.* granted *omnem illam portionem decimarum in D.* then in the Occupation of *B. G.* and that the said Grant should be good against her, notwithstanding *male nominando vel recitando dictam portionem, &c.* yet because these Tithes were not at that Time in the Occupation of *B. G.* the Grant was held void, for the Pronoun *Illam* is not satisfied till the End of the Sentence, and shall refer as well to the Tenure and Occupation of the Portion of Tithes, as to the Place where they lie. *4 Rep. 35. Bozoun's Case.*

7. King *H. 7. Anno 19* of his Reign, granted the Manor of *R.* to *B. G.* in Tail; and by another, reciting, that in Consideration of the Surrender of the first Grant, *by Force whereof he is seised in Fee*, he regranted the said Manor to the aforesaid *B. G.* and *E.* his Wife, and to the Heirs of the Husband; and this was *ex certa scientia, &c.* adjudged that the Reversion passed; for tho' the King had mistaken the Law arising upon the Fact, (*viz.*) that he was seised in Fee by Force of the Surrender, yet that was no Part of the Consideration, or Suggestion of the Party who had truly informed him of his Estate. *6 Rep. 55. Lord Chandos's Case.*

8. King *Ed. 2.* granted the Manor and Castle of *Skipton upon Craven*, to *Robert Clifford* in Tail, and afterwards *H. 6.* granted to *Thomas Lord Clifford* (who was Heir of the Body of the said *Robert*) *Reversionem Castri & Muneris præd'* in Fee; adjudged, that if the Grant in Tail should be void, yet the Castle and Manor did pass to *Thomas Lord Clifford* in Fee, because the Intent of the King was to pass it, either in Possession or Reversion. *8 Rep. 166. Earl of Cumberland's Case.*

9. The Queen being Tenant *pur autre Vie*, made a Lease for forty Years; adjudged, that the Lease was good, tho' she could not make an absolute Agreement for such a Term of Years, because her Title depended upon the Life of another; but because in Judgment of Law a Lease for Years is a less Estate than a Lease for the Life of another, therefore the Queen hath done no Wrong by making the Lease for forty Years, and it shall be for forty Years, if the *Cestui que Vie* should so long live. *7 Rep. 12. In Englefield's Case.*

10. The Lord *Sturton* being seised of the Manor of *Quincemore*, and also of the Manor of *Charleton*, which was held of the Manor of *Quincemore*, was attainted of Felony; *Queen Mary* gave the Manor of *Quincemore* to *Sir Walter Mildmay*, *cum omnibus suis juribus & parcellis*; adjudged, that the Manor of *Charleton* passed by this Grant, because it was now Parcel of the Manor of *Quincemore.* *1 Leon. 26. Sir Walter Mildmay's Case.*

11. King *Ed. 6.* being seised of the Manors of *Hackney* and *Stepney*, in which was a great Marsh, called *Stepney-Marsh*, which he had in Exchange with the Bishop of London, and also twenty Acres of Land called *Stepney-Marsh*, which he had by another Title, (*viz.*) as Parcel of the Possessions of the late *Priory of Grace*; he granted to the Lord *Wentworth* the aforesaid Manors, *neqnon omnes mariscos suos de Stepney præd', neqnon omnes terras & tenementa & mariscos dictis Muneriis pertinent', &c.* it was objected, that the twenty Acres did not pass, because the King had them by a different Title from the great Marsh, and they never belonged to either of those Manors; but adjudged, that they did pass by the Grant of *Omnes mariscos suos in Stepney.* *1 Leon. 119. The Queen versus Lewis and Green.*

12. King *Ric. 3.* granted to the Burgesses of *Glocester* and their Successors, that the Town should be a County of it self, &c. Saving to him and his Heirs, that the Justices of Assize, and of the Peace, in holding their Sessions, and the Sheriff in holding his County Courts, may do it there, for any Matter arising out of the said County of the said Town of *Glocester*, and within the

the County at large, as before they had used to do, but that the Sheriffs Officers of the County shall not execute any Process within the City and County; adjudged, that by the Saving in this Grant, the Judges may sit in the City to enquire of Felonies done within the County at large, and so for the Assises of *Nisi prius*; but an Offence done in the Hall of the City during the Sessions, cannot be determined but by a Commission for the City. *Hill. 35 Eliz. Poph. 17, 18.*

13. King *H. 6.* Anno 20 of his Reign, granted for himself, and did not say for his Successors, to the College of *All Souls* in *Oxford*, for them, their Tenants and Farmers, to be discharged of Toll; adjudged, this was a good Grant against his Successors, tho' not named; and this as well where the Grant goes in Discharge as where it passes an Interest, which in *Plowd. Com.* in *Sir Tho. Wyat's Case*, was agreed to be good. *Yelv. 13. Wood versus Hamstead.*

14. The Queen granted an House and Lands in *Fingergoe in Essex* to one *T. S.* who surrendered the same to the Queen, in order to make a new Lease, and the Queen regranted it to *T. S.* in this Manner, reciting, that whereas *T. S.* hath surrendered his Estate in *Fingergoe in Suffex*, &c. in Consideration thereof I grant to him the House and Lands in *Fingergoe in Essex*; it was objected, that this was no good Consideration, and that the Queen was deceived, for 'tis in Consideration of his Surrender of his Estate in *Suffex* (when he had no Estate there) that she granted a House and Lands in *Essex*: *Sed per Curiam*, the Statute 43 *Eliz. cap. 1.* enacts, that Letters Patents shall be good, notwithstanding any * *Misnaming* of the Town or County, and here is a Misnaming the County. 1 *Roll. Rep. 23. Godfrey versus Sparrow.*

* 4 Leon.
190.
Dean and

Chapter of Christ-Church v. Parott, S.P.

15. *Case, &c.* in which the Plaintiff set forth, that the Town of *Derby* was incorporated, and Anno 9 *Fac.* the Corporation was confirmed by Patent, by which it was granted, that they should have *Retorna Brevium*, and that the Sheriff of the County *Ne intromitteret*, and that the Sheriff, &c. *præmissorum non ignarus*, did enter into the said Vill and served Process, which the Plaintiff set forth in certain; and upon a Demurrer to this Declaration, it was objected, that the Sheriff ought not to take Notice of this Patent at his Peril, but it ought to be shewed to him: *Sed per Curiam*, he must take Notice of it at his Peril, because 'tis of Record; and in this Case 'tis well pleaded, that he had Notice, because 'tis said *Præmissorum non ignarus*, he entered; the Plaintiff had Judgment. 1 *Roll. Rep. 118. The Vill of Derby versus Foxley.*

16. The Queen demised a Rectory to the Church-wardens of *St. Saviour, Southwark*, for twenty-one Years, and afterwards by other Letters Patents, reciting the first Grant, and that the Church-wardens had surrendered all their Estate for Years, *modo habentes & ad præsens possidentes*, &c. he, in Consideration of the said Surrender, and for a Fine of 20 *l.* &c. demised the said Rectory to them for fifty Years; adjudged, that there need not be an actual Surrender of the first Lease, because the Words in the second Lease, (*viz.*) *modo habentes & ad præsens possidentes*, import, that they were then possessed of the first Lease, and their Acceptance of the new Lease for fifty Years was in Judgment of Law a Surrender of the first Lease for twenty-one Years, and shall precede it, and that a Corporation may surrender their Term by an Act in Law, and without Writing. 10 *Rep. 67. Church-wardens of St. Saviour's Case.*

17. The King granted the Manor of *B.* by *Bargain and Sale enrolled*, and afterwards by Letters Patents he granted the said Manor to another, and all his Lands in *B. aut alibi in dicto Com' dict' Manerio spectan'*, the Queen supposing, that the Lands in *B.* and which were not Parcel of the Manor, did not pass by the Indenture, granted them to *Dr. Atkins*; adjudged, that tho' at Common Law, or by the Statute 27 *H. 8.* Lands cannot pass by *Bargain and Sale enrolled*, in the *Case of the King*, because an Use cannot pass; yet since it appears, that the King's Intent was to pass it, the Statute 34 *H. 8.* makes that Indenture good. 2 *Cro. 50. Atkins versus Longuill. Moor 631. S. C.*

18. By a Deed dated 10 *May*, a Rectory, &c. was granted to *H. 8.* and on the 26th of *July* following, and not before, the said Deed was enrolled in the Court of Chancery; the King, by Letters Patents dated 21 *July*, which was five Days before the Enrolment of the Deed, in Consideration of the Grant of the said Rectory to him, gave the same to *B. B.* and his Heirs, &c. adjudged, that tho' the Consideration expressed in the King's Grant was false, for the Rectory was not granted to him till the Deed was enrolled, which was after his Grant to *B. B.* yet his Grant shall be good. *Hob. 120. Needler versus Bishop of Winton.*

19. Where-ever the Queen is deceived, either her self, or by Information of the Party, in such Case her Grant is void at Common Law; but where the Certainty of the Thing appears in the Grant, tho' there are some Things mistaken, yet 'tis good; as for Instance, the Queen *ex certa scientia*, &c. granted to *W. R.* the Manor of *D.* which she had by the Attainder of *Sir Tho. Wiatt*, when in Truth she had it by Descent; now this is supplied by the Statute of *Misrecitals*, as where the Queen granted her Manor of *D.* in *D.* when in Truth there was no such Village as *D.* this Grant is good, because the Substance of the Thing granted is certain, (*viz.*) the Manor of *D.* and in such Case the Statute supplies all other Defects. *Moor 45.*

20. In Ejectment, the Case upon the Evidence at a Trial at Bar was, that *Eleanor*, Queen Dowager of *H. 3.* in the Year 1273, founded *St. Katharine's Hospital*, reserving to her, during her Life, & *Reginis Angliæ nobis succedentibus*, the Nomination of the Master of the said Hospital, which was incorporated, &c. and the Question was, whether by those Words *Reginis Angliæ*, the Queen Dowager, or Queen Consort was intended; and adjudged, that the Queen Dowager had a Right to nominate. 1 *Vint. 149. St. Katharine's Hospital's Case. T. Jones 176. S. C.*

21. The

21. The Company of *Stationers* brought an Action of Debt against the Defendant for printing *Gadbury's Almanack*; and the Question upon a Special Verdict was, whether the Letters Patents by which the sole Printing of Almanacks was granted to this Company, was good, or not; and adjudged good, for Printing is a new Invention, and therefore at Common Law a Man cannot have Liberty of Printing what he will; and where there is no Author claiming a Right to the Copy, the King hath the Right. 1 *Mod.* 256. *Stationers Company versus Seymour.*

(C)

Contrary to Statutes, good with a Non obstante. See *King.* (K) per totum.

1. **Q**ueen *Mary* made a Grant to one to sell Wines by Retail *Non obstante* the Statute 7 *Ed.* 6. in which she commanded her Officers to permit the Patentee to sell, &c. for Life; adjudged, that by the Death of the Queen the Patent was determined, for it was not expressed how long the Patentee should sell, &c. but only, that the Officers should permit him for Life. *Hill.* 10 *Eliz.* *Dyer* 290.

2. The Archbishop's Chaplain having one Benefice of the Gift of the Queen, procured a Dispensation to have another, &c. which the Queen confirmed *absq; impedimento alicujus Statuti, aut alia re quacumq; non obstante*, by Virtue whereof he obtained another incompatible; and it was a Question not then resolved, whether the first was void by the Statute 21 *H.* 8. or not. *Trin.* 18 *Eliz.* *Dyer* 341.

3. King *Ed.* 6. granted to foreign Merchants, that they might export Merchandizes, paying the like Customs as any *English* Merchants paid; now, tho' the Grant did not express *pro se & heredibus*, yet because the King had an *Inheritance* in the Customs as a Prerogative annexed to the Crown, the Grant was held good; but if he granted, that a Man might export 100 Tun of Beer, *aliquo Statuto non obstante*, without saying for himself, his Heirs and Successors, in such Case the Grant determines with his Life. *Mich.* 1 *Maria,* *Dyer* 92.

4. *Indebitatus Assumpsit*, &c. the Jury found a Special Verdict, and amongst other Things, that the King granted the Office of Comptroller of the Customs in the Port of *Excester*, to the Plaintiff for Life, with a general *Non obstante* of all Statutes, &c. it was objected against this Grant, that it was not good, for there ought to have been a particular *Non obstante* of the Statute 14 *R.* 2. cap. 10. by which 'tis enacted, that *no Customer or Comptroller shall have any Office in the Customs for his Life, but only during the Pleasure of the King*; which Statute being made for the publick Good, cannot be dispensed withal: *Sed per Curiam*, the King may dispense with this Statute, for the Subject had no Interest in that prohibitory Clause, it was made only for the Ease of the King; and by the same Reason he may dispense with the Statute 4 *H.* 4. 24. that a Man may hold the Office of *Aulnegar*, without a Bill from the Treasurer; and with the Statute 31 *H.* 6. cap. 5. that no Customer or Comptroller shall have any certain Estate in his Office; for these and the like Statutes were made for the Ease of the King, and not to abridge his Prerogative, and may be dispensed withal, with a general *Non obstante aliquo statuto, &c.* 2 *Mod.* 260. *Arris versus Sinkely.*

(D)

How they must be pleaded.

1. **I**N Trespas, the Defendant justified the Taking as his proper Goods; the Plaintiff replied, and made a Title to the Goods by a Seifure; for that the King by Letters Patents *dedit & concessit* to the Town of *R.* Liberty of a Market; and shewed a Cause of Seifure, as an Officer there; and upon Demurrer the Defendant had Judgment, which was affirmed in Error, because the Plaintiff had made a Title by Letters Patents, but did not plead *Sub magno sigillo Angliæ*; for tho' they are enrolled, yet if not granted under the Great Seal, nothing passes. *Cro. Eliz.* 117. *Kingdon versus Barnes.*

2. King *James*, by Letters Patents enrolled in *B. R.* granted to the Earl of *Southampton* and his Heirs, all *Deodands* within the Manor of *Ditchfield*; an *Inquisition* was certified in *B. R.* that a *Deodand* was forfeited in the Manor, and Process went out, &c. and upon a Motion in Behalf of the *Cobereffes of the Earl*, for the Direction of the Court, whether they ought to set their Title in Pleading, it was ruled, that if they could satisfy the *Inquisition* of their Title without Pleading it, that should be sufficient, in Regard the Letters Patents were enrolled in *B. R.* See Stat. 4 & 5 *Will. & Mar.* cap. 22. which directs how these Grants shall be pleaded. 1 *Vent.* 142. *Southampton Earl his Heirs.*

(E)

What passeth by them, and what not.

1. THE King granted *Turbariam suam* in R. for Years; the Grantee plow'd Part of it, and the succeeding King granted *totam illam turbariam*, which he had demised to B. G. to another; adjudged, that the plow'd Land did not pass. *Owen 67. Farrington versus Charnock.*

2. King Edw. 4th granted to the Dean and Chapter of P. and to their Successors, all Fines *pro licentia concordandi* of all their Homagers, Tenants and Reliants *within their Fee*; adjudged, that this Grant did not extend to the *Post-Fines*; for the Fine *pro licentia concordandi* is the Queen's Silver, and not the *Post-Fine*. *Pasch. 32 Eliz. 1 Leon. 242. Strait versus Bragg.*

3. The Obligor entered into a Bond, conditioned to pay Money to the Obligee at a certain Place within the Manor of L. the Obligee was afterwards attainted of Felony, and lived in the Isle of Ely; the Earl of Northampton had a Grant of the Goods and Chattels of Felons, within the Isle of Ely, and the Lord of the Manor of L. had the like Grant within his Manor of L. and both of them claimed the Money due on this Bond; adjudged, that the Place of Payment signifies nothing in this Case, but that the Bond it self is the Substance which came to the Earl in the Isle of Ely; then it was objected by the Attorney General, in the Behalf of the Queen, that she ought to have the Money, and not the Earl; because by the general Words of *Bona & catalla felonum*, this Obligation doth not pass, without other express Words in the Patent; so the Earl had a Day given to produce his Grant. *Trin. 29 Eliz. Earl of Northampton versus Lord St. John.*

4. In Trespass, &c. the Defendant justified, for that Northampton is an ancient Town, and that King H. 7. granted to the Mayor and Burgeses a Fair to be held yearly upon the Feast, &c. *cum omnibus libertatibus*, &c. to the said Fair belonging; then he set forth, that W. R. at a Fair there holden, sold a Cow to the Plaintiff, for which the Defendant demanded one Penny for Toll, and because he refused to pay it, he distrained the Cow; upon a Demurrer to this Plea, it was adjudged, that by the Grant of a Fair *cum omnibus libertatibus*, Toll was not demandable, because 'tis not incident to a Fair; 'tis true, that such Liberties which a Common Person hath either by Grant or Prescription, and which would have been in the King by Virtue of his Prerogative, if they had not been in the Common Person, in such Case, if they come to the King by Forfeiture, or otherwise, they are extinguished in the Crown; as for Instance, *Waifs, Estrays, Wrecks*, &c. and they cannot afterwards be granted but by a new Creation; but where a Common Person hath Liberties, which the King would not have by his Prerogative, if such Common Person had them not, and afterwards such Liberties come to the Crown, they are not extinguished, but are in Being, as Fairs, Markets, with Toll. *Mich. 40 Eliz. Cro. Eliz. 591. Hoddie versus Wheelhouse.*

5. A House in Southwark holden of the Archbishop of Canterbury, as of his Borough of Southwark, came to H. 8. who granted it to W. R. and his Heirs, to hold *in libero Burgagio*; afterwards Queen Mary granted the Borough and Manor of Southwark to the Lord Mayor and Commonalty of London; then W. R. died without Heir; adjudged, that the Queen shall have the House by Escheat, and not the Mayor and Commonalty, because W. R. the Patentee held it of the Queen in Socage in Capite, &c. and the Words *in libero Burgagio* are void. *Mich. 31 Eliz. Cro. Eliz. 120. May versus Banister.*

6. The King by Letters Patents granted to the Mayor, &c. of Southampton, *omnia Bona & Catalla felonum de se*; a Man to whom Money was due on a Bond became *felo de se*, and the Mayor put the Bond in Suit against the Obligor; now the Debt due on this Bond is properly *Debitum*, and it was the better Opinion, that by a Grant of *omnia Bona & Catalla felonum de se* this Debt would not pass. *Sid. 142. Southampton Mayor versus Richards. See 12 Rep. 2. Ford's Case.*

7. Information in the Exchequer by English Bill for *derelict* Lands, wherein the Case was, King James granted certain Marsh-Lands bordering on the Sea to T. S. and out of his farther Grace he granted all the Soil, Ground, Land, Sand, and Marsh-Land *contigue adjacen'* to the Premises, which are now overflowed and covered with Sea-Water, & *quæ ad aliquod tempus in posterum recuperari forent per relictionem maris*, &c. *non obstante non nominando valorem, quantitatem vel qualitatem*; after this Grant 100 Acres more became *derelict* and adjoining to the said Marsh-Lands; and the Question was, who should have those Lands, either the King or the Patentee; it was insisted for the King, that he should have them, because these Lands were *derelict* since the Grant, and therefore should not pass by it; for the King cannot grant that which he never had: besides, these are Lands which he hath by his Prerogative, and in such Case, Lands will not pass by those general Words in this Grant; to which it was answered, that here is as much Certainty as the Thing is capable to have; 'tis true, the Grant could not describe the Number of Acres, because it could not appear how many they would be; but admitting it to be incertain, 'tis cured by the *Non obstante*, which he's all Defaults for want of Information to the King; but adjudged, that the Grant is void as to these 100 Acres, for nothing passed by these general Words. *2 Lev. 171. Attorney General versus Freeman.*

(F) Now

(F)

How they must be construed.

1. **Q**ueen Mary for her Heirs and Successors, *ex certa scientia*, granted to B. G. that he might sell Wines by Retail, but did not limit for how long Time the Grant should continue; but there was a Clause in it, that he might sell during his Life; adjudged, that this Grant shall be construed to be only *durante beneplacito* of the Queen, and that it shall be determined by her Death. *Hill. 10 Eliz. Dyer 270.*
2. Lessee for Life of the Site and Demesnes of a Manor, rendring Rent, the *Reversion* thereof, and of the Residue of the Manor, to the King, who granted the Manor with the Appurtenances to B. G. for Years together with all Profits, Rents, Services and Hereditaments thereunto belonging; but did not mention the *Reversion*; adjudged, that by the Grant of the Manor, (it being in the Case of the King) the *Reversion* passed. *7 Eliz. Dyer 233.*
3. The King licensed B. G. to transport *Bell-Mettle*, *non obstante* any Statute made, or to be made; adjudged, that in Respect to Statutes afterwards to be made, the Grant was void; but that he may dispense with Things to come, and in which he hath an Inheritance; but this must be by a Special *Non obstante*. *Pasch. 34 H. 8. Dyer 52.*
4. King *Edw. 6.* being seised of R. of which a *Wood* was Parcel, granted it in Fee; afterwards the Wood escheated to him upon a Forfeiture for Treason, and he dying, the Queen granted the Manor, and all the Woods known or reputed *ut pars vel parcel* of the Manor; now because the Wood was always reputed as Part of the Manor, before it was severed by the Grant of *Ed. 6.* therefore it shall pass by the Grant of the Queen, tho' the Word (*ut*) is a Word of Similitude, and not of Identity. *20 Eliz. Dyer 362.*
5. B. G. held a Manor of the King, and R. *IV.* held another Manor of that Manor, to which last there was an *Advowson appendant*; both these Men were attainted of Treason, and the King seised both their Manors, and afterwards granted the Manor, which B. G. held of him, *una cum advocationibus eidem pertin'*; adjudged, that the *Advowson* did not pass with that Manor, but was still appendant to the other. *Mich. 30 H. 8. Dyer 44.*
6. Before the Statute *De prerogativa Regis cap. 15.* Dowers, *Advowsons*, and other Things have passed by general Grants of Kings; but by that Statute they are restrained, if not granted by express Words. *1 Rep. in the Case of Alton Woods. 50. Antea 2.*
7. Where the King cannot make a Grant, being restrained by the Common Law, in such Case, if he makes a Grant *non obstante* the Common Law, it will not make the Grant good; but where he may lawfully make a Grant, and the Law requires, that he should be fully apprised in what he grants, and not any ways deceived, there a *Non obstante* supplies it, and makes the Grant good; likewise where the Words are not sufficient in themselves to pass the Thing granted, there a *Non obstante* will not help. *4 Rep. in Bozoun's Case.*
8. The King was Lord Paramount, the Abbot of *Westminster* was mesne, and B. G. was Tenant of the Manor of R. the Tenant was attainted of Treason, by Reason whereof the Mesnalty was extinct; and after Office found, the King granted the Manor to W. R. and his Heirs, to hold of him and his Successors, and other Chief Lords of the Fee, *per servitia inde debita, &c.* it was insisted, that the Tenure should be of the King, because the Mesnalty being extinct by the Attainder of the Tenant, (for where there is no Tenant there can be no Mesne) there could be *nulla servitia debita* to him; but adjudged, that the Words *tenendum de aliis capitalibus Domini feodi illius*, are sufficient to create a Tenure in the Mesne, and it must be the King's Intention, that it should be so; for 'tis very unreasonable, that he should lose his Services, who never offended; and therefore the Grant to the new Tenant shall be taken most beneficially for the Relief of the Mesne, and for the Honour of the King. *6 Rep. 5 Sir John Moly's Case.*
9. The King granted Lands *tenendum de nobis, &c.* by a Red Rose yearly at the Feast of *St. John the Baptist, pro omnibus serviciis, &c.* adjudged, that this was a Tenure in *Socage* in Chief; and because Fealty is incident to such a Tenure, therefore the Law shall annex Fealty to the Rent, and the Tenant shall hold by the Payment of a Red Rose, and doing Fealty; and the general Words, *pro omnibus aliis serviciis*, shall be intended such Services to which nothing is annexed by the Law. *6 Rep. 6. Wheeler's Case.*
10. King James, Anno 5 of his Reign, *ex certa scientia, &c.* granted to Jehu Webb the Office of Master of the Tennis-Plays, as well within the Palace of *Westminster*, as of the said King elsewhere; and this was during his Life; adjudged, that this Grant should have a reasonable Construction, not only to extend when the King himself plays, but when any of his Household should play. *8 Rep. 45. Jehu Webb's Case.*
11. Queen Mary granted *Eastwood-Park* to the Lord Stafford and his Wife, and to the Heirs of the Body of the said Lord; afterwards Queen *Eliz. Anno 7* of her Reign, reciting the former Estate, and that she had the *Reversion* expectant, she for a Valuable Consideration granted the *Reversion* to B. G. and to the Heirs of his Body; and she did farther will and declare, that if the said B. G. did pay a farther Sum, &c. then he should have *prædict' reversionem* to him and his Heirs for ever; adjudged, that the Words, *will and declare* do amount to a Grant, and so they

they are always taken in Patents of Liberties, and in Things to take Effect in *futuro*; and as for the Words *reversionem prædictæ*, that must be intended such a Reversion which the Queen had, and that was a Reversion in Fee expectant upon both the Estates-Tail; and tho' in Propriety of Speech, and according to a Grammatical Construction, *Reversio prædictæ* must be a Reversion in Tail; yet the Queen would never intend to pass such a Reversion to *B. G.* because he had the Reversion in Tail before. 8 Rep. 74. *Lord Stafford's Case*.

12. The King granted the Herbage and Pannage of *Clipson-Park*, to *B. G.* for Life; and afterwards by another Grant, in which the former Estate for Life was recited, he granted the Herbage and Pannage to the *Earl of Rutland* for Life; now, tho' it was not mentioned in this second Grant, when the Estate in the Herbage and Pannage should begin; yet, because the first Grant was truly recited in the last, the King could not be mistaken, and take a greater Estate upon him than he had to grant; therefore the Estate in the Herbage and Pannage shall commence to the Earl, as it may by Law; that is, it shall take Effect in *Reversion*, after the Death, &c. of the Tenant for Life, to whom it was first granted; so that there was no Incertainty when it should commence; for tho' the Grant to *B. G.* might be determined several Ways, either by his Death, Forfeiture or Surrender, yet it can be but once determined, and when that happens, the other shall commence 8 Rep. 55. *Earl of Rutland's Case*.

13. The King's Grants must be construed according to his Intention; and tho' the Words *ex certa scientia*, which are usually inserted, shall be taken in the strongest Sense against him, yet it shall be intended, that his Knowledge is founded upon a true Suggestion; for that is not properly a Knowledge, which is built upon a False Information. 1 Rep. 43. in the *Case of Alton Woods*. 10 Rep. 109. *Legate's Case*. S. P.

14. *Queen Eliz.* being seized of a Manor, to which an Advowson was appendant, granted the said Manor for twenty-one Years, *excepting the Advowson*, and afterwards she made another Grant to the same Grantee for another Term of Years, and with the like Exception; King *James* in Consideration of Service, *ex certa scientia*, granted the Manor to *B. G.* *exceptis quæ in eisdem literis patentibus excipiuntur*; but then follows this Clause, *et ulterius de uberiori gratia nostra & ex certa scientia*, he granted the said Manor, with the Appurtenances, to *B. G.* and his Heirs, *adeo plene &c.* as the same came to him, &c. and adjudged by this later Clause the Advowson passed; but if those Words *adeo plene & integre* had been omitted, then it would not have passed, tho' the Grant was *ex uberiori gratia & certa scientia*. 10 Rep. 63. *Whistler's Case*.

15. King *R. 3.* granted to the Burgesses of *Gloucester*, that the Town of *Gloucester* should be a County of it self distinct from the County at large, *Saving*, &c. that the Judges of Assise, and Justices of the Peace of the County of *Gloucester*, and the Sheriff in holding his County-Courts, may enter and keep their Sessions and Courts there, as before they had done, of or for any Matter arising within the County at large; adjudged, that by this *Saving* 'tis good; but that by a Commission to the County a Thing cannot be determined which hapens in the Town, tho' 'tis done in the Hall at the Time of the Sessions. *Poph.* 17.

16. King *H. 2.* granted to the Corporation of *Waterford*, that they should be *quieti de consuetudine*; adjudged, that this Grant did not discharge them from the Payment of the ancient and great Customs for Wool, Woolfels and Leather, because *consuetudo* is *nomen collectivum*, and signifies many Customs; therefore a general Word shall not pass a Duty which is payable to the Crown of Common Right; so where the King granted to a Merchant of *Venice*, that he should be quit of all Customs, Subsidies and Imposts, and of all other Sums of Money, due and payable for any Merchandizes imported, *and that he should be free as the Citizens of London*; adjudged in the Exchequer, that he was not discharged of *Prisage*, because it was not Specially expressed in the Grant, tho' the City of *London* by a Special Charter was discharged of *Prisage*. *Dav. Rep.* 7. *Case of Customs*.

17. The Vill of *Gloucester*, (now a City) being Parcel of the County of *Gloucester*, King *R. 3.* granted, that the Vill of *Gloucester* should from thenceforth be an entire County incorporate, and severed from the County, &c. *Non obstante*, that the Justices of Assise, and of the Peace, of the County of *Gloucester*, might hold their Assises and Sessions there, for any Matters arising within the County, as before; and in the same Patent he granted to the Burgesses, that they should have a Mayor and Sheriffs, &c. and that no Sheriff but only of the Vill, should enter and execute any Thing, except the Sheriff of the County of *Gloucester*, to hold his County-Court; and also granted, that they should have Justices of Peace, and that no Justice of Peace of the County should intermeddle with any Matter in the Vill, nor they with any Matter in the County: the Question was, whether the Judges of Assise and Justices in the County of *Gloucester*, could sit in the Vill and take Indictments against Felons for Felonies committed in the County, and out of the Vill; and by all the Judges of *England* it was held, that they might, because as to those Purposes it appeared, that the Intent of the King was to have the Vill Parcel of the County, and for other Purposes (mentioned in the Grant) to be a County of it self; and if the Law should be otherwise, the Patent would be void, because the King was deceived in his Grant, in making the Vill a County, if he could not reserve the Things before-mentioned, for the Justices there; and because the Judges, ever since the Grant made, had held the Assises there; if they could not lawfully do it, then it must follow, that all Indictments taken in the Vill, for any Felony done in the County of *Gloucester*, would be erroneous and void. 1 And. 291.

18. The King made a Corporation, and granted *Ballivis & Civibus, heredibus & successoribus suis*, that *Ballivi & Recordator* of the said City, for the Time being, or two of them, of whom the Recorder shall be one, *una cum hujusmodi aliis personis per nos, &c. ad hoc assignatis*, shall be Justices of Goal-Delivery for the said City, & *volumus, &c.* That no Sheriff or Justice of Peace, *vel alius minister sive Commissionarius noster, vel heredum ut successorum, &c. civitatis prædictæ aliquid in ea exercendæ, &c. de cetero intromittat*, under the Penalty of 100 l. &c. the Question was, whether the Judges of Assize, and General Goal-Delivery of the County, may try Felons for Felonies committed in the City; and adjudged that they might, because this Patent, as to the Gaol-Delivery by the Bailiffs and Recorder, is void, for they have no Authority but jointly with those whom the King shall appoint; and that Appointment the King is not obliged to make; but if he doth make it, 'tis by Patent, and not otherwise, that they have this Authority. 1 *And.* 296.

1Rep. 43. 19. The Case upon a Writ of Error in the Exchequer-Chamber, was thus: *ff.* The King being a Tenant in Tail of *Alton Woods*, with a Remainder to him in Fee, did by Letters Patents *ex certa scientia, &c.* grant the same to *Walter Welch and his Wife in Tail*; the Question was, whether they had an Estate-Tail, or any Estate at all; and adjudged, that the Grant was void, and nothing passed from the King; for it could not pass during his Life; neither could it pass as an Estate-Tail to *Welch*, because the King could not make any Discontinuance; and the Words, *ex certa scientia* will not make it pass, otherwise than intended by the King; and that was to pass an Estate-Tail, which he could not do, and therefore he did not know what Estate he passed. 2 *And.* 154. *Alton Woods* Case.

20. King *Ed. 6.* being seised of the Rectory of *Dale* in *Hampshire*, granted it to one *Mills* by these Words, *Totam illam Rectoriâ de Dale, ac omnes decimas, &c. Quæ quidem omnia & singula præmissa modo extenduntur ad verum valorem de 32 l. per Ann.* at the Time when this Grant was made, there was a Farm in the Parish, which, with the Tithes thereof, was in Lease made by the Abbot *Anno 16 H. 8.* reserving Rent; and the Question was, whether the Grantee of the Rectory, after the Expiration of the Lease, should have the Tithes of this Farm; and adjudged, that he should; for tho' the Words, *Quæ quidem omnia* in the Grant, refer to the Value of the Tithes of the rest of the Rectory, and not to those of the Farm, because they were then in Lease to another; and probably the King intended to grant no more than Tithes of that Value expressed in the Grant; yet having granted *totam Rectoriâ* by these general Words, the Tithes of this Farm will pass. 2 *Roll. Rep.* 118. *Dixon's* Case.

21. King *Ed. 6.* *ex certa scientia, &c.* granted *omnes terras dominicales* of his Manor of *Wellow*; adjudged, that the Copyhold Lands did not pass, and yet they are in Law Parcel of the Demesnes of the Manor. *Bridgm.* 14.

22. King *H. 8.* being seised in Fee of a Manor, of which a certain *Piece of Land and a Close* were Parcel, and had been Time out of Mind Copyhold, built a Messuage upon the Piece of Land, and granted the Office of Keeping thereof to *W. R.* for Life; and likewise the said Close for Life, for exercising the said Office; the King died seised, and the Reversion came to Queen *Mary*, who granted the Premises to *R. R.* for ever; and afterwards, the same by mean Conveyances, came to *T. T.* and his Heirs, who made a Lease thereof to one for sixty Years, and granted the Reversion to another, which afterwards came to one *Boothby*; the Lessee for Years devised the Residue of his Term to his Son, and died; the Son at a Court held for the said Manor, granted the Premises to his Brother, to hold of the said Manor in Fee, at the Will of the Lord, who was admitted accordingly; the Lease of sixty Years expired, and *Boothby*, who was seised of the Reversion, being dead, his Son entered, and claimed the Premises, as Parcel of the Demesnes of the Manor, and denied it to be Copyhold; and in order to try the Title he distrained the Cattle of the Copyholder, who brought a Replevin; and the Defendant avowed the Distress; adjudged, that the Grant of the Office of Keeper of the House, was a good Grant to *W. R.* for Life, notwithstanding it was of a House which was Copyhold; and that after that Estate for Life was determined, the King might grant it again by Copy of Court-Roll, because the King's Grants shall be taken most favourably; therefore the original Grant to *W. R.* for Life, shall not be taken to two Intents, one as a Grant at the Common Law, and the other as a Grant of the Copyhold, but only as a Grant of the Copyhold, and not as a collateral Intent to destroy it; for the Law takes Care to preserve the Inheritance of the King, for the Benefit of the Successor; and it may be for the Benefit of both to continue it Copyhold. *Style* 263. *Cremer versus Barnett*.

23. Information against the Defendant, &c. for that he, on such a Day and Year, imported one Hundred Butts of *Spanish Wine* into *Bristol*, and other out Ports, for which two Tuns were due for Prifage, and demanded, but not paid; the Defendant pleads, that at the Time of Importation of the said Wines, &c. he was, and still is, a Citizen of *London*, and that King *Ed. 1.* *Anno 1.* of his Reign, by Charter granted to the said City, that no Prifage should be taken of the Wines of the Citizens of *London*; the Question was, whether this Grant did extend to Wines of the Citizens imported in any out Ports, and not in the Port of the City of *London*; and adjudged, that it did not, because indefinite Words in the King's Grant shall not import an Universality; as for Instance, the King granted to a *Venetian Merchant*, that he should be quit of all Customs, &c. for any Manor of Goods by him imported, and that he should be as Free as the Citizens of *London*; by which general Words he claimed to be free of Prifage, because by this

Special Grant the Citizens of *London* were discharged thereof; but adjudged, that he should not, because Prilage was not specially expressed in his Grant, and the rather, because Prilage was not a Duty created by the Grant, but was vested in the King precedent to his Grant to the City of *London*, and was Parcel of his Inheritance and Revenue before that Time; for which Reason * Special Words are required to pass it away. *Hudres* 301. *Waller* versus *Travers*.

* Davis
Repetit.
2 Mod. 6

24. In a Special Verdict the Case was, the King being seised in Fee of the Manor of *Leyborn* in *Kent*, which came to him by the Dissolution of Monasteries, and to which the Advowson, &c. was appendant, granted the Manor to the Archbishop of *Canterbury*, excepting the Advowson, &c. afterwards, the Church being void, the King presented *W. R.* then the Archbishop re-granted the Manor and the Advowson to the King, &c. and the King granted the said Manor to *E. N.* and the Advowson, which lately did belong to the Archbishop and to the Abbot adeo plene as they came to him by the Grant of the Archbishop; it was objected, that this Grant of the Advowson was void, because the King was mistaken in his Title; for he apprehended he had a Title from the Archbishop, which he had not, for the Advowson was never in him to grant: But on the other Side it was said, that in construing the King's Grants, where there is a particular Certainty preceding, they shall not be destroyed by any Incertainty or Mistake, which follows; that there is a Difference where the Mistake of the Title is prejudicial to the King, and where 'tis only in some Description of the Thing which is only supplemental, and not material or issuable; that distinct and proper Words which are relative in such Grants, are good to pass any Thing; that where such Grants are on a valuable Consideration, they shall be construed favourably for the Honour of the King, and for the Benefit of the Grantee; and accordingly it was adjudged, that the Advowson did pass, and that the King was not deceived, either in the Value or in his Title; and that in this Case there were as large Words as in *Whistler's* Case. 1 *Mod.* 195. *The King* versus *Clerke*.

Grants of a common Person.

How to be construed. (A)	Where their Grants are void for Mistakes and other Matters, and not void. (D)
What passes by such Grants of Lands. (B)	
What passes by such Grants of Goods and Chattels, and what not. (C)	

(A)

How to be construed.

1. **H**usband and Wife, Jointenants of a Manor, out of which 20 *l. per Annum* was issuing to the Queen; she for a valuable Consideration, did give, grant and release the Rent to the Husband and his Heirs, and he devised it over to another and his Heirs, and died; adjudged, that the Wife shall pay the Rent to the Devisee, because by the Words *Grant* and *Release*, the Husband had Election to take by either; if he took by the Word *Grant*, then the Rent shall be continued, and by Consequence the Wife shall pay it; if he took by the Word *Release*, then 'tis extinguished in his Possession; but he did not take by the later, because in every Grant where there are Words of a different Intent, it shall be taken in that Sense which is most beneficial for the Grantee. *Mich.* 15 *Eliz.* *Dyer* 319.

2. The Father granted Lands to his Son, and to his Wife & eorum primogenit' proli successive, they having no Issue at that Time, but afterwards they had Issue a Daughter; adjudged, that after the Death of the Son and his Wife, their Issue should take nothing by this Grant, because they were not then in Being; besides, the Issue were to take jointly with the Father and Mother, if they took any Thing at all. *Cro. Eliz.* 121. *Stevens* versus *Lawton*. *Owen* 40. *S. C.* Postea Habendum. (D) 2.

3. Lease at Will, rendring 6 *l. per Annum* Rent; the Lessor by another Deed reciting this Rent, granted *Eundem Redditum* to another for Life, the Lease at Will determined; adjudged, that the Grantee shall have 6 *l.* Rent for his Life, for *Eundem redditum* shall be taken for the like Rent, or *Talem redditum*. *Cro. Eliz.* 241. *Kinder* versus *Leverfage*.

4. Grant of an Annuity out of certain Lands, when in Truth the Grantor had nothing in the Lands, yet this shall charge his Person in a Writ of Annuity; and if a Man grant an Annuity to a Woman, who afterwards marries, then 'tis in arrear, and the Wife dies, so as the Annuity is extinct,

extinct; yet the Husband shall have an Action of Debt for the Arrears. *Goldsbr. 30. Sellen-ger's Case.*

5. Lessee for Years of a Messuage granted *All that his Messuage*; the Grantee hath but an Estate at Will; but if he grant all his *Interest and Estate in the Messuage*, then the whole Lease passeth. 2 *Leon. 78. Griffin's Case.*

6. Two Jointenants for Years of a Mill, one of them pretending to have the Whole by Survivorship, did grant to the Plaintiff the said Mill, and *all his Estate therein*, when in Truth his Companion in his Life-time had granted his Part to *B. G.* who entered and evicted the Plaintiff of a Moiety; the Question was, if this Word *Grant* did imply an express *Warranty* against the Title of the other, without any other Words; and adjudged it did. *Cro. Eliz. 809. Proffter versus Johnson. 2 Cro. 233. S. C. Antea Exposition of Sentences. (C) 4.*

7. In Trespass, the Defendant pleaded, that it was used in the Manor of *R.* that every Owner of an House there had Common in the Lord's Waste; that the Lord granted an House to *B. G.* in Fee, who bargained and sold it to the Defendant, *with all Commons, Profits and Commodities used with the same*, and he sold the *Waste* to another; it was insisted, that the Grantee ought not to have Common in the Waste, for if he had, then this would enure as a new Grant to him of the Common, which it could not be, because it referred to a former Usage, and that being interrupted, it did not pass by this Grant; but adjudged that it did, for it shall be a Grant of such Common as other Tenants of the Manor used to have. 2 *Bulst. 222. Grimes versus Peacock.*

8. The Bargainor being seised of the Manor of *D.* and of a House, and also of a *Lease for Years* there, did bargain and sell the Manor, and *all other his Lands and Tenements whatsoever in D. habendum* to the Bargainee and his Heirs, and covenanted that he had the Premises in Fee; the Court was divided, whether this Lease for Years should pass by those general Words. *Godbolt 113. Edwards versus Denton. Moor 832. S. C.* that it did not pass, and since adjudged, it doth not pass. See *Lord North* and *Bishop of Ely*, and 1 *Bulst. 99. Turpin versus Foreigner.*

9. The Lord of a Manor wherein there were Copyholders for Life, made a Lease of a Copyhold Tenement called *Harris-Farm*, to two Persons for eight Years, to commence after the Death of the Lord and his Wife; and by their Indenture they leased the whole Manor to the same Lessees; the Copyholder surrendered, and then the Lord *granted the Copyhold to another*, to hold according to the Custom of the Manor; afterwards he and his Wife died, upon whose Deaths the Lease made by the Lord to the two Lessees did commence; one of them entered and sold his Part, the other entered on the Whole as survivor, and the Copyholder entered on him; adjudged, that the Survivor should have this *Harris-Farm* as in Gross, and not as Parcel of the Manor by the last Lease. *Godbolt 127. Green versus Harris.*

10. Grandfather, Father, and Son, the Grandfather was seised in Fee of several Lands in *D.* and *S.* in the Occupation of *E. of P.* and of *G.* some of which Lands he had by *Purchase* and some by *Descent*, and being so seised, he died; then the Father conveyed to the Son *All his Messuages, Lands, &c. in D. and S. in the Occupation of E. of P. and of G. which my Father purchased of several Men*, and also conveyed to him a House called the *Hart*, which he had by *Descent*, but not in the Occupation of either of those Tenants; the Question was, whether all the Lands which the Grandfather had by *Descent* in both those Towns, and in the Occupation of those three Tenants, did pass by those general Words, or only the Lands which he had by *Purchase*; adjudged, that the Lands only passed which he had by *Purchase*, for the general Words were restrained to those Lands by the later Words in the same Sentence. *Mich. 11 Jac. Clay versus Barnett. Godb. 236.*

11. Adjudged, that where a Man hath *several Fishing* in a River, and grants to another *liberam Piscariam*, in such Case the Grantee hath *free Fishing* with the Grantor; but if he grant *Piscariam suam*, without any other Words, then the entire Fishing passes. 2 *Sid. 8. Alderman of London versus Husing.*

(B)

What passes by such Grants of Lands, &c.

1. Houses and Mills will pass by the Grant of all Lands, because that is the most durable Thing on which they are built; and in a *Præcipe quod reddat*, where a House or Mill is demanded, the Warrant of Attorney is always *in placito terra.* 4 *Rep. 86. in Lutterell's Case.*

2. Lessee of an House and Land for a certain Number of Years, if he should so long live; afterwards the Lessor granted the House and Land to another, *habendum the Reversion for his Life, cum post mortem, sursum redditio vel forisfacturam* of the Lessee, or otherwise it should happen, paying to the Grantor and his Heirs *cum Reversio acciderit*, an yearly Rent of 10 *l.* the Lessee died, the Grantor distrained for Rent due in the Life-time of the Lessee, and after: Adjudged, that by the Grant of the House and Land *for Life*, the Reversion passed after the Death of the Lessee for Years; but if it had been a Grant of the *Reversion*, the Land would not have passed. *Pashmore versus Prowse. Vouch in 10 Rep. Lofeild's Case.*

3. Demise of an House and Land (excepting the Trees) for Life, and afterwards by the same Indenture he covenanted to stand seised *de tenementis præd'* to the Use of *R. L.* in Tail, with di-

vers Remainders over; adjudged, that notwithstanding this Exception, the Trees pass in the Reversion as Parcel of the Inheritance, and annexed to it. 11 Rep. 46. *Liford's Case*.

4. In a Writ of Entry in the *Quibus* against one *Marrow*, for seventy Acres of Land in *R.* the Tenant pleaded, that *B. G.* was seised in Fee, and demised the Land to him for Life; the Demandant made a Title under the same *B. G. absque hoc*, that he demised it to the Tenant *modo & forma*; upon this they were at Issue, and the Jury found, that *B. G.* and six more were seised of an House, and of the said seventy Acres to the Use of the said *B. G.* which House and Lands had been, Time out of Mind, called *W.* and that they made a Lease of the said House, with the Appurtenances (but did not say of the seventy Acres) to the Tenant; there was a Verdict for him, and afterwards the Demandant moved in Arrest of Judgment, for that the Verdict had not found, that the seventy Acres were appurtenant to the House; but adjudged, that by the Grant of the House, the Grantee shall have the other as a Thing implied in the Grant. *Hill. 5 Mar. Dyer 158.*

5. By a Grant *de Vestura terre*, the Freehold doth not pass, because the Soil it self belongeth to another, and the Grantee hath no Authority to dig in it by Virtue of such Grant. *Trin. 30 Eliz. Owen 37. Dyer 375. S. P.*

6. If a Man grant *omnes Boscos suos* in *D.* this passeth the Soil; but if he grant *all his Lands* in *D. exceptis Boscis*, this extendeth to the Trees only, and not to the Soil. 28 H. 8. *Dyer 19. 5 Rep. 11. 11 Rep. Liford's Case. S. P.*

7. Adjudged, that by a Grant of all his Lands the Woods will pass, and by a Grant of all his Lands called *D.* in the Tenure, Occupation, or Possession of *T. S.* that if *T. S.* had Part of the Lands in Lease, and Part not, yet if he depastured his Cattle there, 'tis sufficient to pass the Whole, let the Possession or Occupation be by Right or Wrong. 1 Roll. Rep. 23. *Dockwa versus Befis.*

(C)

What passes by their Grants in Goods and Chattels, and what not.

1. IT was held formerly, that by a Grant of all *his Goods and Chattels*, that Bonds would pass, yet now 'tis held to the contrary, (*viz.*) that the Words *Goods and Chattels* do not extend to Bonds, Deeds, or Specialties, or to any Evidences concerning the Freehold or Inheritance; for these are Things in Action, unless 'tis in some Special Cases, as where they are brought into an Inn and lost by the Default of the Inn-keeper, there the Writ shall be *Bona & Catalla* generally. 8 Rep. 33. *Caly's Case.*

2. If Executors grant *omnia Bona sua*, it was likewise formerly held, that the Goods which they had as Executors, did not pass; but now 'tis held, that by such Grant the Goods which they had of the Testator do pass. 18 Eliz. *Plowd. Com. in Bracebridge's Case. 1 Leon. 263. Lord St. John and Countess of Kent. Noy 106. Balby versus Spooner. S. P.*

4. In Trover for fourteen Lemon-Trees, the Case was, the Plaintiff got Leave of the Lord *Brudnell* above six Years before the Action brought, to have the Trees stand in his Garden, and that my Lord's Gardener should take Care of them; my Lord sold the Garden, and all the Trees therein, to the Lord *Portland*, who sold the Garden, and whatever he had therein, to the Defendant *Vernon*, upon whom a Demand and Refusal of these Trees was proved: It was ruled by *Holt Ch. Just.* that these Trees being in Boxes, did not pass by the Grant of the Lord *Brudnell*, because they were separate from the Freehold. *Mod. Cases 170. Oliver versus Vernon.*

(D)

Where Grants are void, or not void, for Misrecitals and other Matters.

1. FEME, Lessee for Years, married, he in the Reversion granted the Lands to another, to commence after the Term demised to the Husband, when in Truth there never was any such Demise to him, for it was leased to the Wife, and by Act of Law transferred to him, (*viz.*) by the Intermarriage; yet adjudged, that the Commencement of the Lease in Reversion shall be after the Expiration of the Lease to the Wife. *Plow. Com. 192. Wrotesly versus Adams.*

2. Lease for Years, reciting a former Lease to be made 6 Aug. 30 H. 8. when in Truth it was made 30 Aug. in the same Year; the Defendant pleaded *Non dimisit modo & forma*, upon which Issue was joined, and the Jury found the Special Matter; adjudged, that the principal Matter was *Si dimisit*, which being found, 'tis not material whether it was *modo & forma*, or not; so that the Misrecital shall not prejudice the Plaintiff in this Case. *Trin. 3 Mariae, Dyer 116.*

3. The Vendor having purchased an House in *R.* of *B. G.* made a Feoffment of it by the Name of a Messuage late of *R. G. cum pertinentiis* in *R.* aforesaid, which was false, for *R. G.* was never possessed of it; adjudged, that the Feoffment was good, if both the Names of *B. G.* and *R. G.* had been omitted, and that the Words *Messuagium præd' cum pertinentiis* in *R.* had been sufficient to pass it. *Pasch. 29 Eliz. Dyer 376.*

4. King Ed. 6. granted to the Bishop of Coventry, and his Successors, the Advowson of the Church of D. in *proprios Usus*; after the Death of the then Incumbent, the Bishop, in the Lifetime of the said Incumbent, made a Lease thereof, to begin after the Death of the Incumbent, which was confirmed by the Dean and Chapter, and then the Incumbent died; adjudged, that the Lease was void, because the Bishop had nothing in the Advowson when the Lease was made. 7 Eliz. Dyer 244.

5. In Waste for cutting down and selling Trees; the Defendant pleaded, that the Plaintiff granted to him *Omnes Arbores suas crescentes super, &c. quæ possint rationabiliter parcare*; adjudged, that this Grant was void, because 'tis incertain how many Trees might reasonably be spared. Mich. 1 Mar. Dyer 91.

6. Bargain and Sale of several Messuages lying in the Parish of St. Andrew Holborn, in the Tenure of B. G. when in Truth they were in the Parish of St. Sepulchres, but in the Tenure of the said B. G. the Deed was enrolled; but adjudged, that nothing passed by it, because the first Description was false, tho' the second was true; but if the first had been true, and the second false, in such Case the Grant had been good, notwithstanding the Misrecital. 3 Rep. 10. Dowry's Case.

7. Grandfather, Father, and Son, the Grandfather had several Lands, both by Purchase and Descent in R. and S. in the Tenures of B. G. and R. W. and died; the Father made a Conveyance of several Lands to the Son in these Words, (*viz.*) All my Messuages, Lands and Tenements in R. and S. now in the Tenure of B. G. and R. W. which my Father purchased from divers Men, and also a House called *The Hart*, which came to him by Descent, in the Tenures of the said B. G. and R. W. adjudged, that none but the purchased Lands passed by this Conveyance, except the House called *The Hart*, and that passed, because it was expressly named; but all the other Lands which he had by Descent, did not pass by the general Words, *All my Lands and Tenements*, tho' they were in the Tenure of B. G. and R. W. and tho' they were in the Parishes named in the Conveyance, which are two of the Restrictions to which these general Words must refer; but they likewise refer to the third Restriction, (*viz.*) *To all the Lands which the Father had by Purchase*, and therefore the Lands which he had by Descent shall not pass. Godbolt 236. Clay versus Barnett. 8 Rep. 150. Altham's Case, Second Resolution. S. P.

8. King Ed. 3. granted to the Son *Omnes advocaciones Ecclesiarum quæ pertinent ad prioratum de Mountague, &c.* and which he lately granted to William Earl of Salisbury, the Father, when in Truth the Advowson then in Question was never granted to the Father; yet adjudged, that notwithstanding this Misrecital, the Grant was good. 10 Rep. 110. in Legat's Case.

1 Lev. 41. 9. Lessee for Years granted to T. P. *so much of the Term as should be unexpired at the Time of his Death*; the Grantee assigned all his Interest, &c. and covenanted, that the Assignee should quietly enjoy against all Persons, and entered into a Bond for Performance of Covenants; the Oblige brings an Action of Debt, and assigns a Breach, upon which they were at Issue, and the Plaintiff had a Verdict; but it was adjudged upon a Motion in Arrest of Judgment, that this Action would not lie, because the original Grant being void for the Incertainty, the Covenants in the Assignment of that Grant must likewise be void, for those depend upon the original Grant, and the Bond depends on the Assignment, and so they are all void. Raym. 27. Capenhurst versus Capenhurst. See Restor of Chedington's Case. See Yelv. 18. Soprani versus Skurro. Yet in Owen 136, it was held, that the Covenant shall bind, tho' the Deed is void in the Case of Waller versus Dean and Chapter of Norwich.

Guardian.

(A)

Cro. Eliz.

825.

2 And.

171.

* T. Jones

17.

Sadler v.

Draper.

1. IN Ravishment of a Ward, the Case was, that a Woman had two Sons by several Husbands, the Son of her last Husband being under Age; after the Death of the Mother, the Guardianship of the Infant was claimed by his Uncle, and it was likewise claimed by his elder Brother, who was of the * *Half-Blood*; and adjudged, that it belonged to his Brother, and not to his Uncle. Moor 635. Swan versus Gaterland.

2. Before the Statute 12 Car. 2. cap. 24. if Tenant by *Knights-Service* had devised the Guardianship of his Heir at Law, it had been void in respect to the Lord; for notwithstanding such Disposition, he shall have the Guardianship by Reason of the Tenure of the Land, neither shall such a Devise bar a *Guardian in Socage*, because he claims nothing but for the Benefit of the Heir; 'tis true, the Tenant in Socage might have disposed his Lands in Trust for the Benefit of the Heir, but he could not devise or dispose the Guardianship or Custody of the Heir himself, from the next of Kin, to whom the Land could not descend, because the Law gave the Guardianship to such next of Kin. Keilw. 186.

3. But now Tenant in Socage, tho' under Age, hath Power to nominate who shall have the Custody of his Heir, and for what Time, and accordingly the Lands shall follow the Guardianship; not as an Interest devised by the Testator, but as an Incident given by the Law to attend the Custody of the Heir; and therefore such a Special Guardian, which may be now made by Virtue of that Statute, cannot transfer or assign the Custody of his Ward by any Act executed by him, because the Trust is Personal, and cannot be assigned; neither shall it go to the Executor or Administrator of the Guardian, but determines by his Death. *Vaugh. 180. Bedell versus Constable. See Dyer 189. Lord Bray's Case.*

4. By the Statute before-mentioned, 'tis enacted, *That where any Person hath a Child under the Age of twenty-one, and not married at the Time of his Death, the Father of such Child, (tho' under Age himself) whether born, or in Ventre sa mere, may by Deed executed in his Life-Time, or by his last Will, dispose the Custody of such Child till he shall arrive to twenty-one, or for any lesser Term; and such Disposition shall be good against any claiming as Guardian in Socage, and the Person to whom the Custody is so disposed, may have an Action of Trespass against any one who shall take him away, and recover Damages for the Benefit of the Child, and he may receive the Rents and Profits of all his Lands and Tenements, but for the Use of such Child; and also the Personal Estate during the Time he is appointed Guardian, for the like Benefit.*

5. Now the Meaning of this Statute is, that whereas all Tenures are in Free Socage, and the next of Kin, to whom the Land cannot descend, is Guardian at Common Law, until the Heir is fourteen Years old; the Father since the Making this Act may appoint a Guardian to his Heir for any Time until he be twenty-one Years old, and such Guardian shall have the like Remedy for his Ward, as Guardian in Socage had at Common Law.

6. But a Copyholder is not within this Statute, to dispose the Custody of his Heir, for that belongs to the Lord of the Manor according to the Custom, tho' not *de jure*; for if there is no such Custom, then the next of Kin, to whom the Land cannot descend, shall have the Custody both of the Infant and his Lands; but if there is such a Custom, then this Statute shall not set it aside, because if it should, the Lord of the Manor might be at a Loss. *3 Lev. 395. Clench versus Cudmore. 2 Lutw. 1181. S.C. See Hutt. 16, 17.*

7. Sir Henry Wood devised the Guardianship of his Daughter to the Lady Chester; and afterwards the Dutchess of Cleveland, to whose Son this Daughter was contracted, being then about eight Years old, pretended, that Sir Henry Wood had revoked this Guardianship, and libelled in the Prerogative Court to have this Nuncupative Will of Revocation proved; but a Prohibition was granted, because the Guardianship is a Thing cognisable in the Temporal Courts, who are to judge whether the Devise was pursuant to the late Statute. *1 Vent. 207. The Lady Chester's Case.*

8. Debt by a Bishop and his Commissary, upon a Bond to them conditioned, that whereas the Defendant was by the Spiritual Court appointed Guardian to an Infant, if he safely guard his Estate, and render him a just Account of all his Goods and Lands, &c. then the Bond to be void; the Defendant pleaded, that the Bond was taken *extorsive colore Officii*, &c. and upon Demurrer, *Hale Ch. Just.* held, that tho' the Ordinary hath Power to appoint a Curator or Guardian to an Infant, it must be only as to his Personal Estate; but here 'tis both of Goods and Lands, which makes it void; and if he might take a Bond to himself, yet it must not be to his Commissary too; but the other Judges held the Bond good. *2 Lev. 162. Bishop of Carlisle v. Wells.*

9. In a Prohibition, the Plaintiff declared, that the Title to Guardianship is determinable at Common Law; but that the Defendant had libelled against him (the now Plaintiff) in the Spiritual Court, that by the Canons and Ecclesiastical Constitution, any Person having the Tuition of an Infant under Age, committed to him by the Will of the Father, or *per judicem competentem*, ought to have the Custody of such Infant, and his Portion; and if any Person detain such Infant, or his Portion, he is punishable and compellable by Ecclesiastical Censures, to deliver up the Person and Portion of such Infant to his Guardian; and that the Custody of *J. R.* an Infant, under the Age of fourteen, having a Legacy left by his Father, was, upon the Probate of his Will, committed by the Spiritual Court, to the now Defendant, till he should attain the Age of fourteen Years, and that the Defendant then detained him; there was a Plea, and a Replication, and a Demurrer; and adjudged, that tho' the Spiritual Court hath Authority to commit the Custody of an Infant, having only a Personal Estate, yet as this Libel is, the Prohibition must stand, for it being founded on a Libel, which is, that by the Laws Ecclesiastical any Person, having the Tuition of an Infant, &c. ought to have the Custody of such Infant, and his Portion, and a Suit in the Ecclesiastical Court for Detainer of them; this is certainly ill, because it includes Commitments of Guardianships by Fathers, upon the Statute *12 Car. 2.* which appoints a Remedy to the Guardian by an Action of Trespass, where an Infant is taken and detained from him; and therefore they ought not to proceed on this Libel. *2 Lev. 217. Lowry versus Reines.*

10. Habeas Corpus directed to Sir Robert Viner to bring in the Body of Bridget Hide, Daughter and Heir of Sir Tho. Hyde, whose Widow the said Sir Robert had married, and she being now dead, the Custody of her Daughter, being thirteen Years of Age, was left with Sir Robert, who had no Right to her, for that her Aunt was Guardian by Law; it was suggested, that he intended to marry her to some Great Person, but of a small Fortune, tho' she was already married to one Mr. Emmerton, by the Consent of her Mother, whilst living; she was brought into Court, and being asked, whether she was willing to stay with Sir Robert; she answered, that she was; whereupon he was ordered to enter into a Recognizance of 40000 *l.* not to suffer her to marry, whilst she was in his Custody, and that he would permit her Aunt and Friends to visit her. *2 Lev. 128. The King versus Sir Robert Viner.*

Gun.

Gun.

(A)

4 Mod.
49.
* 2 & 3
Ed. 6. c.
14.

1. **T**HE Defendant was indicted at the Quarter-Sessions, for that he *non habens* Lands, &c. of the Yearly Value of 100 l. 9 Nov. 31 Car. 2. at B. did shoot in an * *Hand-Gun, contra formam Statuti*, &c. *contra pacem*, &c. Upon Not guilty pleaded, he was found Guilty, and the Entry of the Judgment was thus; *Ideo considerat' est per Curiam quod præd' T. A. solvet, &c. decem librar' pro fine*, &c. upon a Writ of Error brought, it was assigned for Error, that the Indictment was ill, for the Words *non habens terras* refer to the Time of the Indictment, and not to the Time of the Shooting; for he might have 100 l. *per Annum* when he did shoot, and might part with it before he was indicted for shooting; besides the Judgment is, that *solvet decem librar'*, instead of *solvat decem libras*; and for these Faults the Judgment was reversed; like *Sauslie's Case*. Cro. Eliz. 754. an Indictment for a Forcible Entry into Lands, *existen' liberu' Tenementum*, instead of saying *adunc existen'*, which is ill. Raym. 378. *The King versus Alsop*.

Sid. 419.

2. By the Statute 33 H. 8. cap. 6. the keeping of an *Hand-Gun* is prohibited, and shooting in it with *Hail-shot*, under the Penalty of 10 l. one Moiety to the King, and the other to the Informer; the Defendant *Saunders* was convicted by two Justices of the Peace for this Offence, (*viz.*) *for keeping an Hand-Gun, and shooting with Hail-shot, not having 100 l. per Ann. &c.* and for not paying the 10 l. he was committed, and being now brought up by *Habeas Corpus*, and the Record of this Conviction being removed by *Certiorari*, it was quashed; for that the Conviction was before T. B. and G. B. two Justices of Peace *ad pacem in Com' præd' conservand'*, leaving out the Word *assignatis*; so it doth not appear, whether they were Justices assigned to keep the the Peace, or not; besides, the Conviction was before two Justices, whereas the Statute gives Authority to one Justice to convict, *he being the next Justice of Peace* where the Offence was committed; and it doth not appear in this Case, that either of the Justices was the next, or not. 1 Saund. 263. *Sanders's Case*. See Vent. 33, 39.

3. The Defendant was convicted before a Justice of Peace upon the Statute, for keeping a Gun, not having one Hundred Pounds *per Ann.* and the Record of this Conviction being removed into B. R. it was quashed upon this Exception, (*viz.*) *non habuisset 100 l. per Ann'*, but did not say *when*: for it might be, that he had 100 l. *per Annum* at the Time when he kept the Gun, but not at the Conviction; now in this Case the Offence ought to be certainly alledged, (*viz.*) That the Defendant *prædict' die & anno* had not 100 l. *per Annum*. 3 Mod. 280. *The King versus Silcox*.

* 33 H. 8.
cap. 6.

4. The Case of the King and *Alsop* before-mentioned, is reported in 4 Mod. Rep. upon other Exceptions to the Indictment, as to the Matter in Law, (*viz.*) That the Justices of Peace have no general Jurisdiction to hear and determine this Offence; for tho' their Commission is *ad pacem conservand'*, yet that must be intended in Cases only of open Force and Violence; their Commission is likewise to inquire *de omnibus offensis*, but that must be understood of such Offences of which they may lawfully enquire: Et per Holt Ch. Just. the Justices of Peace have Power by the general Words of their Commission, to punish Offences against any Statute made concerning the Peace; but the Statutes made concerning Shooting do not relate to the Peace, but only to the due Qualification of the Person who shoots, and that cannot be an Offence against the Peace; therefore if this Indictment is not good upon the Statute 2 & 3 Ed. 6. 'tis not good upon the Statute of * H. 8. for by that Statute 'tis required, that the Gun should be a Yard long, and this Indictment doth not set forth the Length of the Gun; therefore the Conclusion *contra formam Statuti* will not help; therefore this Indictment is not good before the Justices of Peace for want of Jurisdiction. 4 Mod. 49. *The King versus Alsop*.

* 33 H. 8.
cap. 6.

5. The Defendant not having 100 l. *per Annum*, did shoot in a Gun in February, and was brought before a Justice of Peace in March following, and by him convicted; now by the * Statute no Time is limited when the Offender shall be carried before a Justice of Peace to be examined; and therefore it ought to be *instantur*, which not being done, the Conviction was quashed upon a Motion. 4 Mod. 147 *The King versus Bullock*.

Habeas Corpus.

Who shall have it; to whom it shall be awarded; and the Punishment for not obeying the Writ. (A)	Of the Proceedings after the Writ delivered. (B) Returns thereof, good. (C) Returns thereof, not good. (D)
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(A)

Who shall have it; to whom it shall be awarded; and the Punishment for not obeying the Writ. See *False Imprisonment per totum*.

1. **W**HERE an Officer of either of the Courts in *Westminster-Hall*, is sued in an Inferior Court, he may have a Writ of Privilege, which is a *Superfedeas* to the Action there, or if he is committed he may have an *Habeas Corpus*, and no *Procedendo* shall be awarded, because his Attendance in a Higher Court is necessary. *Hill. 12 Eliz. Dyer 287. 2 Eliz. Mich. Dyer 175 S. P.*

2. There was Judgment against the Defendant in the Court of King's Bench, and afterwards another Judgment against him in the Court of Common Pleas, upon which he was in Execution in the *Fleet*, and brought an *Habeas Corpus*, and removed himself into the King's Bench; and it was held, that the Writ was well awarded, and that he should now be in the Custody of the Marshal for both the Debts. *Mich. 4 Mar. Dyer 132.*

3. The Defendant was taken in Execution upon a *Ca. sa.* out of the King's Bench, and afterwards they issued a Prerogative Writ out of the Exchequer, to have his Body there, he being indebted to the Queen; the Sheriff brought him thither, and shewed the Cause of his Detainer; and thereupon he was committed in Execution to the *Fleet* for both the Debts; then he brought an *Habeas Corpus* issuing out of the Court of King's Bench, upon which the Warden of the Fleet returned all this Special Matter, and he was remanded to the Fleet. *Dyer 197. Lassell's Case. 3 Ed. 6. Dyer 167. S. P. Owen 90. S. C. Mich. 5 Car. 1. Lady Sand's Case, S. P.*

4. The High Commissioners exhibited several Articles to an Attorney, and he refusing to swear to them, was committed, and upon an *Habeas Corpus* brought, was discharged; for it belongs to the Judges to expound the Statute upon which that Court was established. *2 Brownl. 271. 9 & 10 Eliz. Ley's Case.*

5. An *Habeas Corpus* was awarded to the Lord Warden of the *Cinque Ports*, the Imprisonment being in *Dover*, and he would not obey it; whereupon an *Alias* was awarded, with a Penalty, and the Lord Warden pretended, that the King's Writ would not run there; the same Pretence was formerly by the Mayor of *Berwick*, but there was an Attachment against him, and he was committed for his Contempt; for an *Habeas Corpus* is a Prerogative Writ, which concerns the Liberty of the Subject, and ought to be obeyed; and no Answer can satisfy it, but to return the Cause of the Imprisonment, that the Court may judge of it, with a *paratum habeo*, that they may either discharge, bail, or remand him; and therefore another *Habeas Corpus* was awarded, with a very great Penalty. *2 Cro. 543. Bourn's Case.*

6. An *Habeas Corpus* was directed to the Bishop of *Durham*, who made no Return; thereupon the Court was moved for an *Alias*, with a Penalty; and the Year-Book 43 *Ed. 3.* was vouched, where it appeared, that an *Habeas Corpus* was returned from *Bourdeaux*; the Bishop insisted to have his Privileges recited in the Writ; but the Clerks affirming, that many *Certiorari's* have been returned from *Durham*, the Court would not change the antient Forms. *Latch. 160. Johnson's Case.*

7. Moved for an *Habeas Corpus* to bring a Prisoner to the Assises, who was Witness in a Cause there to be tried; it was granted, but at the Charge and Peril of the Party for whom he was a Witness, if he should escape. *Style 119, 230. Tretton versus Squire.*

8. The Defendant was arrested in *Wiltshire* by a *Latitat*, and being brought to *Marlborough*, the Plaintiff dropt his Prosecution upon the *Latitat*, and arrested him by a Serjeant of that Corporation, and proceeded against him in their Court; the Court ordered an Attachment against the Plaintiff, and an *Habeas Corpus* to bring up the Defendant to the King's Bench. *Style 239. Brian versus Stone.*

9. *Habeas Corpus* directed to the Sheriff or Goaler, quashed, because in the Disjunctive. *1 Salk. 350. The King versus Fowler.*

10. *Habeas Corpus* to the Stannary-Court, to which there was an insufficient Return by Way of Excuse; and the Rule was, that the Party might go to the Coroners, and have an Amerciament on the Warden of the Stannaries estreated, and an *Alias Habeas Corpus* was granted for the Insufficiency of this Return; and if he make another Excuse, then an Attachment will go. 1 *Silk.* 350.

11. *Habeas Corpus* to the Sheriffs of London, who returned an *Action against the Defendant upon a By-Law, with a Penalty*, for not weighing at the City-Beam; and a Motion being made, that the *Record* might be filed, adjudged, that if the *Record* it self was filed, it can never be sent down by a *Procedendo* again; but this *Writ and Return* was filed, because the *Record* was not removed by the *Habeas Corpus*, as 'tis by a *Certiorari*, but remains still below; and the Return is only an Account of their Proceedings stated and sent up to *B. R.* to determine the Matter; therefore if no *Record* is filed, a *Procedendo* may be awarded, and accordingly it was done. 1 *Silk.* 352. *Fazacharly versus Baldo.*

(B)

Of Proceedings after the Writ delivered.

1. **T**HE Error assigned to reverse a Judgment in an Inferior Court was, that after an *Habeas Corpus* delivered to the Mayor, &c. and his Allowance thereof, the Court did proceed to Trial and Judgment; and adjudged, that it was Error, and that all the Proceedings were *coram non judice*; and if it was not true, that the *Habeas Corpus* was delivered to the Mayor, and allowed by him; it ought to have been denied on the other Side, for 'tis triable at Law. *Cro. Car.* 296. *Ellis versus Johnson.*

2 *Cro.* 96.
Quarles
v. Searl.

2. Error to reverse a Judgment in the Palace-Court in Trover after a Verdict, for that the Cause did not arise within the Jurisdiction; and that after the Plaint, and before the Trial, an *Habeas Corpus cum causa* issued out of *C. B.* for the Defendant, which was delivered to the Judge of that Court, and prayed to be allowed; and yet they proceeded afterwards in the same Cause, so that all was *Coram non judice: Per Curiam*, this is manifest Error, and 'tis merely in Favour to Inferior Courts, that Judgments given in Causes not arising within their Jurisdiction, are not reversed upon Motion, without a Writ of Error. *T. Jones* 209. *Copping versus Fulford.*

(C)

Returns thereof, good.

1. **U**PON an *Habeas Corpus* the Return was, that *B. G.* was committed for a Contempt in not performing a Decree made in the Court of Requests; and this was held good. *Godb.* 199. *Lea versus Lea.*

2. One was committed by the Court of Exchequer, and upon an *Habeas Corpus* it was returned, that he was committed by the Court for not paying a Fine of 50 *l.* set on him by the Ecclesiastical Commissioners; and tho' it was not shewed for what Cause the Fine was imposed, yet because the Commitment was by a Court of Record, the Court of *B. R.* would neither bail nor discharge him. *Cro. Car.* 418. *Pasch.* 16 *Car.*

3. Upon an *Habeas Corpus* the Return was, that *Hancock* was convicted upon an Information brought by one *Atkins*, for publishing a False Petition supposed to be delivered to the King, and subscribed by him; that he was contented to discharge the Fine of *T. S.* upon a Suit in the Court of the *Marches in Wales in deceptionem Curiae*, &c. and that he being present in Court was committed to the Gaoler, and by him detained *Virtute decreti & ordinis Curiae*, until he paid 100 *l.* to the King, and 40 *l.* to *Atkins* for Costs, &c. it was objected, that this Return was ill, because it did not set forth the Proceedings, but generally, that he was committed and detained *Virtute ordinis*, &c. *Sed per Curiam*, it doth not belong to the Gaoler to shew the Proceedings at Large; and specially, if it had been *Virtute mandati*, it might be ill. 2 *Roll. Rep.* 307. *Hancock's Case.*

(D)

Returns thereof, not good.

1. **T**HE Warden of the Fleet returned, that the Prisoner was committed to the Fleet *per mandatum Francisci Walsingham militis unius principalium secretariorum Domine Regine*; and because he did not shew for what Cause, the Return was held not good. 2 *Leon.* 175. *Hilliard's Case.*

2. The like Return was made in *Howell's Case*, and held void for the same Reason; but there the Court gave the Marshal Leave to amend the Return, which he did in this Manner: *Infra nominatus Johannes Howell commissus fuit, &c. ex sententia & mandato totius Concilii privati Domina Regina & quod corpus ejus habere non possum, &c.* and this Return was also held insufficient, for by whomsoever he was committed, the Return ought to be, *Corpus tamen ejus paratum habeo.* 1 Leon. 70. *Howell's Case.* See *Postea* 8. *Addis's Case.* 4 Leon. 21. *Hind's Case contra.*

3. The Prisoner was committed to the *Marshalsea* by the Judge of the Court of Admiralty, and upon an *Habeas Corpus* it was returned, that he was committed, &c. for assisting *B. G.* (who was committed upon an Indictment for Piracy) with Ropes and other Engines, to escape out of Prison; adjudged, that tho' the Fact was committed *infra Corpus Comitatus*, yet because it depended on the Piracy of the other, the Prisoner shall be remanded; for the Temporal Judges have no Jurisdiction in this Case. *Yelv.* 135. *Scodding's Case.*

4. The Keeper of *Newgate* returned on an *Habeas Corpus*, that *B. G.* was committed to his Custody by Warrant from the Lord Chancellor, for certain Matters concerning the King, there to remain until the Lord Chancellor delivered him, and for that Cause he could not have his Body there; it was objected, that the Return was too general, because it did not set forth for what Causes he was committed; and that it was against Law for a Man to remain in Prison until he should be delivered by the Lord Chancellor. 2 Cro. 219. *Addis's Case.*

5. *Dr. Alphonso* was committed by the College of Physicians for practising Physick, &c. and upon an *Habeas Corpus* the Return was held insufficient, because it did not set forth the Cause of his Commitment in particular, and the Court would not suffer them to amend the Return, but bailed the Prisoner; the rather, because if they discharged him, he would be immediately committed again, and then they would amend the Return. 2 Bulst. 259. *Dr. Alphonso's Case.*

6. There was a Sentence in the Ecclesiastical Court against the Husband, for Alimony, and a Fine set on him for not paying it, and he was ordered to enter into a Recognizance to perform the Sentence, for both which Causes a Prohibition was awarded; and this Matter appearing upon the Return of an *Habeas Corpus* he was discharged. 2 Brownl. 36. *Agar's Case.*

7. There was a Sentence in the High Commission-Court against the Husband for Alimony, which he did not perform, and thereupon was committed; he brought a *Habeas Corpus*, upon which it was returned, that he was committed to Prison, and there detained for Causes Ecclesiastical, and by Force of the Statute 2 H. 4. cap. 15. adjudged, that the High Commission-Court can neither fine nor imprison for Alimony; and thereupon the Party was bailed. 2 Bulst. 300. *Bradshaw's Case.* 12 Rep. 46. *Roper's Case.* S. P. 12 Rep. 82. *Chancey's Case.* S. P. 2 Brownl. 18. S. C.

8. The Return of the *Habeas Corpus* was, that he was committed to Prison on the 25th of December, &c. by the Command of the Lords of the Privy Council, for his insolent Behaviour, and for Words spoken at the Council-Table; and this Warrant was signed by the Lord Keeper, and twelve other Privy Councillors; but because it did not appear what Words were there spoken, that the Court might Judge of them, this Return was held insufficient. *Mich.* 5 Car. *Chambers's Case.*

9. The Return was, that the Defendants were committed to him by the Lords of the Council of the *Marches of Wales*, who made a Decree against one of them for enticing the Son and Heir of *B. G.* in the Night-time, and when he was drunk, and being but seventeen Years old, to marry the Sister of one of the Defendants, whereupon they were fined in several Sums, and to pay 100 Marks to the Prosecutor, and were committed for a Year, and until the Fines paid; and until they entered into a Recognizance for the Good Behaviour; and until the Court took farther Order; adjudged, that the Return was ill. Cro. Car. 401. *Seelie's Case.*

10. The Warden of the *Fleet* made this Return on an *Habeas Corpus*, that *B. G.* was committed to the *Fleet* by Warrant from the Lords of the Council, there to remain till further Order; and because there was no Cause shewed of his Commitment, he was discharged upon Bail. Cro. Car. 365. *Barkham's Case*, and *Lawson's Case.* *ibid.* S. P.

11. Upon an *Habeas Corpus* to the Keeper of *Newgate*, he returned, that the Prisoners were appointed by an Order of the Privy Council, to appear before the Lord Mayor, to treat with him about foreign Matters; and that they appeared, and being required by the Mayor (being in Commission of Oyer and Terminer for the City) to perform the Order of the Privy Council, and to enter into a Recognizance, they refused; whereupon he committed them; adjudged, that the Return was insufficient, because it did not set forth the Order, that the Court might judge thereof, and because 'tis said they refused to enter into Recognizance to appear before the Privy Council, and doth not say when, or where, or for what Cause. Cro. Car. 397. *Houlmough's Case.*

12. One being committed by the Court of Admiralty brought an *Habeas Corpus*, the Return was, that the Custom of that Court was to attach the Defendant's Goods (in maritime Causes) in the Hands of a third Person; and that after Summons and four Defaults made by the Defendant, the Goods so attached should be delivered to the Plaintiff, upon Caution given to restore them, if the Cause of Action be disproved within a Year; and if the Party in whose Hands the Goods so attached are, shall refuse to deliver them after four Defaults made by the Defendant, then to imprison him till he did; and shewed, that *K. W.* was indebted to *B. G.* upon an Agreement made at Sea, and that he died, and afterwards *B. G.* attached the Goods of the dead Man in the Hands

of *Heaman*; and that after Summons and four Defaults made, he tendered Caution, &c. and *Heaman* refused to deliver the Goods; whereupon they committed him; adjudged, that it was no good Custom to attach the Goods of a *dead Man*; and therefore the Imprisonment was not lawful, and the Return was not good; the Prisoner was discharged. *March 204. Heaman's Case.*

5 Mod.
319.

13. Upon an *Habeas Corpus* to the Keeper of *Newgate*, he returned, *Ego Jacobus Fell, Custos Gaolæ Domini Regis de Newgate, &c.* that the City of *London* is an antient City, &c. and that there is a Custom there, if any Complaint be made to the Mayor and Aldermen in Court, by the Master and Wardens of any Company, that a *Livery-man* chosen, and refusing to take upon him the Office, being admonished by that Court to accept it, that then the Mayor and Aldermen, &c. have used to commit the Person so refusing to the Custody of the Sheriffs of *London*, or any other Officer, there to be detained until he should consent and declare, that he would take upon him the Office, &c. that *Clerke* being a Citizen of *London*, and a Freeman of the Company of *Vintners*, was chosen of the Livery, and required to take upon him the Office, which he refused; that Complaint thereof was made to the Mayor, &c. by the Warden of that Company, and thereupon *Clerke* was summoned to appear, which he did, and refused to take upon him the said Office; and being admonished by the Court to conform, did still refuse; that thereupon the Mayor, &c. By a Warrant in Writing, did commit him to Prison in Custodia mea, there to remain until he would consent and declare, that he would accept the said Office, &c. It was objected against this Return, that it doth not appear to whom this Declaration should be made, but if it did, 'tis a void and an impertinent Custom to commit a Man until he should make such a Declaration, for after 'tis made he is at large again, and may refuse to be of the Livery; 'tis true, they might have imposed a Penalty, to be levied by Distress, but they cannot commit; and so it was adjudged in another *Clerke's Case*. 5 Rep. 64. they might bring an Action of Debt upon the By-Law, for a Forfeiture of a particular Sum; 'tis true likewise, that a Custom to commit until he should take upon him the Office of an Alderman, was held good, because that is a publick Office for the Administration of Justice, which a Liveryman is not; and this was Alderman *Langham's Case*; then it was objected, that the Warrant of Commitment ought to have been returned in hæc verba, which is very true, if this had been an extrajudicial Commitment; but when a Man is committed by a Court of Record, 'tis in the Nature of an Execution for a Contempt, and in such Case the Warrant is never returned; 'tis sufficient to say *Per mandatum Domini Cancellarii, or Dominorum in Concilio, &c.* and so it was in *Taverner's Case*: But the most material Objection, and for which the Return was adjudged insufficient, was, that here is a Custom returned for the Mayor, &c. to commit to the Custody of the Sheriffs of *London*, or other Officer, and that *Clerke* was committed *Custodia mea*, but it doth not appear that he was Sheriff of *London*, or other Officer attending that Court; 'tis true, he begins the Return thus: *Ego Jacobus Fell, Custos Gaolæ Domini Regis de Newgate*, but it doth not appear, that *Newgate* is in the City of *London*; but if it did, he ought to be committed to the Sheriff, and not to the Keeper of *Newgate*, tho' he is an Officer of the Sheriff; but of that this Court cannot take Notice. 5 Mod. 156. *Vintners Company versus Clerke.*

* 1 Mod.
10. S. P.

Habendum.

How, and in what Manner it limits and explains the Premises. (A)	misses, in respect to the Estate limited. (C)
Where 'tis larger than the Premises, in respect to the Parties to the Deed. (B)	Void, where 'tis repugnant to the Premises, and for other Matters. (D)
Not void, where 'tis less than the Premises. (B)	Where 'tis exclusive of the Date of the Deed. (E)

(A)

How, and in what Manner it limits and explains the Premises.

1. **L**ease for Years of a Farm in *R.* the Lessor afterwards made another Lease of the *Reversion* of the Farm in *R.* *Habendum the Farm* (without naming the Reversion) from the Determination of the Lease in Being for sixty Years; adjudged, that the Reversion passed, tho' not named in the *Habendum*; for 'tis all one where a Lease is made of a *Reversion* of a Farm, *habendum the Farm*, and where 'tis made of the Reversion, &c. *habendum Reversionem.* *Plow. Com.* 190. *Wroteley versus Adams.* *Postea* (C) 3. *S. P.*

2. It is the Office of an *Habendum* to limit and explain the Estate in the Premises; therefore where Lands were leased to Two, *Habendum* for the Life of one of them, this is a joint Estate, tho' by Reason of the *Habendum* no Survivorship can take Place; but if Lands are given to Two, *Habendum* to one for the Term of his Life, they are Tenants in Common, because *Omne majus includit minus.* *Dyer* 10, in *Bokenham's Case.* *Hob.* 172. *S. P.*

3. The Grantor made a Grant of the *Reversion* in the Premises, *habendum terras*; and the Question was, whether the Reversion should pass, because it was not mentioned in the *Habendum*, but only *Habendum terras*; but adjudged a good Grant, and that both did stand well together, *Plow. Com.* 155. *Throgmorton versus Tracy.* *Dyer* 125. *S. P.*

4. The next Avoidance of a Church was granted to Three, *Habendum* to them and to one of them jointly and severally; the first Person named in the Grant presented the last, who was instituted and inducted, and it was adjudged good; but if the Bishop had refused Institution upon this Presentation, the Presentee might have failed if he had brought a *Quare Impedit*, because the Grant of the Avoidance was joint in the Premises to all Three; and the Severance in the *Habendum* was void. *Mich.* 14 *Eliz.* *Dyer* 304.

5. Lease to Mother and Son, *Habendum* to them for their Lives, and for the Life of the longest Liver * successively one after another, as they are named in the Lease, and not jointly; Livery and Seisin was made; adjudged, that the Mother had the Freehold, and the Son took in Remainder, and not jointly with his Mother. 20 *Eliz.* *Dyer* 361. * See Postea (B) 2.

6. Tenant for Life made a Lease for Years of Lands, and afterwards granted the same to *B. G.* *Habendum tenementa præd,* from the Feast of *St. Michael next following, for Life*; the Lessee for Years attorned; adjudged, that the Grant to *B. G.* for Life was void, for an Estate of Freehold cannot commence at a Day to come, because a Man cannot make a present Livery to a future Estate; but the *Habendum* is not repugnant to the Premises, because there was no Estate limited to *B. G.* in the Premises, but the Land is generally granted to *B. G.* which might be qualified in the *Habendum* to an Estate for Years, or at Will. 2 *Rep.* 55. *Buckley's Case.* *Mich.* 43 *Eliz.* *Hodge versus Crosse.* *S. P.* *Postea* 13.

7. Lease of a Meadow to one for ten Years, and of another Meadow to another Person for twenty Years; and afterwards the Lessor by a third Lease, reciting the said Leases, demised both the said Meadows to *B. G.* for forty Years, *habendum* after the End of the said several Leases; the first Lease expired; adjudged, that the Lease for forty Years shall begin in the first Meadow immediately, and shall not wait the End of the twenty Years in the other Meadow, because the *Habendum* shall be taken *respective*, and every Deed shall be taken strongest against the Grantor, and in the most beneficial Sense for the Grantee; and 'tis more for his Benefit to have the Lease commence as to the first Meadow presently after the Expiration of ten Years, than to wait to have both after the Expiration of twenty Years. 5 *Rep.* 7. *Justice Windham's Case.* See *Veal* versus *Road.* *Cro. Eliz.* 671.

8. Lease to Three was made in the Premises jointly, *Habendum* to one of them for his Life, Remainder to the other for his Life, Remainder to the Third for his Life; adjudged, that the Estate which was joint in the Premises was now severed by this *Habendum* into so many Remainders; but if it had been *Habendum, &c. successive*, it had been joint still. 1 *Leen.* 10. *Sutton versus Dowse.* *Postea* pl. 13. *S. C.*

1 And
160.
Owen
140.

9. Devise to his Son of all his Lands in R. S. and T. also of all his *Island* or Land enclosed with Water, *habendum all the last before demised Premises* to his Son, and the Heirs of his Body; adjudged, that by this *Habendum* the Devise was not restrained to the *Island* only, but extended to all the Lands before devised, because it was *Habendum all the last before devised Premises*, which being in the plural Number, shews, that the Testator intended the Whole, and not the *Island* alone should pass. 1 Leon. 57. *Wiseman versus Wiseman*.

10. Lease was made to Three, *Habendum* to them for their Lives, and for the Life of the Survivor of them, this is a joint Estate by the *Habendum*; but then followed a Clause, (*viz.*) Proviso, that Two of them shall not take any Benefit during the Life of the Third; and that after his Death, one of them should not take any Benefit during the Life of the other; adjudged, that this Clause came too late, for the Estate was settled by the *Habendum*, which had done its Office by making it a joint Estate, and therefore this Clause after the *Habendum* shall not sever it. 1 Leon. 317. *Scovell versus Clavell*. Cro. Eliz. 89, 107. S. C.

11. The Grantor conveyed *Situm Rectoriae cum decimis eidem pertin'*, *Habendum* the aforesaid Site, with the Appurtenances, for twenty Years; it was insisted, that the *Tithes* did not pass, for tho' they were mentioned in the Premises, yet they were left out of the *Habendum*, and therefore would not pass; but adjudged, that since Tithes are Parcel of a Rectory, they shall pass together with the Site thereof, with the Appurtenances, for the said Term of twenty Years. 1 Leon. 281. *Cary's Case*. Moor 222. S. C.

12. Lease to A. B. and C. for their Lives, *Habendum* to A. for Life, Remainder to B. for Life, Remainder to C. for Life; adjudged a good Limitation, and that they shall take according to the *Habendum*; for in the Premises there is only a joint Estate given by Implication, which is controlled by the express Limitation in the *Habendum*. Cro. Eliz. 25. *Dowse's Case*. 1 Leon. 10. S. C.

13. Feoffment to his Son, but did not express in the Premises for what Estate, *Habendum* to him in Tail after the Death of the Father; afterwards, he by his Will devised these Lands to his Wife for Life, and died, she married again, and then she and her Husband joined in a Lease for Years to W. R. of the same Lands; and in Ejectment brought, all this Matter appearing, the Question was, if the Feoffment was good, for if it was, then the Will as to these Lands is void; adjudged, that since nothing passed to the Son in the Premises of the Feoffment, but an Estate for Life by Implication; and since an express Estate-tail is limited to him in the *Habendum*, that shall controul the Estate for Life by Implication; and if it is void, as 'tis in this Case, after the Death of the Feoffor, then all is void; but if there had been an express Estate for Life limited in the Premises, then the *Habendum* had been repugnant to that Estate, and therefore void, and the Estate limited in the Premises had been good; but as this Case is, both are void. Trin. 34 Eliz. *Hodge versus Croffe*. Cro. Eliz. 254. See *Antea* 6.

1 Roll.

Rep. 332.
384.

14. The Father made a Feoffment to the Son, and to the Heirs of his Body, *Habendum* to him and his Heirs for ever; adjudged, this is an Estate-tail, and that the Words which follow in the *Habendum* are rather an Explanation than a Limitation of the Estate. 3 Bulst. 185. *Cooper versus Franklyn*. Moor 848. S. C.

15. The Wife was Tenant for Life, and the Husband made a Feoffment of the Lands, *Habendum* to the Feoffee and his Heirs, to the sole Use of the Feoffee and his Heirs, for the Life of the Wife; adjudged, that the Husband by making this Feoffment, had forfeited the Estate of his Wife, because the *Habendum* was absolute, (*viz.*) to the Feoffee and his Heirs; and tho' by the subsequent Clause he had limited it during the Life of the Wife, yet the first Part of the *Habendum* being absolute, the Law will limit the Remainder of the Use to the Feoffee and his Heirs. Godbolt 141. *Egerton Sir Ralph's Case*.

16. Lease for Years to Husband and Wife, and to a third Person, *Habendum* to the Husband for eighty Years, if he so long lived; and if he died within that Term, Remainder to the Wife and the third Person, if they should so long live; it was held, that by this Limitation in the *Habendum*, the Husband had all the Interest in the Term, and the other Two had nothing till after his Death; so where a Feoffment is made to Two, *Habendum* to one for Life, Remainder to the other in Fee, this is a good Limitation, and consists with the Premises. Moor 44.

17. Lease of a Manor, with all its Rights, Members and Appurtenances, *Habendum* all the Members of the said Manor to the Lessee for a certain Term of Years; adjudged a good Lease of the Manor by the Premises without the *Habendum*, for the Limitation of the Word *Members* after the *Habendum*, shall be void; so if a Man make a Lease of the Manor of D. *Habendum* to the Lessee for twenty-one Years, without repeating the Word *Manor* in the *Habendum*, 'tis good. Moor 55.

18. A Rent was granted out of Lands to W. R. and his Heirs, *Habendum* to him and his Heirs, to the Use of himself and his Heirs, for the Life of L. R. adjudged, that he had only an Estate for Life, and not a Fee-simple. Moor 876. *Wilkins versus Perrott*.

W. Jones
354.

19. Lease for Years, afterwards the Lessor, reciting the said Lease, granted the Reversion of the Lands to W. R. *Habendum* to him for sixty Years, from such Time as it shall revert to the Grantor, or his Heirs, by Surrender, Forfeiture, or otherwise; it happened, that at the Time of this Grant the Lease for Years was void by a Rasure and Interlineation; and one Question was, whether this Grant was good, or void; and adjudged, that it was void, because it was to pass a Reversion expectant upon a Lease for Years, which Lease was then void; and if there was no such Lease,

Lease, it shall not pass the Lands *in Possession*; for tho' by the *Habendum* the Grantee was to have the Lands; yet that shall not enlarge the Estate, contrary to the Premises in the Grant, which is only of a Reversion; and Deeds must be construed so as to pass the Estate accordingly as intended by the Parties. *Cro. Car. 289. Miller versus Manwaring.*

20. A Prebendary demised a Prebend to *T. S.* and his Heirs, *habendum* to him and his Heirs for three Lives, with a Letter of Attorney to make Livery and Seisin to *T. S.* his Heirs, Executors and Assigns; it was objected, that this Lease did not bind the Successor, because in the Premises an Estate *in Fee* passed, which was not abridged by the *Habendum*, and the Letter of Attorney is uncertain upon what Estate it shall operate. *Sed per Curiam*, this Lease is good; as to the *Habendum*, it may * enlarge the Premises, it may abridge the Premises, it may (1) avoid the Premises, or it may (2) explain the Premises; now in the Principal Case it explains the Premises thus, (*viz.*) the Lessee and his Heirs shall have the Prebend, but they shall have it but for three Lives. *T. Jones* 8 Rep. 154. 2 Cro. Thurnman v. Coorper. 4. *Pilsworth versus Pyett.*

per. (1) 2 Rep. Buckler v. Harvey. (2) Dyer 160. Moor 45.

21. In Replevin the Defendant made Conuſance as Bailiff of *Elizabeth Coffen*, under a Grant of an Annuity of 10 *l.* made to her for Life, &c. the Plaintiff craved Oyer of the Grant, which appeared to be made between *Nicholas Coffen* of the one Part, and *Elizabeth Coffen* and *Nicholas* her Son, of the other Part, reciting a Surrender of a former Grant, and then immediately these Words follow, *Hath given and granted* unto the said *Elizabeth and her Heirs*, one Annuity of 10 *l.* &c. *habendum* to her, and to *Nicholas* her Son, and to the Survivor of them, &c. with a Clause of Distress during their *Natural Lives*, and the Life of the Survivor; and upon Demurrer it was objected, that this Grant was not good, because there was no Grantor named; but as to that Matter it was held well, because the Indenture was made between *Nicholas* of the one Part, and *Elizabeth* of the other Part; so it must be intended the Grant of *Nicholas*; then it was objected, that the Defendant in his Conuſance had justified under a Grant of an Annuity to *Elizabeth for Life*, and upon reading the Grant, it appeared to be to her and her Heirs, which is a material Variance; and the *Habendum* to her and the Survivor, which imports only an Estate for Life, cannot alter an express Limitation of the Estate in the Premises, which was a Grant of a Rent *in Fee*; and so it was adjudged, and that the Privilege of Distress was only during Life. 1 Vent. 141. *Tretbewy versus Elſden.*

22. In Ejectment, the Plaintiff declared upon two Demises, (*viz.*) that *T. P.* had demised ten Acres to him, (but did not say for what Term) and that *W. R.* had demised ten Acres to him, *habendum for five Years*, and that he entered into the Premises so demised to him *in forma præd.*: Upon Not guilty pleaded, the Plaintiff had a Verdict; it was insisted in Arrest of Judgment, that one of the Demises was for no certain Time or Estate, and that the *Habendum* could not relate to it, but only to the last, because it was in a new Sentence; but adjudged, that the *Habendum* was a good Limitation to both the Demises for five Years, and the Averment, that the Plaintiff entered on the Premises demised to him *in forma prædicta*, shews, that all was demised to him for five Years; this Judgment was affirmed in *B. R.* upon a Writ of Error. 2 Vent. 214. *Moor versus Furſdon.*

(B)

Old, where 'tis larger than the Premises, in Respect to the Parties to the Deed.

1. Lease of Lands to *T. H.* *habendum* to the said *T. H.* and *B. G.* and to the Sons of the said *T. H.* naming them, for their Lives & *alterius eorum diutius viventis successive*; adjudged, that none could take immediately by the Deed but *T. H.* because he was only Party to it, the rest being not named, but in the *Habendum*; and those which are named there, cannot take by a Joint Remainder, because of the Word *Successive*; neither can they take in *Succession*, because 'tis uncertain who shall begin, and who shall follow. *Hob. 313. * Windſmore versus Hobert. Owen* 38. *Pasch. 27 Eliz. S. P. Mich. 30 Eliz. Kirkman versus Reynolds, S. P. 2 Leon. 1. Palm. 29. Tiler versus Fisher. 2 Cro. 63. S. C.*

2. Lease to the Husband, &c. *Habendum* to him and his Wife, and to his Daughter * successively, as they are written and named *in ordine*; the Husband and Wife died, and the Question was, whether this was a good Remainder to the Daughter; it was objected, that it was not, because it was uncertain when it should commence; but adjudged a good Remainder to her, because it shall be intended to vest as they are written and named *in Charta*, tho' 'tis said *in ordine*. 4 Leon. 246. *Grubbeam's Case.*

8 Rep. 154.
2 Cro. Thurnman v. Coorper.
2. Moor 45.

* 4 Leon. 246. S. C.
* See Antea (A) 5. S. P.

(C)

Not void, where 'tis less than the Premises, in Respect to the Estate limited.

1. **T**HE Grantor made a Grant to *B. G.* and *his Heirs*, *habendum* for 99 Years, rendering Rent; adjudged, that tho' the *Habendum* was of a less Estate than the Premises, yet it was good, upon the Distinctions following, (*viz.*) Where Things which lie in Grant, as Rents, Commons, &c. are conveyed, and take Effect barely upon the Delivery of the Deed, without any other Ceremony; in such Case, if they are granted to a Man and *his Heirs*, in the Premises, *habendum* to him for Years, the *Habendum* is void, because 'tis repugnant to the Premises; so 'tis where the Estate is given *in Fee* in the Premises, *habendum* for Life, for Livery and Seisin is requisite in both Cases; and as soon as Livery is made, the Effect of the Deed shall be taken in the strongest Sense against the Feoffor; therefore the *Habendum* shall be void which limits the Estate but for Life, and the Premises shall stand good, which gives it *in Fee*: But where a Ceremony is requisite to the Perfection of an Estate limited in the Premises, and none but the bare Delivery of the Deed to that limited in the *Habendum*, there, tho' 'tis of a less or meaner Estate than in the Premises, the *Habendum* shall stand good, and qualify the Fee granted in the Premises; as in the Principal Case there was a *Fee-simple* limited in the Premises, which Estate was not perfect by the Delivery of the Deed; for the Law requires another Ceremony to perfect it, and that is, *Livery and Seisin*; but by the *Habendum* the Estate is limited for Years, to which no Manner of Ceremony is required, for it passes by the bare Delivery of the Deed; therefore 'tis a good Estate for so many Years as are therein limited, and no Inheritance; so where a Rent, &c. is given to *B. G.* in the Premises, without limiting for what Estate; this by Implication is an Estate for Life; but if the *Habendum* be for Years, 'tis good, and qualifies the implied Estate in the Premises. 2 Rep. 23. *Baldwyn's Case*.

2. The King granted a Manor to *B. G.* and *his Heirs*, *habendum* the said Manor to him and his Assigns; adjudged, that the Fee passed by the Premises, and that the Omission of the Word *Heirs* in the *Habendum* shall not make that void, which was certain in the Premises. 8 Rep. 55. *Earl of Rutland's Case*.

3. There was a Lease for Life in Being, afterwards the Lessor demised the Reversion of the same Lands to *H. R.* *habendum* the said Lands from the Feast of St. Michael next after the Death, Surrender or Forfeiture of the Tenant for Life, for the Term of twenty-one Years; the Tenant for Life did not attorn; one Question was, whether the Reversion did pass since the Demise was *concessit Reversionem, habendum terra*, without mentioning the Reversion in the *Habendum*; adjudged a good Lease of the Reversion, and that the Premises and the *Habendum* did well stand together. Mich. 2 & 3 Mar. Plow. Com. 156. *Throgmorton versus Tracy*. Dyer 125. S. P. *Antea* (A) 1. S. P.

2 Roll.
Rep. 19.
habendum
to them and
their Heirs.

Dyer 126.

4. Lands were given to the Husband and Wife, and their Heirs, *habendum* to them and the Heirs of their Bodies, Remainder to them and the Survivor of them, for Life, (to hold of the Chief Lord) with a Warranty to them and their Heirs; in an Ejectment brought, it was adjudged, that this was an Estate-Tail, with a Fee expectant; for 'tis given *in Fee* in the Premises, and tho' the *Habendum* limits an Estate-Tail, yet it doth not limit the Remainder to another, but warrants it to them and their Heirs, which makes it a Fee-simple expectant upon the Estate-Tail; and the Office of Judges is so to expound a Deed, that all the Words of it may be effectual. Pasch. 16 Jac. 2. Cro. 476. *Thurman versus Cooper*.

(D)

Void for being repugnant to the Premises, and for other Matter.

1. Lessee for Years, reciting his Term and Lease, granted all his Estate, Term and Interest to another, *habendum sibi & assignatis* immediately after the Death of the Grantor; adjudged, that the *Habendum* was void, and that the Grantee should not wait for the Death of the Grantor, but have the Estate presently. Pasch. 10 Eliz. Dyer 272.

2. Lease to Husband and Wife, and to their first begotten, but did not say, whether Son or Daughter, *habendum* to them & *diutius eorum vivent successive*, and afterwards they had Issue a Daughter only; adjudged, that the Daughter should take no Estate by this *Habendum*; for if she took any, it must be an Estate for Life, and there must be Livery made to perfect such an Estate; but Livery cannot be made to a Person who was not in Being at the Time of the Estate granted, where 'tis not limited by Way of Remainder, as it was not in this Case; therefore she shall take nothing. Owen 40. *Stephens versus Layton*. Cro. Eliz. 121. S. C. *Antea* Grant of Common Person. (A) 2.

3. In a Special Verdict in Ejectment, the Case was, Tenant for Life, Reversion in Fee to Sir Thomas Pomeroi, who granted to the Plaintiff *Dalpper* and others, *Reversionem* of the Lands, *habendum* the said Reversion *cum post mortem* of the Tenant for Life (without saying any more) *ad*

Term-

Termini' vitæ eorum & alterius eorum diutius viventis ; the Tenant for Life attorned to this Grant ; the Question was, whether this was a good Grant of the Reversion in the Premises, without having any Reference to the Death of the Tenant for Life in the *Habendum* ; and adjudged, that the Reversion passed in the Premises, and that the Words *post mortem* in the *Habendum*, are repugnant ; for it plainly appears, that the Grantor intended to pass the Reversion ; now if it should not pass till after the Death of the Tenant for Life, then 'tis no Reversion, nor any Thing to which an Attornment may be made ; so where Lessee for Years granted all his Term, *habendum* after the Death of the Grantor, the whole Term passes by the Premises, and the *Habendum* is void. 1 And. 284. *Daspper versus Milburne*.

4. The King granted Lands to one and his Heirs, *habendum* to him and his Assigns ; 'tis a good Estate in Fee, and the *Habendum* shall be rejected for the Honour of the King. 8 Rep. 55. *In the Earl of Rutland's Case*.

5. Lessee for Years granted all his Estate and Interest therein to his Daughter, *habendum* to the Lessee and his Wife for Life, and afterwards to his Daughter, till she married and had Issue ; adjudged, that the Daughter shall take immediately by the Grant, and that the *Habendum* is repugnant to the Premises, and therefore void ; for the Daughter had an Estate for Life by Implication, to commence immediately by the Premises ; and she was to wait for it till after the Death of her Father and Mother by the *habendum*, and not to have it then, if she had no Heirs of her Body. Cro. Car. 154. *Gosbawke versus Chigwell*. W. Jones 205.

6. Grandfather, in Consideration of Natural Affection, and of 5 s. &c. bargained and sold to his Grandson and his Heirs, the Lands in Question, *habendum* after his Death to his said Grandson (who was the Lessor of the Plaintiff) and the Heirs of his Body, with Remainders over ; and on the same Day by another Indenture made between him and his Grandson, and for the like Consideration, he bargained and sold other Lands to his said Grandson and his Heirs, *habendum* after his Death, to him and the Heirs Males of his Body, with Remainders over ; both the Deeds were duly enrolled, and the Grandfather enjoyed the Lands during his Life ; after whose Death the Mother of the Lessor, being the Daughter and Heir of the Grandfather, entered, upon whom the Lessor entered, and made a Lease to the Plaintiff ; all which Matter being found in a Special Verdict in Ejectment, it was insisted for the Mother against the Grandson, that he could take nothing by these Deeds, because he was not to take by the *Habendum* till after the Death of his Grandfather, and an *Habendum* of a future Freehold is void ; if so, the Lands must descend to the Mother, who was Heir at Law ; but adjudged, that tho' the *Habendum* is void, yet it being expressly granted in the Premises to the Grandson and his Heirs, the Indenture shall enure on the Premises, and pass the Estate to him ; and that it was wrongful for the Grandfather to continue in Possession afterwards, who, 'tis probable, might not intend his Grandson should have any Thing till after his Decease ; but his Intention will not alter the Law, to make a future Freehold good, and a present Freehold void. 3 Lev. 339. *Carter versus Madgwick*. See Hob. 171. 3 Cro. 254. *Moor* pl. 187.

(E)

Where 'tis exclusive of the Date of the Deed.

1. **W** Here a Man recites a Lease which is not, or which is void, and misrecites the same in a Point material, *Habendum* from the Expiration of the said Lease ; in such Case the new Lease shall commence from the Time of the Delivery. 1 Mar. Dyer 93.

2. Ejectment, in which the Plaintiff declared on a Lease made 1 January 3 Jac. *habendum a Datu* of the said Indenture, &c. and that *postea scilicet* on the same Day the Defendant ejected him ; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that *Habendum a Datu*, is the same as if it had been *a die Datus*, and that being exclusive of the Day of the Date, this Ejectment was brought before the Plaintiff had any Title ; but adjudged, that a *Datu* and a *die Datus*, are quite different ; for where 'tis a *Datu*, there the Date shall be the Time of the Delivery of the Deed. Hill. 13 Jac. 2 Cro. 135. *Osborne versus Rider*.

3. Grant to B. G. *habendum a die confectiois*, the Day of the Date is excluded ; for the Prepositions *a* or *ab*, are always taken exclusive. 5 Rep. 94. *in Barwick's Case*. Cro. Car. 182. S. P. 2 Cro. 458. *Smith versus Boles*. S. P. 2 Cro. 153. *Hennings versus Penchardin*. 2 Bulst. 303.

Heir.

Who shall be Heir to his Ancestor, and where he shall redeem a Mortgage. (A)	a Word either of Limitation or Purchase. (D)
Where, and in what Manner he shall be charged for his Ancestor. (B)	Where he shall enter for a Condition broken, where not. (E)
What shall go to him exclusive of the Executor. (C)	Where he may have an Action of Debt, tho' not named in the Deed, and where not. (F)
Where an Estate in Fee passeth, without the Word <i>Heirs</i> , and where 'tis	Of Pleadings by an Heir. (G)

(A)

Who shall be Heir to his Ancestor, and where he shall redeem a Mortgage, &c. See *Descent per totum*.

1. **T**HE Husband made a Feoffment to the Use of his Wife for her Life, and after her Death, to the Use of the right Heirs of the Body of the Husband and Wife; they had Issue, and the Wife died, living her Husband; adjudged, that such Issue could not enter, because the Husband could have no *Right Heir* during his Life. *Pasch.*

1 *M. Dyer* 99. See *Postea* pl. 5.

2. The Father had a Son and a Daughter by one Venter, and a Daughter only by another Venter, and died; the Reversion of his Lands, after an Estate for Life, descended to his Son, who had Issue a Son, and died, and then the Reversion descended to that Son, and he likewise died without Issue; adjudged, that now the Daughters by both the Venters should be Heir to the Father, and not the Daughter only of the first Venter. *Mish. 7 Eliz. Bindlows* 22.

3. Lands are devised to a Man and the Heirs of his Body, and he hath Issue a Son and Daughter, by one Venter, and a Son by another Venter, and dieth, and then the eldest Son dieth before any Entry made on the Lands either by his own Act, or by the actual Possession of another; the younger Brother shall inherit, for he claimeth as Heir of the Body of his Father, and not generally, as Heir to his Brother; but if the elder Brother enter, and by his own Act hath gained the Possession, or if the Lands were leased for Years, or in the Hands of a Guardian, there the Possession of the Lessee or Guardian doth vest the Fee-simple in the elder Brother; and then upon his Death the Sister shall inherit as Heir to her Brother, for there is *possessio fratris*. 3 *Rep.* 42. in *Rancligh's Case*.

4. The Cognitor levied a Fine, and declared the Uses to *W. R.* for Life, and afterwards to the Use of the Children of *B. B.* procreant, who had at that Time two Sons living; and afterwards, but before *W. R.* died, he had Issue two Daughters; adjudged, that by this Limitation the Sons only shall take, because they were *in Effe* at that Time; and that the Daughters should have nothing, for they could not take as Jointenants, or Tenants in Common, or by Way of Remainder; so if the Limitation had been to the *Right Heirs* of *W. R.* and he had Issue a Daughter at that Time, and he died, leaving his Wife big with Child with a Son, who was afterwards born, yet the Daughter shall have the Lands, because she is in of an Estate executed; to the like Purpose it was adjudged in the *Earl of Bedford's Case*, who made a Conveyance to the Use of himself for Years, Remainder to his eldest Son in Tail, Remainder to his own *Right Heirs*; tho' he intended that his eldest Son should take as a Purchaser, yet he shall take it as a Fee executed in himself. *Term. 26 Eliz. Cro. Eliz.* 334. *Frederick versus Frederick*.

5. This Word *Heir* is not a good Description of the Person in the Life-Time of the Ancestor; as for Instance, the Testator had Issue two Sons and a Daughter, and he devised his Lands to his youngest Son in Tail, and for want of such Issue, then to the *Heirs* of the Body of the eldest Son; and if he die without Issue, then to the Daughter in Fee; the youngest Son died without Issue, the eldest Son likewise died, but left Issue; adjudged, that the Daughter should have the Lands, because the eldest Son could not take by the Name of *Heir* in the Life-Time of his Father. 2 *Lein.* 70. *Chalmer versus Bowyer*. See *antea* pl. 1.

6. The Word *Heir* is sometimes taken *absolutely*, and that is in Respect to the Descent of the Lands at Common Law; sometimes 'tis taken *secundum quid*, and that is in Respect to the Descent of Lands by Custom; as for Instance, in *Borough-Engle*, the youngest Son is Heir by that

Cu-

Custom; so in Gavelkind, all the Sons are Heirs in Point of Descent, by Virtue of that Custom; but even Land of that Nature, when 'tis limited either by Deed or Will to another and his Heirs, then 'tis out of the Custom, and the Heir at Common Law shall take Place. *Hob. 31, in Cunden and Clerk's Case. Reversion. (A) 2. S. C.*

7. Husband and Wife were divorced *causa præcontractus*; adjudged, that there shall be no Proof of an Heir against that Sentence. *2 Cro. 186. Robertson versus Stallage.*

8. There can be no *possessio fratris* of a Dignity, for in such Case the younger Brother is *hæres natus*, and the Sister only *hæres facta*, but that must be by the Possession of her Brother of such Things which are in Deinesne, but not of a Dignity or Honour; therefore where the Lord Grey of Ruthen being created a Baron, (*viz.*) to him and his Heirs, and had Issue a Son and Daughter by one Venter, and a Son by another; and after his Death, his eldest being possessed of the Barony, and dying without Issue, it was adjudged, that the younger Brother, and not the Sister, should have it. *Cro. Car. 437. Lord Grey's Case.*

9. Mortgage in Fee, Proviso, that if the Mortgagor or his Heirs pay the Mortgage-money, that in such Case he may re-enter, &c. the Mortgagor had Issue a Daughter, and died, leaving his Wife with Child of a Son, who was afterwards born; but before the Birth of the Son the Money was paid at the Day by the Daughter; it was the Opinion of the greater Part of the Judges, that the Daughter should retain the Lands against the after-born Son, because she came in as a Purchaser by Payment of the Money, for otherwise the Estate had been forfeited to the Mortgagee, and if she should not retain it, she had no Remedy for her Money; but other Judges were of a contrary Opinion, because, tho' she paid the Money, she still had the Lands as Heir, which she could not be after the Birth of the Son. *Cro. Car. 61. Kirton's Case.*

10. Upon a Plea to a Bill in the Exchequer, the Case was, *N. W.* being seised in Fee, mortgaged his Lands for 500*l.* and afterwards, upon his Marriage, covenanted to leave his Wife 2000*l.* to be paid to her within two Years after his Death, and entered into a Statute for the Performance of the Covenant; then he devised the Lands to his Wife and her Heirs, if the 2000*l.* was not paid according to this Marriage-Covenant, she discharging the 500*l.* and died, leaving his Wife Executrix, and *Affets* which came to her Hands; the 2000*l.* was not paid; she discharged the 500*l.* and had the Mortgage assigned to her, and afterwards made a Conveyance of these Lands to *T. S.* in Fee, by *Fine*, &c. and died; and the Question was, whether the Heir of the Covenantor should redeem, upon Payment of the aforesaid Sums, with Interest, and Discount of the Profits: *Hale* Chief Baron held, that the Devise of the Wife was absolute, the 2000*l.* not being paid, and that the *Fine* was a Bar to the Equity of Redemption, but that a *Fine* levied by a Mortgagee is not; that if an Executor hath *Affets*, he is compellable in Equity to redeem a Mortgage for the Benefit of the Heir; and so likewise where the Heir is charged in Debt; but a Creditor may sue either Heir or Executor. *Hendr. 511. Holfman versus Aston.*

11. In the following Case there seems to be a contrary Resolution: *Jf. The Testator* being seised in Fee of Lands in *Chubham*, devised them to *Higden and his Heirs*, upon Trust, to permit *Robert Durdant* to receive the Profits for Life, and after his Death, then to the Heirs Males of *Robert Durdant*, now living, and to such Heirs Males or Females as he should have of his Body: The said *Robert*, at the Time of the Making this Will, had Issue *George Durdant*, his only Son and Heir; adjudged, that this was a Remainder executed in *George*, by the Name of *Heir Male*, (tho' it was objected, that *nemo est hæres viventis*) for here is a plain Description of the Person of *George*, because the Words *now living* must relate to the Heirs Males of *Robert Durdant*, who were then living, and that was *George*; 'tis true, *Robert Durdant* is the next Antecedent to those Words; but it would be absurd to construe them to relate to him, because the Testator took Notice before, that *Robert Durdant* was living, for he devised the Profits, &c. to *Higden* and his Heirs, in Trust, to permit *Robert Durdant* to receive them for Life, and so Judgment was given for the Right of *George* in *B. R.* but this Judgment was afterwards reversed in the Exchequer-Chamber; and upon a Writ of Error brought in the House of Peers, the Judgment in the Exchequer-Chamber was reversed, and the Judgment in *B. R.* was affirmed; the Reason was, because the Estate limited to *Robert Durdant* was an Estate for Life executed in him by the Statute of Uses; and then he being Tenant in Tail, his *Fine* barred the Estate-tail. *2 Lev. 232. Burchett versus Durdant.*

Jones 97.
1 Vent.
354
2 Vent.
311.
Raym.
350.
by the
Name of
Jones 2.
Richard-
son. See
Uses. (F)
S. S. P.

* 2 - H 3

(B)

Where, and in what Manner he shall be charged for his Ancestors.

1. THE Obligor being seised in Fee, entered into a Bond, by which he bound himself and his Heirs to pay Money, &c. and afterwards he died, leaving Issue two Sons, the eldest Son entered and died without Issue, then the youngest Son entered; adjudged, that he might be sued as Son and Heir of his Father, tho' there was an intermediate Descent of the Fee to his elder Brother. *Dyer 368. pl. 46.*

2. Debt was brought in *London* against the Heir, upon the Bond of his Father; he pleaded *Riens per Descent* at the Time of the Writ brought; the Plaintiff replied *Affets* by Descent in *London*, &c. and Evidence was given, that he had *Affets* by Descent in *Cornwall*; and adjudged, that

the Jury find it upon this Issue and Evidence; for tho' a certain Place is named for Conformity and for Necessity, where the Trial is to be, yet the Jury may find Assets in any County, and the Plaintiff shall have Execution of all the Lands which the Heir hath in each County. *Dyer* 10. *Eliz.* 271. 6 *Rep.* 47. in *Dowdall's Case*.

3. The Testator being indebted, by his Last Will appointed Executors, and died, leaving Assets: *Per Curiam*, an Action of Debt will lie against the Heir, or against the Executors at the Election of the Creditor. 1 *And.* 7. *Capell's Case*.

4 Debt against the Daughter as Heir of *T. S.* she pleaded *Riens per Descent*, and the Jury found, that *T. S.* died seised in Fee, leaving Issue this Daughter, and his Wife then with Child, who was delivered of a Son, who died about an Hour after it was born; and upon a Demurrer the Defendant had Judgment, because the Plaintiff declared against her as Daughter and * Heir to her Father, when in Truth she was not, but Sister and Heir to her Brother who was last seised. 2 *Cro.* 161. *Duke versus Spring*.

* See Kel-
low v.
Rowden.

5. The Case in a Special Verdict in Ejectment was, Tenant in Tail entered into a Recognizance, and died; the Cognisee brought a *Scire facias* against the Issue in Tail, who pleaded *Riens per Descent* in Fee from the Cognisor, upon which they were at Issue, and before the Verdict and Judgment, the Issue in Tail made a Lease for Years of the Land; afterwards the Jury found, that the Issue in Tail had the Lands by Descent in Fee; and thereupon Judgment was given against him, and the Lands extended; and the Lessee being turned out, brought an Ejectment, in which all this Matter was found specially; the Question was, whether this Lessee for Years could falsify the Verdict and Judgment in the *Scire facias* against the Lessor, who was the Issue in Tail; and it was argued, that he might, because the Lease being made before the Judgment given against the Lessor, the Land was not at that Time charged: But *per Curiam*, the Issue in Tail is bound by the Verdict, and can never avoid it, and by the same Reason his Lessee must be bound, and he shall never falsify this Verdict, either by the Statute 21 *H. 8.* or by the Common Law. 1 *Roll. Rep.* 424, 443. *Crawley versus Marrow*.

6. Judgment by *Nil dicit* against the Heir, for the Debt of his Father, and a *Capias ad satisfaciend'* against him; whereupon he brought a Writ of Error *tam in redditione judicii quam Executionis*, because the Lands only which he had by *Descent*, ought to be put in Execution, and not his *Body*, or any other Lands which he had not by *Descent*; but adjudged no Error, because he did not shew what Lands he had by *Descent*, therefore he shall lose that Benefit which the Law gave him; and it shall be intended, that he had personal Assets to satisfy the Debt. *Cro. Eliz.* 692. *Barker versus Brown*. *Moor* 522. *S. C.*

7. Debt against the Heir, who pleaded *Riens per Descent* on the Day of the Action brought; the Plaintiff replied, that he had formerly brought an Action against the Heir for the same Debt, and thereupon he was outlawed, which was afterwards reversed; and then he immediately brought a new Action, and averred, that the Heir had Assets at the Time of the first Writ; and upon Demurrer the Heir had Judgment, because after that Writ, and before the second Action, he had aliened the Assets, and in such Case he is not chargeable. *Hob.* 248. *Spray versus Sherrott*.

8. A collateral Heir is chargeable for the Debt of his Ancestor; but then the Declaration must be Special, and he must be charged as collateral Heir, and not as immediate Heir; as for Instance, there were two Brothers, the eldest of them entered into a Bond, and died, leaving Issue a Son, who afterwards died without Issue; an Action of Debt was brought upon this Bond against the surviving Brother, as Brother and Heir of the Obligor, which he was not, but Uncle and Heir of the Son, and for that Reason the Defendant had Judgment. *Cro. Car.* 151.

9. In an Action of Debt against *C.* as Daughter and Heir of *D.* she pleaded *Riens per Descent* from *D.* and by a Special Verdict it was found, that the said *D.* was seised in Fee, and had Issue *C.* the Defendant; but at the Time of the Death of the said *D.* he left his Wife with Child, which Child being a Son, was afterwards born, but died within an Hour; and upon arguing this Special Verdict, the Plaintiff could never get Judgment, because the Defendant should be sued as Sister and Heir to her Brother, who died last actually seised of the Fee, for it was vested in him as soon as he was born. *Hetley* 134.

10. Debt against an Heir, who pleaded *Riens per Descent*, upon which they were at Issue, and the Plaintiff had a Verdict; it was insisted in Arrest of Judgment, that the Action was brought against him in the *Detinet* only, and for that Reason it was adjudged ill, and not cured by the Verdict. 1 *Lev.* 130. *Goodwin versus Newton*.

11. Before the Statute 3 & 4 *W. & M. cap.* 14. three Things were requisite to make an Heir chargeable for the Debt of his Ancestor, (*viz.*) He must be expressly bound by the Name of Heir, he must have Assets in Fee simple by *Descent* from his Ancestor, and not in Tail, or by any Manner of Conveyance; and the Land thus descended to him, must be actually in his Possession at the Time of the Action brought against him; for if he had sold it before that Time, the Creditor had no Remedy, because by the Law the Heir was only chargeable in respect of the Land of which he was seised at the Time of the Action brought; 'tis true, the Creditor might bring the Action either against him or against the Executor or Administrator of the Debtor, upon Bond or other Specialty, and the Heir was chargeable, tho' the Executor had Assets; as for Instance, an Action of Debt was brought against the Heir, upon a Bond of his Ancestor; the Defendant pleaded, that Administration of the Goods of the Ancestor was granted, &c. to *T. P.* and that he had Assets sufficient,

cient, &c. and upon a Demurrer by the Plaintiff, this was adjudged an ill Plea, because he had Election to sue either the one or the other. 3 Lev. 189. *Davis versus Churchman*.

12. Judgment was had against the Ancestor, and a *Scire facias* against the Heir upon that Judgment, and afterwards an *Elegit*, and the Tenant by *Elegit* brought an Ejectment; the Defendant pleaded, that he was seised only of an *Estate-tail*; adjudged an ill Plea, because after Judgment was obtained against the Ancestor, as Tenant in Fee-simple, his Heir shall not be admitted to plead, that he is Tenant in Tail. 2 Sid. 7. *Gibburne versus Ruck*.

13. Tenant for Life, Remainder to his Issue in Tail; the Tenant for Life entered into a Statute, and died, afterwards the Cognisee brought a *Sci. fa.* against the Heir (who was the Issue in Tail) and the Sheriff returned *Sci. feci*, and thereupon Judgment was had, and the Heir being turned out, brought an Ejectment; and the Question was, whether he should be bound by this Execution; and adjudged that he should, and that he hath no Remedy, either by Ejectment, Writ of Error, *Audita querela*, or any other Way, but only an Action against the Sheriff, if his Return is false, because, if he is not answerable for this Debt of his Ancestor, 'tis his own Fault for not Pleading to the *Scire facias*, when the Sheriff had returned him warned. Sid. 54. *Day versus Guilford*. Raym. 19. S. C.

14. Case, &c. in which the Plaintiff declared, that there being a Discourse between him and the Heir of *W. R.* concerning the Bond in which *W. R.* was bound to the Plaintiff; he, the Defendant, in Consideration the Plaintiff would forbear, &c. promised to pay, &c. after a Verdict for the Plaintiff, the Judgment was arrested, because it did not appear that *W. R.* had bound himself and his Heirs, and if the Heir is not bound by exprefs Words, then he is not liable, and if so, then this Promise is void. Sid. 248. *Hunt versus Swaine*. 1 Lev. 165. Raym. 127.

15. *T. Bostocke* gave Bond to one *Haight*, for the Payment of 130 *l.* and Interest, and made *Luke Langham* and others, his Executors, and died, leaving Issue *Susan*, his Daughter and Heir, who married the said Executor; and now *Haight*, the Obligee, brought an Action of Debt on the Bond against *Langham* and his Wife, as Daughter and Heir of the said *Bostock*; they pleaded in Abatement another Action depending against *Langham* and others, Executors of *Bostock* on the same Bond; and upon Demurrer to this Plea, it was insisted, that admitting the Plaintiff had his Election to sue, either the Heir or Executor, or both separately, and to recover Part against the one, and Part against the other, yet he cannot charge one and the same Person as Heir and Executor at the same Time; because in such Case he might have two Judgments at the same Time for the same Thing, and the Defendant can have no Remedy by *Audita querela*, because he might have pleaded the Matter in Abatement: But adjudged, that since one and the same Person represented both the Heir and Executor, he is chargeable, as if they had been represented by different Persons; and so the Defendant was ruled to answer over. 3 Lev. 303. *Hught versus Langham*. See *Sperry's Case*. 5 Rep. 424. 1 And. pl. 13. *Dyer* 204.

16. *Assumpsit*, &c. wherein the Plaintiff declared, that the Father became bound to him (the Plaintiff) in a Penal Bill, conditioned for the Payment of so much Money, which he did not pay at the Day, but afterwards died, and that the Defendant is his Son and Heir; and the Plaintiff intending to sue him upon the said Bill as Son and Heir, he, in Consideration the Plaintiff would forbear, &c. promised to pay the Money upon the Request, and avers Forbearance, and that the Defendant had not paid the Money on the Day and Place, upon Request; upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that here was no Consideration to raise this Promise, because it did not appear by the Declaration, that the Defendant could be sued upon this Bill as Son and Heir, for he was not so much as named, and by Consequence not bound in this Bill; to which it was answered, that tho' this Declaration might be ill upon a Demurrer, yet it was not so after a Verdict, because the Jury had found that the Defendant was bound as Son and Heir, otherwise there had been no Consideration, and if not, then they must have found *Non Assumpsit*; but adjudged, that the Court will not intend that an Heir is bound by the Obligation of his Ancestor, even after a Verdict, unless he is expressly named in the Bond. 2 Saund. 136. *Barber versus Fox*. Raym. 127. *Hunt versus Swain*. S. P. not adjudged. See *Bidwell versus Cotton*. Hob. 216. See Hob. 18. *Woolaston versus Webb*. See *Bard versus Bard*, 2 Cro. 602, and *Fry versus Richardson*. Yelv. 56.

17. Debt against an Heir upon a Bond of his Ancestor; the Defendant pleaded, that his Ancestor was seised in Fee, and made a Settlement on Trustees to the Use of himself for Life, Remainder to the Heirs Males of his Body, Remainder to his own right Heirs, with Power to the Trustees to make Leases for three Lives, or ninety-nine Years, &c. and that the Trustees had made a Lease for ninety-nine Years, and that he had not Affets *prater* the Reversion expectant upon that Lease; the Plaintiff replies, that the Defendant had sufficient Affets by Descent; and upon a Demurrer it was objected, that this general Replication was ill, and that the Plaintiff ought to have replied to the *Præter*: *Sed per Curiam*, the Replication is good, and the *Præter* is insignificant, because the Lands which come under the *Præter* are not chargeable, for 'tis a Reversion after an Estate-tail. 2 Mod. 50. *Oxbaston versus Stanhope*.

18. Upon an *Habeas Corpus cum causa* directed to the Sheriffs of London, they return, that a *T. Jones* Plaintiff was levied against *Bligh* as Son and Heir, upon a Bond of his Ancestor; and the Question was, whether he should be discharged upon common Bail: *Et per Curiam*, he shall, for the Case of an Heir Defendant is stronger than that of an Executor Defendant. *T. Jones* 82. *Lawrence versus Eligh*. 82.

19. Debt against an Heir upon a Bond of his Ancestor, the Defendant pleaded *Riens per Descend*; the Plaintiff replied, that he had Lands, &c. by Descent, *before* the exhibiting the Bill, *unde* (the Plaintiff) *de debito prædicto satisfecisse potuit*, and so puts himself upon the Judgment of the Court; and upon a Demurrer to this Replication it was objected, that it was double, that he ought to have concluded to the Country; that it was ill, both at Common Law and upon the Statute 3 & 4 Will. and first at Common Law, for the Plaintiff sets forth, that the Defendant had Lands by Descent, *before the Exhibiting the Bill*, which may be true, and yet have none *at the Time of the Bill exhibited*; then 'tis provided by the Statute, that if the Heir sells any Lands which were liable to the Debt of his Ancestor, before any Action brought against the Heir, he shall be answerable to the Value of the Land so sold; so that the Replication directed by the Statute must be, that the Defendant had Lands, &c. by Descent, before the original Writ brought, which should be tried by a Jury, who, upon finding the Land descended, are *ex officio* to enquire of the Value; but here the Plaintiff hath made the Value Part of his Replication: But adjudged, that the Replication is good, for tho' it may be falsified by a Jury as to the Value, yet the Plaintiff shall recover *pro tanto*, (*viz.*) to the Value of the Land sold. 5 Mod. 122. *Redshaw versus Hester*.

20. 'Tis true, where there is a Reversion in Fee expectant upon the Determination of an Estate-tail, which is afterwards spent, and the Reversion descends upon a collateral Heir, in such Case he may be sued as Heir to him who was last actually seised of the Fee, without naming any of the intermediate Remainders, because they were never seised of the Fee, but of the Fee-tail only, and 'tis the Possession and not the Expectancy which makes the Party inheritable. 3 Mod. 253.

21. *Anne Head* being seised in Fee of Lands, married *Thomas Clealand*, by whom she had Issue *Benjamin* and *Hester*; afterwards *Benjamin* entered into a Bond to the Plaintiff for Payment of Money, his Father *Thomas* being then living; then *Benjamin* died, leaving Issue *Elizabeth* his only Child, and then *Thomas* the Grandfather died, so that the Reversion in Fee descended on *Elizabeth*, who afterwards died without Issue, so that the Reversion in Fee now descended on *Hester* the Defendant, against whom an Action of Debt was brought on this Bond of her Brother, as Aunt and Heir of *Elizabeth*, who was Daughter and Heir of *Benjamin* the Obligor; and the Question upon a Special Verdict on *Riens per Descend* pleaded was, whether the Defendant was well charged by this Declaration, and adjudged that she was. 1 Lutw. Rep. 503. *Rooke versus Clealand*.

22. Debt against an Heir upon the Bond of his Ancestor; and upon a Demurrer it was objected against the Declaration, that the Plaintiff did not shew how the Defendant was Heir; adjudged, that if the Action had been brought by the Heir, he ought to shew his Pedigree; but where 'tis brought against him, it would be hard to compel the Plaintiff, who is a Stranger to it, to set it forth. 1 Salk. 355. *Denham versus Stephenson*. See Administrator.

23. Debt against an Heir upon the Bond of his Ancestor, who pleaded, that his Ancestor was seised in Fee of three Fourths of such Tenements, and that he demised the same to W. R. for 500 Years, who entered, and that the Reversion descended to him, and nothing else; and that at the Time of the Action brought he had no Tenements in Fee simple by Descent, besides the said Reversion; and that afterwards the Widow of his Ancestor exhibited a Bill in Chancery against him for her Dower, and obtained a Decree for a third Part, &c. it was not a Question, whether the Plaintiff should have Judgment, for that was admitted, but whether it should be a general or special Judgment; and adjudged, that it should be a general Judgment; for the Heir cannot plead a Term of Years raised by his Ancestor in Delay of Execution, but ought to confess Assets, because the Freehold and Inheritance d'd descend to him, which is present Assets, and an immediate *extendi facias* ought to go to apprise the Reversion upon an Inquisition taken, and to deliver it to the Plaintiff to enter when it falls in Possession. 1 Salk. 354. *Smith versus Angell*.

24. But now 'tis enacted by the Statute before-mentioned, That where any Heir at Law shall be liable to pay a Debt of his Ancestor, in Regard of any Lands descended, and shall alien, sell, or make over the same, before any Action brought, or Process sued out against him, such Heir shall be answerable for the Debt or Debts in an Action, to the Value of the Land which he sold, in which Case all Creditors shall be preferred, as in Actions against Executors or Administrators, and Execution shall be taken out upon a Judgment recovered against such Heir, to the Value of the said Lands, as if it was his own proper Debt, saving that the Lands, Tenements, and Hereditaments, bona fide aliened before the Action brought, shall not be liable to such Execution.

And 'tis farther enacted by the same Statute, That in an Action of Debt upon a Specialty brought against an Heir, he may plead *Riens per Descend* at the Time of the original Writ brought, and that the Plaintiff may reply, that the Defendant had Lands, Tenements, or Hereditaments from his Ancestor, before the original Writ brought; and if the Plaintiff have a Verdict, the Jury shall enquire of the Value of the Lands descended, and thereupon Judgment shall be given, and Execution awarded as aforesaid.

But if the Judgment is by Confession, and without confessing the Assets descended, or upon a Demurrer, it shall be for the whole Debt or Damages, without any Writ of Enquiry of the Value of the Lands descended.

By the same Statute 'tis enacted, That All Wills of Lands, Rents, &c. shall be fraudulent against Creditors, their Executors and Administrators, and every such Creditor may have an Action of

of Debt upon his Bond, or other Specialty, against the Heir at Law of the Obligor, and against the Devisee jointly.

(C)

What shall go to him exclusive of the Executor. See *Rent*. (D) per totum.

1. **T**HE Testator made a Lease of an House, and several Implements, to the Lessee, rendring *Rent* to the said Testator, his *Heirs* and *Assigns*, and died ; afterwards the *Executor* received the *Rent* for several Years, and in an *Action* of Debt brought against him, they were at Issue upon the *Assets* or not, and the *Jury* found all that Matter Specially, and conclude their Verdict, & sic the Defendant had *Assets*; but adjudged, that the *Rent* belonged to the Heir, and that the Words & sic are void. *Dyer* 368.

2. *Wainscot and Glass* fastned in any Manner to the Walls or Posts, tho' put up by the Lessee himself, shall go to the Heir, and not to the Executor; for 'tis Parcel of the House, and by Consequence Parcel of the Inheritance. 4 *Rep.* 63. *Harlakenden's Case*. *Mich* 32 *Eliz.* *Warner* versus *Fleetwood*. *S. P.*

He may have an Action against the Heir for taking or

defacing *Tomb-stones* in a Church-yard; for tho' 'tis annexed to the Freehold, the Parson hath no Right. *Godb.* 199. *Pym's Case*. *Moor* 178. 12 *Rep.* 104. *S. C.*

3. *Trespas*s for taking his *Fish* out of his Pond with Nets, the Defendant justified the Taking as Executor; adjudged the Heir shall have the *Fish*, for they are *Chattels* descendible to him. *Goldf.* 129. *Girley* versus *Trower*.

4. A Lease was made, rendring *Rent* at *Michaelmas*, &c. or within ten Days after; the Lessor died after *Michaelmas*, but before the ten Days are expired; adjudged, that the Heir shall have the *Rent* as incident to the Reversion, because it was not due till the ten Days are passed. 10 *Rep.* 128. *Clun's Case*. *Postea Rent*. (C) 3. *S. C.* *Cro. Eliz.* 475. *S. P.* 2 *Cro.* 309. *Pilkinton* versus *Dalton*, *S. P.* *Dyer* 142. *Smith* versus *Bustard*. *S. P.*

5. Lessee for a certain Number of Years, sowed the Lands with Corn a little before the Expiration of the Term; afterwards his Term expired, but before the Corn was ripe; adjudged, that the Heir shall have the Corn. *Cro. Eliz.* 464.

6. In *Goodale's Case*, this is cited, (*viz.*) *Randall* covenanted with one *Brown*, that if the said *Brown* paid to *Randall*, his *Heirs* or *Assigns*, 400*l.* before such a Day, that then *Randall* and his *Heirs* would stand seised of the Lands to the Use of *Brown* and his *Heirs*; afterwards the said *Randall* devised the same Lands to his Wife during the Minority of his Son, and made her *Executrix*, and died before the Day appointed for the Payment of the Money; the Question was, to whom it should be paid, (*viz.*) either to the *Executrix*, or to the Heir of *Randall*; adjudged, that the Heir, and not the Executor of *Randall*, shall have the Money, because it was expressly to be paid to him and his *Heirs*; 'tis true, the Word *Assigns* is likewise mentioned; but in this Place an *Assignee in Fact* must be intended by that Word, and not an *Assignee in Law*, as an Executor is, because he had sold his whole Estate by this Covenant to stand seised; but if instead of that he had made a Feoffment in Fee, upon Condition, that the Feoffee should pay the Purchase-Money to the Feoffor, his *Heirs* or *Assigns*, there, because he had parted with his whole Estate by the Feoffment, and left nothing but a naked Condition, which could not be assigned over, the Law will intend what Person is most apt to receive the Money as an Assignee, and that is his Executor, because he represents the Person of the Testator in all Personal Things; but here the Word Heir excludes such an *Assignee in Law*; for by the Word *Assigns*, an *Assignee in Fact* must be intended. 5 *Rep.* *Randall's Case* cited in *Goodale's Case*, 96. *b.*

7. *Coats of Arms* placed in Church Windows, or *Monuments* in the Church or Church-yard, cannot be beaten down or defaced; if they be, the Heir by Descent may have an *Action* of *Trespas*s, for he is inheritable to them. 2 *Cro.* 367. *Francis* versus *Lea*.

8. So 'tis generally held, that where a Man dies seised of the Inheritance in a *Dove-House*, *Park*, *Pond* or *Warren*, that the *Pidgeons*, *Deer*, *Fish* and *Conies* belong to the Heir, and so doth every Thing fastned to the Freehold, and which cannot be removed without doing some Injury to that to which 'tis fastned; for all those Things are accounted Parcel of the Freehold.

9. So where the Condition of a Bond was, to pay Money to such Person as the Obligee by his last Will appointed; he afterwards made a Will, and constituted *T. P.* Executor, but did not appoint who should receive the Money; adjudged that this Executor shall not have it as an *Assignee in Law*, because it appears, that the Obligee intended it for an *Assignee in Fact* of his own making, because the Word *Pay* implies a Property in the Person who is to receive; therefore, if he had appointed such Person, he must have received it to his own Use; but if it should be received by an *Assignee in Law*, then it must be for the Use of the Testator, which was never intended by the Bond. 1 *Roll. Abr.* 915.

10. As to Money my Lord Coke tells us, in 1 *Inst.* 209. that if the Condition of Redemption of mortgaged Lands is to pay the Money to the Mortgagee or his *Heirs*, and if the Mortgagee dieth before the Day appointed for the Payment of the Money, that in such Case it shall be paid to his Heir; for he lays it down as a Rule, that *designatio unus est exclusio alterius*; but if the

Con-

Condition was to pay the Money to the Mortgagee, *his Heirs, Executors or Administrators*, it may be paid to either.

But if the Heir of the Mortgagee exhibits his Bill in Equity against the Mortgagor, either to have the Money paid, or to make a farther Assurance, or else to be foreclosed of the Equity of Redemption; in such Case he must make the Executor of the Mortgagee a Party to the Bill, because it may happen, that he may have a Title to the Money; and 'tis a good Demurrer to the Bill, if he is not made a Party to it. 1 *Ch. Rep.* 51. *Freak versus Hearsey*.

(D)

Where an Estate in Fee passeth without the Word Heirs, and where 'tis a Word either of Limitation or Purchase.

1. **D**Evise of Lands to a Man and *his Heirs*; the Devisee died in the Life-time of the Testator; adjudged, that his Heir should not take by *Purchase*; for he is named only to express and limit the Estate which the Devisee should have; and that was a *Fee-simple*, which he could not have without that Word. *Plow. Com.* 342. *Brett versus Rigden*. *Postea* Legatee. (A) 2. *S. C.*

2. In every Case where the Word *Heirs* is wanting, if there are other Words equivalent, an Estate in Fee will pass; but this must be understood where the Interest passeth by the Consideration only, without any farther Ceremony in the Law, and not where the Consideration, together with another Ceremony (but not without it) directs the Estate; as for Instance, a Bargain and Sale of Lands to a Man *for ever*, in Consideration of *Money and Natural Affection*, there the Consideration only directs the Estate, and Conscience saith, that the Bargainee hath as great an Estate in the Land as the Bargainor could convey, which must be an Estate in Fee, there being no farther Ceremony to compleat it; for where Natural Affection is Part of the Consideration, the Deed is good without Enrolment; but where a Man in Consideration of Money, makes a Feoffment of the Lands to another *for ever*, there the Consideration alone doth not direct the Estate, but another Ceremony is required to perfect it, and that is Livery and Seisin; therefore the Feoffee shall have but an Estate for Life.

3. If the Feoffor, for and in Consideration of 10 *l.* make a Feoffment to *B. G. habendum* to him and *his Heirs*, to the Use of the said *B. G. for ever*, he hath but an Estate for Life. 1 *Eliz. Dyer* 167.

4. The Grantor by a Fine, granted a Rent-Charge to *B. G. habendum* to him and his Assigns during the Life of the Wife of the Grantor, and that if it should be arrear, then it shall be lawful for him and *his Heirs*, during the Life of the Wife, to distrain; adjudged, that the Grantee had a Fee-simple in the Rent, determinable by the Death of the Wife of the Grantee. *Dyer* 253. *Swinerton's Case*. 10 *Rep.* 98. in *Seymour's Case*. *S. P.*

5. But where an Estate is granted to a Man and his Heirs, during the Life of *B. G.* 'tis but an Estate for Life in the Grantee, upon which a Remainder may depend at Common Law. 1 *Rep.* 140. In *Chudleigh's Case*.

6. Where the Ancestor by any Conveyance takes an Estate of Freehold, and in the same Conveyance an Estate is limited to his Heirs, either in Fee, or in Tail, the Word *Heirs* is always a Word of Limitation of the Estate, and not of Purchase; but where an Estate is limited to the Ancestor for Years, Remainder to another for Life, Remainder to the *Right Heirs* of the Lessee for Years, there the Word *Heirs* is a Word of Purchase. 1 *Rep.* 104. In *Shelley's Case*.

7. But where a Rent-Charge was granted to a Man and *his Heirs, Executors, &c. to the Use of himself, his Executors and Assigns, during the Life of B. G.* adjudged by the whole Court, that he had an Estate in Fee. *Mich. 6 Jac. Whiskyns versus Davies*.

8. In Ejectment the Case was, that the Father being seised of the Lands in Question, did upon the Marriage of his Son levy a Fine thereof, to the Use of himself for Life, and for the Life of his Son, and afterwards to the Use of the intended Wife for Life, Remainder to the Use of the *Heirs to be begotten upon the Body of the Wife by the Son*; the Question was, whether the Word *Heirs* shall relate only to the *Heirs of the Wife*; and if so, that then the Son should have only an Estate for Life; and it was insisted, that it shall relate only to the Heirs of the Wife, because being limited to no Person, 'tis left to the Construction of Law, to whose Heirs it shall relate, and the Law applies it to the Heirs of the Wife, because her Advancement was intended; and the Words *upon her*, are as much as to say, *of her Body*; but adjudged, that the Word *Heirs* shall be applied to the Heirs of both Parties, and that where the Words are plain, and shew the Intent of the Father, they shall not be construed to any other Meaning. *Style* 325. *Goffage versus Taylor*.

(E)

Where he shall enter for a Condition broken, where not.

1. **W**Here a Condition is annexed to an Estate, and 'tis afterwards broken, or not performed; the Heir shall enter and take Advantage of it, because he hath received an Injury by the Condition, by which he would be defeated of the Estate, if it had been performed, and which would otherwise have descended to him.

The Testator owed 500 l. on Bond, and devised his Lands to his Son in Fee, *upon Condition, that if he did not pay the Debt, then he devised it to the Uncle in Fee upon the like Condition*; the Money was not paid either by the Son or Uncle, who made his Will, and appointed an Executor, and died, the Money being still unpaid; it was a Question, whether the Heir of the Uncle might enter and perform the Condition; this being a new Question, it was not then resolved. *Dyer 128. Wilford versus Wilford.*

2. But since that Time it hath been often adjudged, and the Law is now settled, that the Heir may enter; as where the Testator devised Lands for Years, *reddendum & solvendum* to another 20 l. at Michaelmas every Year; adjudged, this is a Condition, and if the Money is not paid the Heir may enter. *Cro. Eliz. 454. Fox versus Cailin.*

3. Devise of Lands to his Wife for Life, *upon Condition, that she should educate his Son at School at her own Charge, &c.* until he came of Age; and after her Death he devised the Lands to his second Son in Tail, Reversion in Fee to his own Right Heirs; the Wife did not perform the Condition, the eldest Son entered, and adjudged lawful; for by the Breach of the Condition, to which his Mother's Estate for Life was annexed, that Estate was determined, and the Heir at Law to him who created the Estate, shall take Advantage of it, only during the Life of the Wife; for the Remainder to the younger Son is not destroyed by the Entry of the Heir, because 'tis created by a Will, which makes it good, tho' the Particular Estate for Life became bad upon the Breach of the Condition. *Dyer 127. Warren's Case.*

4. So where a Feoffment in Fee was made to the Use of himself and his Heirs, and the Feoffor, *Anno 21 H. 8.* devised the Lands to his youngest Son in Tail, Remainder to his eldest Son in Fee, *upon Condition, that if his youngest Son, or any of his Issue should discontinue or alien the Estate, then the Devise, as to him or them, should be void*; the youngest Son made a Lease for Lives pursuant to the Power which he had by the Statute 32 H. 8. and then levied a Fine to the Use of himself and his Wife, and to the Heirs Ma'es of their two Bodies, Remainder to the Right Heirs of his Father; adjudged, that by this Will the Condition was annexed to the Use of the Estate, which Use was now by the Statute transferred into Possession, and by Consequence this Condition was annexed to the Possession, which Condition now was broken by this Alienation; for it may be, that his youngest Son had Issue by a former Wife, which Issue would be barred by this Fine contrary to the Intent of the Testator; and therefore the elder Brother and Heir may lawfully enter. *1 Leon. 298. Ruddall versus Miller.*

Savil 16.
S. C.
Moor
212 S. C.

(F)

Where he may have an Action of Debt, tho' not named in the Deed, and where not.

1. **T**HE Ancestor made a Lease of Lands, *reddendum* a certain Rent to himself, his Executors or Assigns, leaving out the Word Heirs; and after his Death the Heir brought an Action of Debt for the Rent; adjudged, that he could not maintain the Action, because he was not named in the Reddendum. *Owen 9. Richmond versus Butler. Postea Rent. (C) 4. S. C. See pl. 3.*

Cro. Eliz.
217. S. C.
1 And.
201. S. C.

3. So where the Rent was reserved by the Ancestor, payable to himself or his Assigns; adjudged, that the Heir after the Death of the Ancestor, could not have the Action for the Reason before mentioned. *Latch. 44. Sury versus Cole, and 274 Sury versus Brown.*

2. But notwithstanding the Judgments in those Cases before mentioned, it hath been since adjudged to the contrary, (*viz.*) where the Lessor made a Lease, reserving Rent to himself, his Executors and Assigns, *during the Term*; and the Law now is, that the Heir shall have an Action of Debt for the Rent, because the Rent being incident to the Reversion, shall continue after the Death of the Ancestor, and go to the Heir; and so it was adjudged in the aforesaid Case of *Sury and Col*, as it appeared upon Search of the Roll; tho' 'tis otherwise reported. *2 Lev. 13. Surbottle versus Frigate. See ante pl. 1. See Reservation of Rent. (C) 1. See Latch 274. Wotton versus Edwin, S. P.*

1 Vent.
148, 161.
2 Saund.
361.
Raym.
213.

4. So where the Lessee covenanted with the Lessor, his Executors and Administrators, to repair, &c. and to leave it well repaired at the End of the Term; now the Heir is not named in this Covenant, yet he, and not the Executor, shall have the Action, because 'tis a Covenant which goes with the Land. *2 Lev. 92. Lougherne versus Williams.*

5. But there may be a Case where the Executor, tho' not named, shall have the Action, and not the Heir; as for Instance, *W. R.* purchased Lands, and the Vendor covenanted, that the Ven-

dee, his *Heirs and Assigns*, should quietly enjoy the Lands, &c. afterwards the Vendee was evicted, and died, and then his *Executor* brought an Action of Covenant against the Vendor; and it was adjudged good, because the Eviction and Injury was done to his Testator in his Life-Time, and the Damages for such Injury shall be recovered by his Executor (tho' not named) because he represents the Person of the Testator. 2 *Lev.* 26. *Lucy versus Lewingstone*.

6. The Case before-mentioned of *Sachaverell* and *Frogate* was, where Tenant in Fee made a Lease to the Defendant for twenty-one Years, rendring Rent annually, &c. to the Lessor, *his Executors, Administrators or Assigns, during the Term*; now in the Cases before-mentioned, these Words *during the Term* are omitted; and in this Case the Words *Executors and Administrators* are void, for the Rent cannot go to them; if so, then the Reservation is no more than this, (*viz.*) to the Lessor and *his Assigns, during the Term*, which are express Words, declaring his Intent, and therefore it shall go to the Heir. 1 *Vent.* 161, 162. *Sachaverell versus Frogate*.

(G)

Of Pleadings by an Heir. See *Assets.* (F) per totum.

1 And. 7. 1. DEBT against the Defendant as Brother and Heir of *H. Capell*, in which the Plaintiff declared upon a Bond made by his Brother, the Testator; the Defendant pleaded in Bar, that his Brother made a Will, and did thereby constitute and appoint his Wife to be Executrix, and died; and that afterwards the Executrix died, and Administration of the Goods of the Testator not administered, was granted to *W. R. who had Assets in his Hands to the Value of the Debt*; adjudged, that in an Action of Debt brought upon a Bond against an Heir, 'tis no good Plea to say, that the Executors have Assets in their Hands. *Dyer* 204. *Capell's Case*.

2. Debt against two Daughters upon the Bond of their Father; and after a Judgment against them by *Nil dicit*, the Plaintiff brought a *Sci. fa.* to have Execution; to which they pleaded, *Riens per Descent* in Fee, at the Time of the first Writ brought, not after; adjudged, that this Plea comes too late by the Heir after a Judgment against him by Confession, *nil dicit*, or *non sum informatus*. *Dyer* 344. * *Henningham's Case*. 7 *Ed.* 6. *Dyer* 81. *Pepps versus Henningham*. 23 *Eliz.* *Dyer* 373. *Poph.* 117. *S. C.*

*4 Leon. 3. The Father made a Lease for Years, rendring Rent, &c. after his Death the Son brought an Action of Debt against the Lessee, suggesting in his Declaration, that the Rent was due to him as Heir, but did not declare, that the Action was brought by him as Son and Heir of the Lessor; and for that Reason it was adjudged, that his Declaration was not good, for he ought to have shewed, how he came to the Reversion. 1 *Bull.* 48. *Smith versus Newsam*. *Postea* Reservation. (E) 6. *S. C.*

4. In Replevin, &c. the Defendant avowed for Rent granted *Anno 12 Ed.* 2. and set forth a Descent to such a Person, whose Heir the Plaintiff is, but did not shew how Heir; and upon a General Demurrer to this Plea, it was held, that in a Writ a Man need not shew how he is Heir; but he must in a Declaration, and an Avowry is in Nature of a Declaration; but 'tis only Form, to shew how Heir, because 'tis not traversable; but Heir or no Heir is issuable. *Moor* 885. *Beard versus Baskerville*.

5. Debt against an Heir upon a Bond of his Ancestor; the Defendant confessed, that he had a dry Reversion, and no Assets *ultra*; the Plaintiff replied, that he had Assets *ultra*, upon which they were at Issue; and afterwards the Plaintiff moved the Court for Leave to waive the Issue, and to take Judgment of the Reversion *quando acciderit*, which was ruled accordingly. 1 *Roll. Rep.* 57.

6. Debt against the Heir upon the Bond of his Ancestor, must be brought in the *Debet and Detinet*, because he himself is bound; therefore if it should be brought in the *Detinet* only, it would be ill; and so it was adjudged upon a Demurrer to the Declaration, where the Plaintiff declared in the *Detinet* only against an Heir. *Sid* 342. *Comber versus Wootton*; but 'tis cured by a Verdict. 1 *Lev.* 224. *S. C.* See *Lev.* 130.

7. Debt against an Heir upon the Bond of his Ancestor; the Defendant pleaded, that his Father was seised in Fee of several Lands, &c. and being so seised, made a Lease thereof to one *M.* for 500 Years, under the yearly Rent of a Pepper-Corn, and that he had not Assets by Descent *prater Reversionem* of the said Lands; upon a Demurrer to this Plea it was objected, that the Defendant should have either * confessed or denied the Debt; besides it did not appear, that the Lessee had accepted the Lease by entering on the Lands, for till that is done, there is no Reversion, and by Consequence the Fee must descend; but it was answered, that the Lessee might enter at any Time; and that 'tis a strong Implication, that he had already entered, for the Defendant expressly alledged, that he (the Defendant) had nothing, besides the Reversion; which shews, that there was a Lease in Being, and an Entry made, otherwise there could be no Reversion; and as to the Confession of the Debt, there seems to be no Necessity for it, because what is not denied must be admitted. 1 *Lut. Rep.* 442. *Smith versus Boughton*. * *Dyer* 373. *B.*

Heriot.

(A)

1. **I**N Replevin, if the Defendant justifies for an Heriot-Custom, 'tis no Plea for the Plaintiff to reply, that the Place where the Heriot was taken, was out of the Manor, because he claims such Heriot as his proper Goods, which he may *seise* in any Place where he finds it, but for *Heriot-Service* he ought to distrain, and not to *seise*. *Bendl. 18. Gre-sham versus Gainsford.*

2. A Heriot reserved upon a Lease, tho' 'tis sometimes called an *Heriot-Service*, yet 'tis not like the Case where a Man holds Lands by the *Service of Paying* an Heriot, &c. because where a Heriot is reserved upon a Lease, the proper Remedy is either a Distress, or an Action of Covenant grounded on the Contract, for the Lessor cannot *seise*, as the Lord of a Manor may do the Beast of his Tenant who holds of him by *Heriot-Service*. *Keilw. 82, 84. B.*

3. In Replevin, the Defendant made Conuſance as Bailiff of *B. G.* setting forth, that he was seised of the Manor of *R.* and that *R. W.* was seised of a Tenement holden of the said Manor by Rent and Heriot Service, payable after the Death of every Tenant; and that the said *R. W.* died possessed *de animalibus & catallis*, and because the Heriot was not paid, he by Command of the said *B. G.* distrained, &c. Exception was taken to this Avowry, because it did not set forth * what was the best Beast, whether an Ox or Horse, &c. nor the Price or Value thereof; so that the Plaintiff could not tell what to offer to have his Beast again; but adjudged the Avowry was good, for he might not know what was the best Beast; and the Plaintiff having drove off several Cattle, he ought, at his Peril, to tender sufficient Recompence. *Trin. 18 Eliz. Dicker versus Higgins.* * *Cro. Car. 189, 260. Major versus Brandwood. S. P.*

* Pl. & contra.

* W. Jones 300.

4. Where the Tenant maketh a fraudulent Gift of several Horses, or other Cattle, within the Statute 13 *Eliz.* to defraud the Lord of *one Heriot*, he shall not lose the Value of all the Cattle so fraudulently conveyed, but the Value only of the best Horse, &c. so given or conveyed away, because there was no more than one Horse fraudulently conveyed, for there was but one Heriot due. 2 *Leon. 8. Creswell versus Cook.*

5. In Trespas for Taking an Ox, &c. the Defendant pleaded, that *T. Odyham* was seised in Fee of an Acre of Land, &c. which he held *by the Service of rendring* after the Death of every Tenant, who died seised of that Acre, the *best Beast* which he had at the Time of his Death; my Lord *Anderson* tells us, that the Question in this Case was, whether the Defendant might *seise*, or whether he ought to *distrain* for this Heriot; and that it was adjudged he might *distrain*, but that he could not * *seise*; all the other Reporters of this Case tell us this Judgment was reversed in *B. R.* where it was held, that the Lord might *seise* for an *Heriot-Service*, because where the Tenure is, that the Lord *shall have the best Beast* for an Heriot, there 'tis in his Election what he will take for the *Best*, and one of them tells us, that the Lord may either *seise* or *distrain*; now, if he may *seise* (as certainly he may) 'tis by Reason of the Property which he hath in the Heriot, which being his own by Virtue of the *Tenure*, he may *seise* it where-ever he finds it. *Odyham versus Smith. Cro. Eliz. 590.*

1 And. 298.

Moor 540. Gouldsb. 191.

* Because 'tis Parcel of the Services which lie in Render and not in Prenders.

Feme sole was Tenant for Life of a Copyhold held of a Manor, where the Custom was to pay the best Beast for a Heriot, upon the Death of every Tenant; she married and died; the Lord shall not have an Heriot, because a Feme Covert cannot have any Goods by Law. 4 *Leon. 239.*

6. In Replevin, the Defendant avowed for an *Heriot-Service*, and did not set forth what the Heriot should be, either the best Beast, or any other Thing; the Plaintiff replied, that the Tenant at the Time of his Death *nulla habuit animalia*; and upon Demurrer the Avowry was held insufficient for the Reason before mentioned. *Hob. 176. Shaw versus Taylor. Hutton 4. S. C. See Antea 3. contra.*

7. In Replevin, the Defendant made Conuſance as Bailiff to *B. G.* Lord of the Manor, &c. for that the Plaintiff's Father was a Tenant thereof by Fealty and Heriot, &c. and that the Custom of that Manor was, that the Lord, &c. for the Time being used to have a Heriot for each Parcel of Land held of the Manor, and of which the Tenant died seised; that the Plaintiff's Father died seised of several Parcels of Land, (but did not say of what Estate he died seised) and that by his Death a Heriot was due to the Lord, in whose Right he justified the Taking *nomine heriotorum*; it was objected, that he ought to have shewed of *what Estate the Father died seised*; but adjudged, that it was sufficient to alledge, that an Heriot was due to the Lord upon the Death of every Tenant dying seised. 1 *Bull. 101. Siliard's Case.*

8. The Bishop of *Glocester* being seised of a Manor, &c. let twenty Acres of it to the Father, during the Lives of Three of his Children, rendring Rent, &c. and also Two of his best Beasts upon the Death of each of the Children; afterwards the Bishop let the entire Manor to *B. G.* rendring the antient Rent, and then one of the Children died; adjudged, that the Heriot thus reserved shall go to *B. G.* who had the Reversion, and not to the Bishop. *Winch 57. Bishop of Glocester versus Wood.*

Copy-
hold (S.)
S. C.

9. In Trespass, &c. the Defendant justified the Taking, and set forth the Custom of the Manor of R. to be, for the Lord to have the best Beast of every Tenant who died seised of any Messuage holden thereof after the Death of such Tenant; and if the Beast was drove away before the Lord or his Servant could seise it, then he used to have the Beast of any other, levant and couchant on the same Land, and then sets forth, that B. G. a Tenant, &c. died seised, by Reason whereof his best Beast was due to the Lord for an Heriot, but before it could be seised it was drove off the Land, whereupon he justified the Taking the Plaintiff's Ox levant and couchant, but did not say that he seised it *nomine herioti*; adjudged an unreasonable Custom. *Pasch. 3 Eliz. Dyer 199.* See Sir John Davis's Report in the Case of *Tanistry. S. P. 1 Eliz. Bendl. 39. S. P.* but this was contrary to the Opinion of *Brampton Ch. Just. Hill. 17 Car.* who held it to be a good Custom, because such a Distress is only as a Pledge and Means to get the Heriot. *March 165. Thorn versus Tyler.*

10. A Lease was made to Robert Chichester and his Assigns for ninety-nine Years, if he and B. and C. should so long live, paying at the Death of him and B. and C. his or their best Beast, in the Name of an Heriot; provided that no Heriot shall be paid upon the Death of B. or C. if Robert Chichester shall be living; afterwards Chichester assigned this Lease to Scory, and then died; the Question was, whether the best Beast of Scory the Assignee should be taken for an Heriot; and adjudged it could not, because the Reservation of an Heriot upon this Lease was collateral to Rent, and being against common Right, ought to be strictly pursued; now, by this Lease, the best Beast of Chichester was reserved for an Heriot, and therefore the Beast of his Assignee could not be taken, because so long as he had a Property in the Beast, it could not be the Beast of Chichester. *Cro. Car. 313. Scory versus Randall. Hetley 57. S. C.*

11. A Copyhold was held paying Rent, &c. and rendring an Heriot upon every Alienation and Surrender, by the Custom of the Manor; the Copyholder aliened Part of his Copyhold to one and Part to another, and kept the other Part to himself, and surrendered each Part to the Use of the Alienees; the Question was, whether he should pay one Heriot, or more; it was insisted, that he should pay but one, because of the Fine upon the Alienation, especially this being a Heriot-Custom, which is against common Right, and therefore ought not to be multiplied; but adjudged, that the Lord of the Manor shall have a Heriot for the Alienation of every Part; for if it should be otherwise, then it would be in the Power of all Copyholders to defeat the Lord, by an Alienation of Part, and in this Case the Alienor shall pay the Heriots, because he still continues Tenant of the Manor; but upon every Alienation afterwards, the Alienees shall pay it. *Palm. 342. Snagg versus Fox.*

2 Mod.
93.
1 Vent.
314.
2 Lev.
210.

12. A Lease was made to one Ingram for ninety-nine Years, if Joan, Anthony, and John Ingram should so long live, rendring an Heriot, or 40 s. at the Election of the Lessor or his Heirs, after their several Deaths *successive*; John died first, and then Joan; the Question was, whether an Heriot was due at her Death; it was objected, that it should not, because the Reservation of an Heriot (which is a Thing not due of common Right) ought to be strictly pursued; therefore in this Case Joan, Anthony, and John should die *successive*, as they are named in the Reservation, otherwise no Heriot is due, if they die out of Course; this Point was not adjudged, but the Court held the Avowry to be ill, because it did not appear that Anthony was living at the Time of the Distress taken; for if he was not, then the Lease was determined, and by Consequence the Distress was not lawful. *1 Mod. 216. Ingram versus Tothill.*

Postea
15. S. C.
1 Lev.
294.

13. Besides, a Heriot reserved upon a Lease cannot be paid after the Lease is determined, but an Heriot which grows due by Tenure may be seised when ever 'tis due, because the Tenure still continues; as to the first Point, this Case happened; Lease for ninety-nine Years, if the Lessee and Julian Carver, or either of them, should so long live, and to commence after the Death of Cecilia, paying yearly a Rent, and also 3 l. in the Name of an Heriot, after the several Deceases of the Lessee and Julian, and upon the respective Death of either of them; afterwards the Lessee died in the Life-time of Cecilia, and by Consequence before the Term commenced; adjudged, that the Lessor shall have no Heriot, because a Heriot reserved upon a Lease is in Nature of a Rent, which must go with the Reversion; but here the Lessor had no Reversion, because the Term was not yet commenced. *2 Saund. 165. Lanyon versus Carver. March 46. S. P.*

2 Lev.
S. C.
3 Mod.
230.

14. Trespass for Taking a Gelding, the Defendant pleaded in Bar, that his Grandfather P. S. was seised in Fee, &c. and made a Lease, &c. to Dorothy Edgcomb and her Assigns, for ninety-nine Years, if she and Murgery Upton should so long live, rendring yearly 20 s. and also after the Decease of the said Dorothy and Murgery, her or their best Beast, in the Name of an Heriot; then he derives a Title to himself of the Reversion, and sets forth, that Dorothy Edgcomb married the Plaintiff Osborne, and that he was possessed of the Premises in Right of his Wife, and that she and Murgery Upton are dead, and that the Defendant took the Gelding for an Heriot after the Death of Murgery Upton; the Plaintiff craved Oyer of the Lease, and demurred specially, for that it did not appear the Gelding was took on the Lands charged with the Heriot; but it was insisted, that an Heriot ought not to be paid at all in this Case, because it being reserved on a Lease 'tis an Heriot-Service, and of the same Nature of all other Services reserved on Leases, so that it must be paid whilst the Term is in Being; but here the Term was at an End upon the Death of Murgery, and a Heriot is no more payable afterwards than a Rent after the Expiration of the Lease; and of this Opinion were two Judges because there was no Reversion in the Defendant at the Time the Heriot became due, for the Lease was then determined: Two Judges were of another Opinion, that the Defendant had a reversionary Interest in that Instant of Time when Murgery died, and that

the Seifure shall relate to that Time; and thereupon it was adjourned into the Exchequer-Chamber, &c. 2 *Lutw.* 1366. *Osborne versus Sture.*

15. Lease for ninety-nine Years, if *A. B.* and *C.* should so long live, which Lease was to commence after a *Lease for Life then in Being*, reddendo a certain Rent yearly, and two Days Work in Harvest, and two Capons at *Christmas*, *post principium inde*, and 3 *l.* in the Name of an *Heriot*, after the Death of *A. B.* and *C.* or either of them; one of them died before the Commencement of the Lease; and in an Action of Covenant brought for the 3 *l.* the Defendant demurred to the Declaration, supposing that the 3 *l.* was not due, unless the Death had happened after the Commencement of the Term; and so it was adjudged, because all the other Reservations in this Lease were after the Beginning of the Term, and Clauses in Companies are to expound one another. 1 *Vent.* 91. *Lion versus Carew*, and fol. 9. *S. C.* 1 *Lev.* 294. *S. C.* *Sid.* 437. *S. C.* 2 *Saund.* 165. *S. C.*

16. In Trespass for a Cow, the Defendant pleaded, that *H. R.* was possessed of, &c. and died, and that he seized the Cow as an *Heriot-Service*, but did not set forth, that he seized it within the Manor; but adjudged, that a *Heriot Custom or Service* may be seized any where; but one cannot distrain for them out of the Manor. 1 *Salk.* 356. *Austin versus Bennett.*

Highways. See Ways.

Homine replegiando.

(A)

1. Information exhibited against *Designy*, a Merchant, by the Father of one *Turbett*, who was a young Boy at *Merchant Taylor's School*, for spiriting him away to *Jamaica*; upon Not guilty pleaded, he was found guilty at the *Nisi prius*, at the Sittings after *Trinity-Term*; and appearing in Court in *Michaelmas-Term* following, was fined 500*l.* and committed till he paid it; but he having made some Interest to the King to pardon the Fine, the Court directed the Father to bring a *Homine replegiando* against the Prisoner, and upon an *Elongatus* returned, he was charged with it in Prison; and now he procured a Letter from the Commissioners of the Treasury, signifying the King's Intention to pardon the Fine, if the Judges could advise, that by such Pardon he might be discharged from his Imprisonment; but they did not think fit to bail him upon the *Capias in Withernam*, unless he brought 1000 *l.* into Court, and the Money to be forfeited, if he did not produce the Child within six Months; 'tis true, the Return of an *Elongatus* is not conclusive, because the Party may bring an Action on the Case against the Sheriff for a false Return, if in Fact 'tis so; and if it be found to be false in such Action, then the Party may be bailed; and 'tis no Objection to say, that the Sheriff may die before such Action brought, or before the Issue tried, because if he should die, the King may issue out a Commission to inquire of the Truth of the Return, and an Inquisition taken thereon may be traversed; and if the Issue upon the Traverse is found for the Defendant in the *Homine replegiando*, then he may be bailed; 'tis true, the *Capias in Withernam* is no Execution; but 'tis as true, that unless the Defendant doth confess the Taking and Having the Child in his Custody, he cannot be bailed. *Raym.* 474. *Designy's Case.*

2. *Sir Tho. Grantham* brought over an *Indian Monster*, who had the perfect Shape of a Boy growing out of his Breast, all but the Head, and this Man he exposed to be shewed for Profit: The *Indian* turned Christian, and was baptised, and being detained from his Master, he brought an *Homine replegiando* against the Person who detained him; the Sheriff returned, that he had replevied the Body, but did not say the Body in which *Sir Thomas* claimed a Property, he was ordered to amend his Return, and then the Court of *C. B.* bailed him. 3 *Mod.* 120. *Sir Tho. Grantham's Case.*

3. In an *Homine replegiando*, the Sheriff returned an *Elongavit*; thereupon a *Capias in Withernam* went forth, and afterwards the Defendants having entered an Appearance with the Filazer, they moved for a *Superfedeas* to the *Withernam*, and offered to plead *non ceperunt*, insisting, that they were not to be concluded by the Sheriff's Return; this was opposed, unless they would give Bail to deliver the Person, in Case the Issue was found against them: *Sed per Holt Ch. Just.* if they had pleaded any Property in the Party, then they ought to give Bail to deliver him; but they say, that they have not the Person, therefore *non ceperunt* is a proper Plea, and they shall put in Bail to appear *de die in diem.* 4 *Mod.* 183. *De la Bastide versus Reynell.*

4. The Return of an *Habeas Corpus* was, that *Watts* was in Custody upon a *Capias in Withernam*, that upon a *Homine replegiando*, the Sheriff upon Inquisition returned, that the Jury found the

the Party was esloined, &c. whereupon a *Capias in Withernam* issued against *Watts*, returnable *octab. Martini* which was not yet come; and the Defendant was taken upon the said *Capias*; and the Question was, whether he should be bailed; it was objected, that he should not, because the Return is in Nature of a Conviction, and then the *Capias in Withernam* is an Execution; and afterwards the Defendant can never plead *Non cepit*, for he has no Day in Court: But adjudged, that a *Homine replegiando* doth not differ from a common Replevin, in which the Sheriff must return *Deliberari feci*, or an Excuse why he doth not; and that is either, that the Cattle were esloined, or that no Body came to shew him which they were; that where he cannot make Deliverance, if he return an *Elongati*, the Defendant is not concluded by that Return to plead *Non cepit*, because if he should, then he is without Remedy; for he cannot falsify the Return, because no Action lies against the Sheriff, upon the Return of *Elongatus*, tho' 'tis false; that the *Capias in Withernam* makes no Alteration of the Case, because 'tis only the Consequence of an *Elongatus*; therefore the Defendant is no more estopped by the *Withernam* to plead *Non cepit*, than he was by the Return of the *Elongatus*, or to claim Property, if it had been in a *Common Replevin de averiis*; that in such a Replevin, even after the Return of an *Elongati* and a *Capias in Withernam* against the Defendant, if he plead *Non cepit* he shall have the Cattle again, and so he shall if he claims; for since the Taking or Property are in Question, the Law accounts it reasonable, that the Defendant should have the Goods *pendente lite*; and by the same Reason, in a *Homine replegiando*, if the Defendant pleaded *Non cepit*, he shall be bailed, for the *Withernam* is no Execution, 'tis no more than a mesne Process; and the Court disliked that Case in *Raymond* 474, and the Case of the Lord *Grey*, who coming in upon the Return of an *Elongata*, was committed, and lay in Custody above a Fortnight; and they held, that after the Defendant is bailed upon this *Capias in Withernam*, there may be a new *Withernam* against him; for the Bail must be in a Sum certain, with a Condition, that the Defendant shall appear *de die in diem*; and that Judgment be against him, that he render his Body in *Withernam*, there to remain *quousque* he deliver the Party, and permit him to go at large: Lastly, it was held, that upon the Return of this *Habeas Corpus* the Party could not be bailed, but that he might, after the *Capias in Withernam* returned; that in a *Homine replegiando* after an *Elongatus* returned, if the Defendant comes in *gratis*, and calls for a Declaration, and pleads *Non cepit*, he shall not be obliged to give Bail; but if he come in upon the Return of the *Capias*, he shall give Bail, but shall not be admitted to it till he call for a Declaration, and plead *Non cepit*; and the Reason why he shall not give Bail in the first Case is, because by pleading *Non cepit*, the *Withernam* is suspended; now, if the Plaintiff will not deliver a Declaration, and by that Means continue the Defendant in Custody, because he cannot be bailed till a Declaration delivered, and the Defendant pleads *Non cepit*, in such Case the Plea may be demanded upon the Return of the *Withernam*, and may be nonsuited if he doth appear. 2 *Salk.* 581. *Moor* versus *Watts*.

Honours.

See *Privilege.* (A) 2.

(A)

1. **K**ING *Richard II.* created *Ralph Nevill* Earl of *Westmorland*, to him and the Heirs Males of his Body, which Honour descended to *Charles Nevill* Earl of *Westmorland*, who was attainted of Treason; adjudged, that a Name of Dignity or Honour may be entailed upon one and the Heirs Males of his Body, and that such an Entail is within the Statute *de Donis*, because it concerns Land; for every Earl, &c. is created of some Place; that such a Dignity may be forfeited at Common Law, (for 'tis an antient Office) that is, it may be forfeited upon an Attainder for Treason, and this by a Condition in Law annexed to the Dignity; for his Office is *ad consulendum Regem tempore pacis & defendendum tempore Belli*, therefore he forfeits it when he takes Counsel or Arms against the King; and if such a Dignity had not been forfeitable at Common Law, 'tis now forfeited by the Statute 26 *H. 8. cap.* 13. by the Word *Hereditament*, for a Dignity is an Hereditament. 7 *Rep.* 33. *Nevill's Case*.

2. In a *Quo Warranto* for using Liberties within the Town and Manor of *Petworth*, and keeping Markets, and taking Toll there; the Defendant justified under the Title of the Earl of *Northumberland*, and shewed, that *Anno 5 Mariae*, the Honour of *Petworth* was entailed on the Earl by Parliament, with all Markets, &c. the Question was, whether the Manor of *Petworth* was within the Honour of *Petworth*; and the Jury found, that *Petworth* was an Honour, and that the Manor was Parcel of the Honour, and that they had Fairs and Markets there, and used to take Toll of all People, except of the Tenants of the Earl of *Arundell*. 1 *Bulst.* 195. *The King* versus *Levett*.

3. In *Levet's Case* before-mentioned it was said, a Man might have an Honour, (*viz.*) a Barony or an Earldom by Prescription; and in the *Earl of Shrewsbury's Case*. 12 Rep. 106. it was said, that a Man might have a Dignity without Possessions; but that the *Duke of Bedford, George Nevill*, Anno 17 Ed. 4. was degraded by Act of Parliament, because he had not any Inheritance or Possessions to support the Name, Title and Dignity of a Duke.


4. Judgment against the Countess of Rutland, who was taken in Execution upon a *Ca. sa.* and thereupon an Information was exhibited against the Officers in the Star-Chamber, in which it was adjudged, that a Baron, who is Lord of Parliament, cannot be arrested in an Action of Debt or Trespass, for by Reason of his Dignity, he shall be intended to have sufficient to satisfy every Body; neither shall he be of any Jury, unless he will; but in the Principal Case, a *Capias* being awarded against the Countess, she may be taken in Execution by the Sheriff, because he ought not to dispute the Authority of that Court from whence the Writ issued, but must execute it, for he is bound by his Oath so to do; and altho' by the Writ it self it appeared, that the Defendant was a Countess, against whom a *Capias* would not lie, yet, because in some Cases it may lie, as for a Contempt, &c. therefore the Sheriff ought not to examine the judicial Acts of the Court, but because the Officers did arrest the Countess upon a feigned Action, tho' afterwards she was charged by them with a *Ca. sa.* it was adjudged False Imprisonment, and they were fined. 6 Rep. 52. *Countess of Rutland's Case*. Moor. 765. S.C.

5. An *Earl* is the most antient Title of Honour amongst the Peerage; for there were no Dukes till 11 Ed. 3. when that King created the Black Prince *Duke of Cornwall*, and those who were created Earls were usually of the Blood Royal, and therefore were stiled by the King, as they are at this Day, *Consanguinei nostri*, and for this Reason they have several Privileges by the Law, (*viz.*) That they shall not be arrested for a Debt or a Trespass; because 'tis presumed, that they assist the King with their Advice and Counsel; but if Issue be taken, whether the Defendant is an Earl or not, it shall not be tried by a Jury, but by the King's Writ. 9 Rep. 43. In the *Earl of Shrewsbury's Case*. 7 Rep. In *Nevill's Case*. Antea 1. S. C.

Honour.

(A)

Of the Court of Honour.

1.  NE Parker, being a Corporation-Man of the Company of Painter-Stainers London, did as a Herald-Painter, furnish the *Publick Funeral* of my Lord *Gerrard* with Banners, Escutcheons, &c. and did marshal the said Funeral without the Directions of any Herald; the Marshalling whereof belonged to *Garret King at Arms*, this being the Funeral of a Nobleman; but those of the Gentry belong to *Clarendieux* and *Norroy*; Parker was summoned before the Court of Honour, which was held by Commission, for that the *Duke of Norfolk*, who was *Earl-Marshal*, was *Non Compos*; and for this Offence he was committed by the Commissioners to their Prison, called the *White Lyon* in *Southwark*; and upon an *Habeas Corpus*, the Gaoler returned the Warrant of Commitment, which was, *till farther Order*; and this Return being amended, the Gaoler returned another Warrant, by which all the said Matter was recited, and that Parker was committed *for the Cause aforesaid*; it was objected against this Return, that a Commitment *till farther Order*, is ill, because 'tis indefinite; for it may be for a Month, for a Year, or for Life, if the Commissioners will not discharge him; and a Commitment *for the Cause aforesaid*, is as bad, without saying, till he shall be delivered by due Course of Law; this was as to the Form of the Return; then as to the Matter it was insisted, that if this was an Offence, yet the Commissioners have no Power to commit, because 'tis punishable only in the Court of Honour, which is to be held before the Constable or Earl Marshal, and before no others, and by Consequence not before Commissioners; for the Court of Honour being a Court by Prescription, cannot be altered but by the Parliament; and such Commissioners are illegal, as appears by the Statute 3 Car. 1. and of this Opinion was Justice *Twisden*; but the other Judges held the Commission to be good, and that it might be as well executed as the Office of a Chancellor or Lord Treasurer, by Commission; and that this Return was good; for a Commitment *till farther Order*, implies, till he shall be discharged by Order of Law; then the Question was, what shall be a *Publick Funeral*; the Heralds said, that if there were more than six Escutcheons, it was a *Publick Funeral*; the Painter-Stainers affirmed, that it was not the Number of Escutcheons, but Banners, and other Badges of Honour, according to the Quality of the Deceased that make his Funeral publick; and that as to Painting of Escutcheons, it ought to be (according to the Heralds) by their Direction, and was never a distinct Trade till Queen *Elizabeth's* Reign; for before that Time they were painted by the Servants of the Heralds in a Room which they had in their

their Office for that very Purpose ; but *Parker* submitting to the Commissioners, was discharged by their Warrant.

As to the Original of Arms, and how they became Hereditary, it was thus, (*viz.*) the Original Institution was to distinguish Commanders in War; for the antient Defensive Armour being a Coat of Mail, with a Hood of Mail over the Head and Face, which was covered, except the Eyes, and a small Space to breath, the Persons could not be distinguished; therefore a certain *Badge* was painted on their Shields, which covered the left Side of their Body; and the Thing thus painted was called *Arms*, but not as yet appropriated to Families, till *Richard 1.* with many of his Subjects, made a Voyage to *Jerusalem*, to regain it from the *Turks*; the Commanders in this Expedition having several Things painted on their Shields, those who descended from them accounted this War so Honourable, that they and their Heirs have ever since taken the same Thing to be their *Arms*; but because this was painted on Shields, and by Consequence could be seen only on the Left Side; therefore afterwards they had a Silk Coat drawn over their Armour, on which their Arms were painted both on the Breast and Back; and afterwards a stiff Coat was invented, on which their Arms were painted all over; and this is the Herald's Coat to this Day; and this was called *Coats Armour*, as that painted on Shields was called *Escutcheons* from *Scutum*; all which Military Institutions being now useless, the Arms still remain as a Badge of Honour to distinguish Families. *Sid.* 352. *The King* versus *Parker*.

2. In Assault and Battery by the Plaintiff, who was a *Dr. in Divinity*, and he and his Wife brought this Action against the Defendant and his Wife, for the assaulting the Wife of the Plaintiff; the Defendant pleaded, that her Husband is a *Justice of Peace*, and an *Esquire in Plymouth*, and that she ought to have Precedence of the Wife of the Plaintiff; and that at such a Funeral in *P.* she (the Plaintiff's Wife) took Place of the Defendant's Wife, whereupon she *molliter manus imposuit* to remove her; and upon Demurrer it was insisted for the Defendant, that the Wife of an *Esquire* ought to take Place of the Wife of a *Dr. in Divinity*; but admitting that a *Dr. of Divinity* took Place of an *Esquire*, yet, that being in Respect of his Degree in the *University*, is not communicable to his Wife, but Personal to him only; as the Dignity of a Bishop is not communicable to his Wife, tho' he is a Baron in Parliament; but the Court would not determine who should have Precedence, for that is properly determinable by the Court of Honour, but gave Judgment for the Plaintiff, because the Defendant by his Demurrer, had confessed the Battery. 2 *Lev.* 133. *Ayton* versus *Jennings*.

House of Correction. See Justice of Peace and Sessions.

Hue and Cry.

(A)

On the Statutes of Winton, (*viz.*) 13 Ed. 1. 27 Eliz. cap. 13. of Hue and Cry.

1 And.
158.

1. ff. **T**WO were robbed of a joint Sum in the Hundred of *W.* who joined in an Action against the Inhabitants of the said Hundred; they pleaded, that they had pursued the Felons thro' three Towns in that Hundred to the Town of *R.* and there levied Hue and Cry; adjudged no Plea; for the Statute of *Winton* is not satisfied without apprehending the Criminals, or the Defendants knowing them, that they may be indicted or outlawed. *Dyer* 370. See 4 *Leon.* 18. *Shrewsbury* versus *Inhabitants of Apton*.

* 1 Leon.
57. S. C.
* 4 Leon.
59, 191,

2. ff. Resolved upon the Statue of *Winton*, that if a Robbery is done in a House, at any Time, by Day or Night, the Hundred is not liable; for it must be an open Robbery, that the Country may take Notice of it; and if 'tis done before Day, the Hundred shall not be charged; but if after Sun-set in *January*, and before 'tis dark, the Hundred must answer. 7 *Rep.* 6. *Sendill's Case*. 7 *Rep.* 6. * *Athpool's Case*. 7 *Rep.* 6. * *Milborn's Case*. 2 *Cro.* 106. *Mary* versus *Hundred of Morley*. *Cro. Eliz.* 753. *S. P.*

3. ff. A Carrier's Boy being only with the Waggon, it was robbed in the Absence of the Carrier, and the Boy made Hue and Cry, and came to a Justice to be examined, but he refused to examine him; thereupon the Plaintiff was examined, and brought his Action on the Statute against the Hundred; but adjudged it did not lie; for the Boy who was robbed ought to have

been

been examined, because he might know the Robber; and not the Plaintiff, whose Money it was that was taken away, and an Action framed on this Statute; would lie against the Justice, who refused to examine the Boy. 1 *Leon.* 323. *Green versus Hundred of Bucklechurch.*

* 4 *Leon.*

4. A Man was robbed in *Buckinghamshire*, and an Action was brought against the Hundred; S. C. upon Not guilty pleaded. the Jury found, that he was robbed on the Day, and in the Year, but not in the Parish set forth in the Declaration, but that the Parish where he was assaulted, and that where he was robbed, were both in the same Hundred; adjudged, that 'tis not material in what Parish he was robbed, so it was in the same Hundred. *Goldf.* 58. *Barnell's Case.*

5. If a Man is robbed in one Hundred, and he pursue the Felons into another County, and there he takes one of them, tho' the Hundred where he was robbed do nothing, they shall not be charged. *Goldf.* 55. *Comford versus Hundred of Offley.*

6. By the Statute 27. *Eliz. cap.* 13. none shall have an Action, except the Party robbed give Notice thereof to some of the Inhabitants of the neighbouring Village, Town or Hamlet, next the Place where the Robbery was done, that they pursue the Robbers. 7 *Rep.* 6. in *Sedill's Case.*

7. A Carrier, coming towards *London* out of *Gloucestershire* with Money on a Pack-horse, was assaulted in one Hundred, and the Felons took his Horse and Pack, and led him into another Hundred, where they robbed him; adjudged, that the first Hundred was liable to the Action, for he shall be said to be robbed where he was first assaulted, and where the Horse was first taken; but if the Carrier had led his Horse himself into another Hundred, then that Hundred should be charged, because by his leading his Horse, the Money was still in his Possession, and therefore it was no Robbery till he came into the second Hundred: A Man's Purse was picked out of his Pocket in the King's Bench Court, and the Thief was taken in the very Fact, but a Key being fastened to the Purse, did still stick in his Pocket; it was the Opinion of two Judges, that he was still in Possession both of his Purse and Money, and so no Felony. *Pasch.* 30 *Eliz. Goldf.* 86.

8. An Action upon the Statute of *Hue and Cry* must always be brought by Writ, and never by Bill, because 'tis brought against many Inhabitants, who cannot be supposed to be in *Custodia Marescalli*, as a single Person may be. *Hill.* 43. *Eliz. Goldf.* 148.

9. Adjudged upon the Statute of *Hue and Cry*, that tho' the Statute mentions Robberies done in the Day before Night; yet if a Robbery is done in the Morning before Day, or in the Evening after Day, in which Times Men usually travel, that the Hundred is answerable. *Hill.* 34 *Eliz. Cro. Eliz.* 270. *Ridgely versus Hundred of Warrinton.*

10. ff. Resolved on the Statute of *Winton*, that if one is robbed on a Sunday, in the Time of Devine Service, and makes Hue and Cry, that the Hundred shall be charged; for Many Persons are necessitated to travel on that Day, as Physicians, &c. and 'tis an Act of Justice to pursue the Felons; and Ministerial Acts done on Sunday are good. 2 *Cro.* 496. *Waite versus Hundred of Stoke.* *Godb.* 280. S. C.

11. ff. The Plaintiff was robbed in a Highway in *divisis hundredorum*, and gave Notice to the Inhabitants of the Hundred near the Place where he was robbed; adjudged, that Notice to either Hundred is sufficient. 2 *Cro.* 675. *Foster versus Hundred of Isleworth.*

12. Action upon the Statute of *Winton*, 13 *Ed.* 1. and the Plaintiff brought himself within all the Circumstances required by the Statute 27 *Eliz.* and concluded *contra formam Statuti prad'*; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration was not good, because he having declared on two Statutes, ought to have concluded *contra formam Statutorum*; but adjudged, that the Action is grounded only on the Statute of *Winton*, and that the other Statute is rather an Obstruction to the Action, than otherwise, because the Plaintiff might bring an Action generally against the Hundred, before that Statute 27 *Eliz.* was made; but now he is restrained under certain Circumstances to be performed by him, before he can charge the Hundred; and therefore *contra formam Statuti* must necessarily refer to the Statute of *Winton*; and if he had concluded *contra formam Statutorum*, it had been ill. *Yelv.* 116. *Andrews versus Hundred of Lewkenor.* *Noy* 125. S. C. 2 *Cro.* 187. S. C.

13. An Action was brought against the Inhabitants of the half Hundred of *Waltham*; after a Verdict for the Plaintiff, it was moved, that it ought to be brought against a whole Hundred; but it was answered, that the half Hundred is a Hundred by it self; adjudged, that it ought to have been brought against the Inhabitants in the Hundred of *Waltham*, called the half Hundred of *Waltham*; but it shall be so intended. 1 *Brownl.* 158. *Constable versus Hundred of Waltham.*

14. The Plaintiff declared, that he was robbed of 80 *l.* in Money, and of divers other Things particularly set forth in his Declaration: Upon Not guilty pleaded by the Hundred, the Jury found *quoad captionem*, &c. of the Money, that the Defendants were guilty, and assessed Damages to 90 *l.* and as to the Rest, Not guilty; upon a Writ of Error brought, the Error assigned was, that the Hundred could not be found guilty *de captione* of the Money; for they can be no otherwise guilty than *pro non captione* of the Robbers, and not answering the Money; but adjudged, that the Finding them guilty *de captione* of the Money, is as much as to find, that so much was taken from the Plaintiff, and that the Hundred had not made him any Amends; another Error assigned was, that the Judgment was in *miser cordia*, when it ought to be *quod capiantur*; because their Negligence in not pursuing and taking the Felons, was in Contempt of the Law; but adjudged, it was only a *Malefeasance*, and that the Judgment *quod sint in mia'*, is well. 2 *Cro.* 350. *Oldfield versus Hundred of Wetherly.*

15. In an Action upon the Statute of *Winton*, the Robbery was laid to be 9 *October* 13 *Jac.* and the *Teste* of the Writ was on the *very same Day and Year*; adjudged, that there is a Difference where Time is to be reckoned from and upon the Dates of Writings, and from Acts done; for in the last Case, the Day on which the Act was done shall be always reckoned: Now in the Principal Case the Action ought to be brought within a Year after the Robbery was committed, which was not done, because the Robbery was done on the 9th of *October* 13 *Jac.* and the *Teste* of the Writ was on the *very same Day and Year*; which cannot be, because there are not *two ninth Days of October*, in the same Year; therefore the Action being brought on the 9th of *October*, it must be intended a Year after the Robbery, and then it will not lie. *Hob. 139. Norris versus Hundred of Gawtry.*

16. In an Action on the Statute of *Winton*, the Plaintiff in his Declaration had not mentioned any Day when the very Robbery was done, but generally, that it was done in *September*, whereas in Truth it was in *October*; and now he moved the Court, that the Record which was taken out for Trial, but never put in, might be amended, for the Notice given to the Hundred, as to the Record, would appear to be before the Robbery was committed, and it was amended accordingly. *Trin. 15 Jac. 1 Brownl. 156. Camblin versus Hundred of Tendring.*

17. The Case was (*viz.*) A Man travelling on the Sabbath-Day in the Time of Divine-Service, was robbed; and this being found in a Special Verdict, upon an Action brought against the Hundred, the Question was, whether the Hundred was chargeable; and adjudged by three Judges against the Chief Justice, that it was chargeable. *2 Roll. 59. Case of Hundred of Stoke.*

18. In an Action upon the Statute of *Winton*, and a Special Verdict found, the Case was, that the Hundred made Hue and Cry, and that Sir *Joseph Ash* finding one of the Robbers in the Presence of Sir *Philip Howard* a Justice of Peace in *Westminster*, he himself being an Inhabitant in *Thistleworth*, charged the Person with this Robbery before Sir *Philip Howard*, who promised, that he would appear at the next Sessions in the *Old Baily*; the Plea was, that they made Hue and Cry, and within forty Days took *Dudley*, one of the Robbers, and had him in Custody: The Replication was, that *Dudley* was not taken upon their fresh Pursuit *modo & forma*; the Question was, whether this was such a Taking as was put in Issue; and adjudged, that it was and that the Charging him in the Presence of a Justice, was a Taking within the Statute; for being before the Justice, which in Construction of Law is under the Power of that Magistrate, it had been in vain to lay hold on him; and it shall be intended, that this was upon fresh Pursuit. *1 Vent. 118, 325. Methwin versus Hundred of Thistleworth. Raym. 221. S. C. 3 Lev. 4. S. C.*

19. *Jf.* Resolved on the Statute of *Winton*, that if a Man is assaulted in one Hundred, and in Flying is pursued by the Rogues into another Hundred, and there robbed, that Hundred shall be only charged. *Hutt. 125. Dean's Case.*

20. *Jf.* Oath was made, &c. before a Justice of Peace inhabiting within the Hundred, and within twenty Days before the Action brought, which Justice was then at his Chamber in the *Temple*; and it was objected, that he had no Jurisdiction out of the County where he was a Justice; but resolved, that the Examination was good. *Cro. Car. 153. Helie versus Hundred of Benhurst.*

21. Action against the Hundred upon the Statute of *Winton*, and the Oath of the Robbery was made before a Justice of Peace who dwelt in the County where it was done, but was then at *London*; adjudged that the Oath and the Examination were well taken within the Meaning of the Statute 27 *Eliz.* because that is not an Act for exercising any Jurisdiction, but only directory, that an Oath and Examination shall be taken, which may be done as well in any Place as within the County; but a Justice of Peace cannot exercise any coercive Power, but only in the proper County where he hath Jurisdiction. *Cro. Car. 211. Helier versus Hundred of Benhurst.*

22. The Master brought an Action against the Hundred for a Robbery upon his Servant, and Notice was given of it in the Hundred, five Miles from the Place where he was robbed; and this was held good, because the Party may be a Stranger to the County, and so not know the nearest Place or Town. *March 10. Sir John Compton's Case.*

23. Action upon the Statute, &c. in which the Plaintiff declared, that he was robbed of such a Sum, and made Hue and Cry at C. in the said County near the Place where he was robbed, and gave Notice of the Robbery to the Inhabitants of C. After a Verdict for the Plaintiff, a Writ of Error was brought, and the Error assigned was, because the Plaintiff did not alledge, that C. was a Village in the Hundred where the Robbery was done; for Notice given to the Inhabitants of a Village out of the Hundred, is not good; but adjudged, that if Notice is given to the Inhabitants of a Village near adjoining to the Place where the Robbery was committed, 'tis good enough; for the Statute doth not require, that it should be given to the Inhabitants of the Hundred; and it hath been held good, where Notice hath been given to the Inhabitants of a Village out of the County, so that it was near the Place where the Robbery was done. *Cro. Car. 275. Merrick versus Hundred of Rapegate, and Cro. Car. 30. Tatter versus Hundred of Dawruey, S: P.*

* 4 Leon. 24. *Jf.* The Servant was robbed of the Master's Money, he may sue the Hundred upon the Statute of *Winton*. *Goldf. 24. Tirrett's Case. Style 318. Crosthwaite versus Hundred of Lowden*

25. *Jf.* If a Carrier's Man or Son conspire to rob him, and the Carrier himself is not privy to it, he may sue the Hundred on the Stat. of *Winton*; but the Conspiracy may be given in Evidence in Mitigation of Damages. *Style 427. Matthew versus Hundred of Godalman.*

26. The

26. The *Servant* was robbed, and he made Oath of the Robbery within twenty Days before the Action brought, and that he did not know any of the Robbers, &c. the Master brought the Action; and it was objected, that the *Action* would not lie, because he was not sworn, that he did not know any of the Robbers; but adjudged, that the Action is well brought by the Master, and that the Servant's Oath is sufficient, for it lies properly in his Knowledge who was robbed, whether he knew any of the Robbers, and the Master knows only the Fact by the Report of his Servant; and if he and not the Master should bring the Action, then the Servant might release or compound, and so the Master should lose by his Falshood. *Cro. Car.* 26. *Raymond* versus *Hundred of Oking*.

27. Upon a Special Verdict, the Case was, *Hall* the Plaintiff was robbed of 403 *l.* in *Yorkshire*, of which he made Oath the next Day before a Justice of Peace of the *Riding* where the Robbery was committed, and afterwards, but within twenty Days before the Action brought, he made a second Oath before the next Justice of the *Riding*; and the Jury found, that there were no other Justices in the *County of York*, but of the *Three Ridings*, which are the North, East, and West Ridings, and which are as three distinct Counties; the Question was, whether this Oath was within the Statute 27 *Eliz.* by which 'tis enacted, that it shall be made before a *Justice of the County*, and this was made before a Justice of a *Riding*; and it was insisted, that it was not, for tho' a *Riding* shall be taken for a County in all beneficial Statutes, as upon the Statute of Inrolments, which provides, that the Deed shall be acknowledged before the Clerk of the Peace, and one Justice of the *County* where the Lands lie, there a Justice of the * *Riding* shall be sufficient; but 'tis not so in Penal Statutes as this is; but adjudged, that if a † *Riding* should not be taken for a County, then *Yorkshire* would be out of this Statute, because there are no Justices there but of *Ridings*; adjudged likewise, that Notice given to the *Parish* where the Robbery was done is good Notice within the Statute, which appoints it to be given to the *Town, Vill, or Hundred*, and that if a Man deliver Money to a Carrier to carry to such a *Vill*, and he is robbed, and makes Oath thereof according to the Statute, that the Owner who hath the real Property, or the Carrier who hath the possessory Property may bring the Action against the Hundred. 2 *Sid.* 45. *Hall* versus *Hundred of Skarrock*.

* Hob.
128.
Perkyn v.
Perkyn.
† Co. Ent.
349.

28. Action upon the Statute of *Winton* against the Hundred of *Agbridge* in *Yorkshire*, and in a Special Verdict, the Jury found Notice according to the Statutes, and that none of the Robbers were taken within forty Days, but that fifty Days after the Robbery was done, two of the Robbers were taken; and the Question was, whether the Hundred is discharged, if any of the Robbers are taken before the Verdict or Judgment given; it hath been held, that the Hundred is discharged, if any of them are taken before the Verdict, tho' after the forty Days, and so 'tis resolved in *Milborn's* Case, but the Court doubted of it in this Case. *Sid.* 11. *Baskervill* versus *Hundred of Agbridge*.

29. Action against the Hundred was discontinued, and a new Action brought, and adjudged ill, because a new Oath was not taken within forty Days before the last Action brought. *Sid.* 139. *Newman* versus *Inhabitants of Stafford*.

30. Adjudged, that if Robbers drive a Waggon, or cause the Waggoner to drive it out of the Highway in the Day-time, but do not rob the Waggon till Night, that this is a Robbery in the Day-time, because the first Seizure is the Robbery. *Sid.* 263. *Pledall* versus *Hundred of Thistleworth*. *Gouldf.* 86. *S. P.* *Hutt.* 125. *S. P.*

31. Action on the Statute of *Winton*, in which the Plaintiff declared, that he was robbed, and none of the Robbers taken within forty Days, according to that Statute, &c. after a Verdict for the Plaintiff it was objected, that the Statute was misrecited, for it was not the Statute of *Winton* which gave the Hundred forty Days to take the Robbers, for that Statute gave half a Year, but it was the Statute * 28 *Ed.* 3. cap. 11. which restrained the Time to forty Days, as appears by the Authorities in the Margin: But adjudged, that all those Books are mistaken, for the Statute of *Winton* gave no more than † forty Days, and so are all the modern Precedents; and upon View of the Parliament-Roll of the Statute of *Winton*, it appeared to be forty Days, and no more; and 'tis the Statute 28 *Ed.* 3. by which 'tis confirmed. 3 *Lev.* 320. *Peirson* versus *Hundred of Westward*.

* 2 Leon.
12.
Dyer 370.
pl. 59.
2 Inst. 569.
Old. Ent.
218.
Ent. 328.

Co. Ent. 350. † Raft. Ent. 406. Co. Ent. 351. *Herne* 215. 2 *Saund.* 376. *Form pl.* 99. *Robinson*

32. Case upon the Statute of *Winton*, in which the Plaintiff declared in every Circumstance according to the Statute, but only in the Oath, which he set forth thus, (*viz.*) that he was robbed by four Persons to him unknown; now, by the Statute 13 *Eliz.* 'tis required, that he shall make Oath, that he did not know the Robbers, nor any of them; and this Matter being found specially, it was objected, that this Oath was insufficient, for he might not know all but some of them; there being but two Judges in Court, they were divided in Opinion. 3 *Lev.* 328. *Pye* versus *Hundred of Westbury*. See *Noy* 20. *Bateman's* Case.

33. Action against the Hundred, &c. at the Trial some poor House-keepers, who lived in the Hundred, were produced as Witnesses; and the Question was, whether they should be admitted as Evidence; 'tis true, Alms-People and Servants are good Witnesses, but these are not, because, tho' they are poor, yet before the Money recovered may be levied, they may be worth something. 1 *Mod.* 73.

2 Cro.
469, 675.
1 Cro.
267.

34. Action upon upon the Statute of *Winton*, the Plaintiff had a Verdict, but it was objected in Arrest of Judgment, that the Declaration was ill, because the Plaintiff did not alledge that the felonious Taking was in the * *Highway*; adjudged not necessary, for the Action lies, tho' the Robbery was not in the *Highway*. 1 *Mod.* 221. *Savill's Case*.

35. In an Action upon the Statute of Hue and Cry brought by a common Carrier, in which he declared, that certain Malefactors, (*viz.*) three Men, to him unknown, 10 *Octob.* 22 *Car.* in the Highway, within the Hundred of *E.* in the Parish of *T.* in the County of *R.* with Force and Arms assaulted him, *ac* 29 *l.* in *Pecuniis numeratis de denariis ipsius the Plaintiff*, then and there found, feloniously did take from him; *ac* *diversa bona & catalla in custodia sua existen' ad Valenciam* 39 *l.* &c. *ad tunc & ibidem similiter invent' de eodem the Plaintiff*, did take and carry away; and upon a Demurrer to this Declaration, it was adjudged ill as to the Goods, because the Plaintiff did not set for the Particulars, and did not say that they were his own Goods; for if they were not, then they who had the Property, and not the Plaintiff who had the Possession, would be entitled to the Action; and so is 2 *Cro.* 49. and *Style* 53, but as for the Money the Plaintiff had Judgment, for this Action is in Nature of an Action of Trespass, in which Damages are to be recover ed, and therefore it may be divided, and Judgment may be for what is well laid in the Declaration, and the Plaintiff shall be barred for the rest; so likewise in Covenant, the Plaintiff shall recover for a Breach which is well assigned, and shall be barred for those that are not, if the Defendant demur generally; therefore, in the principal Case, the Plaintiff had Judgment for the Money, and he entered *Remittit damna* as to the Goods; but he being answerable for the Goods, might have maintained an Action for the Robbery, if he had declared right. 2 *Saund.* 379. *Pinkney versus Hundred of East Hundred.* See 2 *Cro.* 348, 350, 557. *S. P.*

36. Trover for two Geldings, brought against the Under-Sheriff of *Bucks*; upon Not guilty pleaded, the Case upon the Evidence before *Hale Ch. Just.* was, there was a Judgment obtained upon the Statute of Hue and Cry against the Inhabitants of the Hundred of *Stokepoges* in that County, and a *Fieri facias* awarded against them; *Leigh*, the Plaintiff, was seized of several Lands in the said Hundred, which he kept in his own Hands, but he had no House, nor ever lodged in the Hundred; and for that Reason, supposing he was not bound to keep Watch and Ward, he being assessed to 10 *l.* for his Proportion towards the Robbery, refused to pay it; and thereupon the Sheriff levied the same by Taking the Horses; but it was held by the Chief Justice, that so long as he keeps his Lands in his Hands within the Hundred, so long he shall be chargeable to the Robberies, and be accounted an Inhabitant within the Hundred; and if the Statute should be otherwise expounded, it would be altogether eluded, because it might happen, that in a small Hundred all the Owners of the Lands might have Houses and dwell in another Hundred. 2 *Saund.* 423. *Leigh versus Chapman.*

37. In an Action against the Hundred for a Robbery at a certain Place called *Fair-Mile-Gate*, in the Parish of *C.* after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that it did not appear, that the Parish was within the Hundred, nor that the Robbery was committed in the Highway, nor that it was done in the Day-time: But *per Curiam*, these Faults are cured by the Verdict. 3 *Mod.* 258. *Young versus Inhabitants of Totnam.*

38. In a Special Verdict upon the Statute of *Winton*, the Case was, that the Plaintiff was travelling in the Highway within the Hundred of *Michel*, and assaulted there by Robbers, who took Possession of him and carried him to a Coppice near the Highway, but in the Hundred of *Basingstoke*, and there robbed him; adjudged, that this shall not be a Robbery from the Time of the Assault, so as to make the Hundred of *Michel* chargeable; 'tis true, the Assault is the Cause, *sine qua non*, but 'tis not the immediate and efficient Cause, for there was no Robbery done till the Plaintiff was in the Hundred of *Basingstoke*, and there the actual Taking was; now the Reason why the Hundred is liable is, because they did not take Robbers within such a Time, and not because a Robbery was committed in the Hundred; but the Hundred of *Michel* had no Reason to pursue and take the Robbers, because the Robbery was not actually done within their Hundred, for there was nothing there but the Assault. *Far.* 156. *Cooper versus Hundred of Basingstoke.*

3 *Mod.*
287. *S. C.*

39. An Action was brought by the Master for a Robbery committed on his Servant *T. P.* the Jury found, that *T. P.* was a *Quaker*, and that he would not take the Oath required by the Statute, *That he did not know any of the Robbers*; adjudged, that the Master may bring an Action for a Robbery done on his Servant, and that the Oath of the Servant in such Case is sufficient; that if he is robbed in the Presence of his Master, then the Oath of the * Master is sufficient; but if not in his Presence (which was this Case) then the Servant must make Oath; therefore the Quaker refusing to make Oath, the Hundred is not liable, for the Statute of *Eliz.* was made in Favour of the Hundred, to prevent Combination between the Persons robbed and those who rob. 2 *Salk.* 613. *Aylcomb versus Hundred of Spelholm.*

* *Cro. E.*
liz. 142.
Cro. Car.
336.
Style 156.

4 *Mod.*
303.

40. The Servant brought an Action upon the Statute against the Hundred, for a Robbery in Taking from him the Goods of his Master, and declared, that he was possessed of them *ut de bonis suis propriis*, &c. the Jury found, that the Plaintiff was a Servant, and was robbed of 20 *l.* of his Master's Money, and of 20 *s.* his own Money, &c. adjudged, that the Action is well brought by the Servant, for by the Possession he is entitled to the Money *ut de bonis suis propriis* against all Mankind but him who hath the very Right. 2 *Salk.* 614. *Coombs versus Hundred of Bradley.*

41. In Debt upon the Statute of Hue and Cry, the Jury found a Special Verdict, that the Plaintiff was set upon in the Hundred of *M.* and carried by the Robbers into the Hundred of *Basingstoke*, and robbed there; and the Question was, which Hundred should be charged; and adjudged, that the Hundred of *Basingstoke* should, because there, and not before, the Robbery was committed; and if it had been in two Counties, the Indictment must be against the Offenders in the County where the Goods were taken away, and not in that County where the Assault was first made: Now, upon the Statute of Hue and Cry, the Hundred is liable for not Taking of the Robbers; and the Taking the Goods by the Robbers shall not relate to the first Assault, so as to make it a Robbery *ab initio*, like the Case of a Murder, where there shall be Relation to the Stroke, because as to *Forfeitures* there shall be Relation to the first Stroke, which is the efficient Cause of the Murder; but in the principal Case, the Assault was not the necessary Cause of the Robbery as the Stroke is of a Murder; 'tis true, a Man may be assaulted in one Hundred and carried into an House in another Hundred, and there robbed, or he may be assaulted in the Day-time in one Hundred, and carried into another Hundred, and there robbed in the Night; in these Cases there is no Remedy by the Statute, but 'tis not necessary, that to charge the Hundred the Robbery should be in the Highway. 2 *Salk.* 614. *Cowper versus Hundred of Basingstoke.*

42. After a Verdict for the Plaintiff upon this Statute, it was moved in Arrest of Judgment, that it appeared by the Declaration, that the Oath was taken before a Justice of Peace of the County, and not before a Justice dwelling in the Hundred, according to the Statute 27 *Eliz.* but adjudged, that the Statute of *Winton* doth not require it, and the Statute 27 *Eliz.* is only directory, and that the Declaration had been good, tho' it had not set forth any Oath taken before a Justice. 2 *Salk.* 614. *Dowley versus Hundred of Odium.*

Hundred.

(A)

1. **A**FTER the Division of *England* into Counties, which was in the Reign of *Alfred*, King of the *West-Saxons*, and the Government of each County given to a Sheriff; those Counties were subdivided into Hundreds, of which the Constable was the chief Officer; and about 4 *Ed.* 3. there were Petty Constables made, and not before.

2. If a Man hath an Hundred, together with Felons Goods, Fines, Amerciaments, &c. and such casual Hereditaments, they may be demised under an yearly Rent, and such Lease is good. 3 *Rep.* 33, in *Butler and Baker's Case.*

3. All Things triable in the Hundred-Court are determinable there by the proper Judges of that Court, who are the Suitors, and not the Lord of the Hundred; and the King cannot alter the Jurisdiction of such Court. 6 *Rep.* 11. *Jenileman's Case.*

4. The Grants of Hundreds at first proceeded from the King to particular Persons; and if afterwards such Hundreds should come back to the Crown, they are not extinguished, but remain as they were before. 9 *Rep.* 25. *Abbot of Marcella.*

5. Adjudged, that the Hundred is not liable for a Robbery done in an House, nor on the Highway, if in the Night-time, because the Statute of *Winton* was made for the Safety of Travelers in the Day-time. *Moor* 620.

6. The Plaintiff declares, that he is Sheriff of *Leicester*, to which Office it doth belong to constitute a Bailiff of the Hundred of *Gartree*, Time out of Mind, and still doth belong, and that every Sheriff, &c. hath from Time to Time constituted a Bailiff of the said Hundred, and hath, and of Right ought to hold a View of Frankpledge of the Hundred, and a Court of the said County, and had divers Fees and other Profits as incident thereunto; but that the Defendant at *T.* and elsewhere in the said Hundred, had executed the Office of Bailiff, &c. for six Months, without any Right, and held Courts and received Profits, &c. upon Not guilty pleaded, the Jury found a Special Verdict, that the Plaintiff was made Sheriff, &c. That *Ed.* 2. Anno 2. of his Reign, granted this Hundred to *John Saddington*; that *H.* 4. Anno 1. of his Reign, granted the same Hundred to *William Hogwick* for Life, that 11 *Novemb.* 15 *Jac.* the King granted it to *William Ireland*, Father of the now Defendant, for twenty-one Years; and that 5 *Septemb.* 13 *Car.* 2. The King granted it to the now Defendant for thirty-one Years: They find also the Statute 2 *Ed.* 3. cap. 12. by which 'tis enacted, that Hundreds shall not be separated from the Counties, and the Statute 14 *Ed.* 3. cap. 9. that all Hundreds which have been separated shall be united; they find, that the Defendant did keep Courts, and received the Profits of the Hundred: The Question was, whether the Grant of this Hundred was good; it was argued, that it was not; that before King *Alfred's* Reign, which was Anno 872, the Counties remained entire, but were then divided into Hundreds; that the Counties were then governed by *Earls*, who were *con-*
guines

guiney Regis, and so it continued till they were weary of the Trouble; and then the Sheriff or Vicecomes was appointed, who hath the Custody of the County to this Day, and had the View of Frankpledge and the Turn, till the Reign of *Ed. 2.* and then that King granted the *Leet out of the Turn*, and a Court-Baron out of the Hundred-Court; but the Jurisdiction of the County still remained entire to the Sheriff, until that King granted some *Hundreds in Fee*, but afterwards the Statutes before mentioned were made to restrain all such Grants for the Future; *adjournatur*, but

* *Because* afterwards, *Pasch. 34 Car. 2.* Judgment was given for the * Plaintiff. *Raym. 360. Cole versus all Hun-* Ireland. See 1 *Roll. Rep. 118. The Vill of Derby versus Foxley.* See *Dyer 175*, and 4 *Rep. 33.* *Mitton's Case*, and *Scroggs's Case*, and *Dyer 241. a.* *which*

were not before that Time granted by the Crown in Fee, were by these Statutes joined to the Office of the Sheriff, and not only those Hundreds which were granted by Ed. 3.

7. King *Ed. 3. Anno 17* of his Reign, granted to the Abbot, &c. of *Cirencester*, seven *Hundreds in the County of Gloucester*, which, upon the Dissolution of Monasteries came to the Crown, and were afterwards granted to one *Kingston*, under whom the Plaintiff claimed, who brought an Action on the Case against the Under-Sheriff of *Gloucester*, setting forth his Title as aforesaid, and that he had the Return and Execution of Writs, and that the Defendant knowing thereof, did execute several Writs there, &c. *ad damnum*, &c. all this Matter being found specially, two Judges were of Opinion, that this Grant was void, because by the Statute 2 *Ed. 3. cap. 12.* it was ordained, that from thenceforth Hundreds should not be given or separated from the Counties; and by the Statute 14 *Ed. 3. cap. 9.* it was ordained, that all Hundreds which were separated from the Counties should be rejoined to the Counties; but the Lord Chief Baron *Hale* was of Opinion, that the Grant was good; he held, that formerly the Hundreds were Parcel of the Crown, and that by the Grant of an Hundred, not only the Leet did pass, but an implied Power of making a Bailiff, which Bailiff was an immediate Officer to the King for the Execution of Process; that in antient Time all the Counties of *England* were assessed to a certain Farm, and all the Hundreds were rated to this Farm in the Sheriff's Hands, which he was every Year to account for in the Exchequer; afterwards there were a Sort of Men called *Approvers*, sent into every County on Purpose to encrease the Farms of Hundreds; and the King's of *England* having granted to several Persons, Parcel of those Hundreds at the old Farms, yet the Sheriffs were charged with the Encrease; therefore the Hundreds thus let to Farm by the King, either for Life, or otherwise, were again united to the Counties, and that the Sheriffs and their Heirs should have an Allowance for what was past, and that from thenceforth the Hundred should not be severed from the Counties, (*i. e.*) those Hundreds which were formerly in the Sheriff's Hands, and rated at a certain Farm; afterwards the Sheriffs themselves let out those Hundreds to a higher Farm than they did pay to the King, and their Lessees or Farmers let the same at higher and greater Sums to others; so that by enhancing those Farms, and putting in a great Number of Bailiffs, the People were oppressed; therefore, by the Statute 14 *Ed. 3. cap. 9.* this was prevented, and all Hundreds which were severed from the Counties were rejoined to the same, and that the Sheriffs should hold the same in their own Hands, and put in such Bailiffs for whom they should be answerable; now neither of these Statutes extend to a Grant of the King of an *Hundred in Fee*, with *retorna Brevium*; 'tis true, by such Grant the Hundred was divided from the County, but then the Sheriff was at no Inconvenience, for the Grantee was liable to Escapes, and to every Thing done and suffered by him; so that these Statutes extend only to those Hundreds which were in the Sheriff's Farm. 1 *Vent. 399. Sir Rob. Atkyns versus Clare.*

8. *Quo Warranto* against the Defendant, to shew Cause why he executed the Office of Bailiff of the Hundred of *Barnstaple*, &c. The Defendant pleaded, that the Hundred, the Office of Bailiff, and the Hundred-Court were antient; that the Return of Writs was an antient Liberty and Franchise, that *Car. 1.* was seised of the said Franchise *jure Corona*, and granted the same to one *North*, *Habendum the Hundred* to him and his Heirs, and so derives a Title to himself, and so justified to have *Retorna Brevium*; and upon a Demurrer to this it was adjudged ill, because he sets forth that the King was seised in Fee, &c. and that he granted the Franchise, *Habendum the Hundred*, whereas nothing can pass in the *Habendum*, but what is mentioned in the Premises, and there nothing was mentioned but the Franchise: Besides, the Defendant cannot have any Title, either by Grant or Prescription; he cannot have it by Grant from the Crown, because the Hundred cannot be separated from the County; 'tis true, it hath been derivative from it in former Times, when the Sheriffs let the Hundreds to Farm, and those Farmers put in Bailiffs errant, to the great Oppression of the People, which was the Occasion of Making the Statute of * *Ed. 3.* by * 14 *Ed. 3.* which the Hundreds were united again to the Counties, and therefore cannot now be separated cap. 9. by the King's Grant, except such as were granted in Fee by that King or his Ancestors; which being usually to Abbots, whose Possessions coming to the Crown by the Dissolution of their Abbeys, those Hundreds are now merged in the Crown, neither can the Defendant have any Title by Prescription; 'tis true, he sets forth, that the Office of Bailiff is an antient Office, but that is not a Prescription, but a bare Averment of its Antiquity; but if the Prescription had been Right in Form, it had been wrong as to the Matter, because a Man cannot prescribe by a *Que Estate* to have *Retorna Brevium*, because these are Matters of Record. 3 *Mod. 199. The King versus Kingmill.*

Identitate Nominis.

(A)

1. **T**HIS is a Writ which is very seldom brought ; but it lieth where a Man is sued in any Personal Action, and another is taken who is of the same Name ; in such Case he may have this Writ directed to the Sheriff, which is in Nature of a Commission for him to enquire, whether the Person arrested is the same Person against whom the Action was brought, and if not, then to discharge him ; but if the *Sirnames* of both are not the same, then the Writ will not lie. *Mich. 25 H. 8. Dyer 5.*

2. Judgment against one *Ralph Stubbs*, and upon a *Capias ulagatum* against him, one *Ralph Stubbs the Younger* was taken in Execution, and he brought a Writ *De identitate nominis*, and a *Superfedeas* thereon to the Sheriff to stay Execution ; but adjudged, that the *Superfedeas* ought to be set aside, because *Ralph Stubbs the Younger* might have an Action of False Imprisonment, because the Defendant against whom the Judgment was obtained, was named *Ralph Stubbs*, without any Addition ; and therefore he shall never be accounted the *Younger*, but always the *Elder* of the two ; but he was ordered to appear to a *Scire facias*, and plead, and go to Trial, whether he was the Person or not. *Hob. 330. Wilson versus Stubbs. Hutt. 45. S. C. 2 Cro. 622. Stubbs versus Cook.*

Jdcots. See Lunatick.

Jeofails.

In what Cases the Statutes 32 H. 8. | In what Cases the Statutes will not
18 Eliz. and 21 Jac. help. (A) | help. (B)
| Where cured by a Verdict. (C)

(A)

In what Cases the Statutes 32 H. 8. cap. 30. and 18 Eliz. cap. 14. 21 Jac.
of Jeofails, help.

1. **A** Writ which is not good in Form, but sufficient in Matter, is helped by the Statute 18 Eliz. so adjudged in *Godb. 126. Downall versus Catesby. Formedon. (A) 4. 113. otherwise reported.*
S. C.

2. The *Venire facias* varied from the Roll ; for that was *Peter Percie* and the *Venire facias* was *John Percie*, and the *Postea* was according to the Roll, which was his true Name ; adjudged, that this was as if there had been no *Venire facias* at all ; and in such Case 'tis helped by the Statute of *Jeofails* ; for if there is neither a *Venire facias*, or *Habeas Corpora*, yet if the Sheriff return a Jury, 'tis helped by the Statutes. *Godb. 194. Herenden versus Taylor. 5 Rep. Bishop's Case. S. P. Goldf. 126. Downall versus Catesby. S. P. Goldf. 188. Bowyer versus Jenkins, S. P. Ve. fa. (A) 8. S. C.*

3. *Trespas, &c.* the Defendant justified under a Custom of a Manor ; the Plaintiff replied *de injuria sua propria absque tali causa*, upon which they were at Issue, and he had a Verdict ; now, tho' he should not have traversed the Cause generally, but the Custom of the Manor, yet because it was only Form, and because *absque tali causa* contained the Custom, and more, it was helped by the Statutes of *Jeofails*. *Hob. 76. Banks versus Parker. Postea Traverse. (D) 16. S. C.*

4. In Trespass, &c. and a Verdict for the Plaintiff, it was moved, that upon the *Return* of the *Venire facias* there wanted these Words, * *quilibet Jurator per Plegios*; so that the Writ was as if it had never been returned; but adjudged, this was not as a Blank Return, or where the Name of the Sheriff is omitted, but 'tis an insufficient Return, for the Omission of the Pledges is but Matter of Form, and not like *Huffie's Case*. where the Pledges were omitted upon the *Original*; therefore 'tis helped by the Statutes of *Jeofails*, 2 *Cro.* 534. *More versus Blackwell*. * 2 *Cro.* 414. *Huffie versus Moor*. 3 *Bull.* 171. *S. C.* *Cro. Car.* 64. *S. C.*

5. In Trespass for taking and carrying away 10 Loads of Turf, &c. the Defendant pleaded, that the *locus in quo*, &c. (when in Truth there was no Place alledged in the Declaration) was two Acres called *B.* in *L.* and so justified as his Freehold; the Plaintiff replied, that the *locus in quo*, &c. was a Piece containing twenty Acres in *L. alia quam* the said two Acres, &c. the Defendant rejoined, that *quoad aliquam transgressionem in prædict'* 20 Acres, Not guilty; upon this they were at Issue, and a Verdict for the Plaintiff; it was moved in Arrest of Judgment, that this was no Issue, because there were neither the two Acres, or the twenty Acres, or any Place certain in the Declaration; but adjudged, that tho' it was not in the Declaration, yet it was no Departure, because both Parties agreed, that the Fact was done at *L.* therefore 'tis a Verdict help'd by the Statutes of *Jeofails*. *Hob.* 176. *Plant versus Thorley*. 1 *Brownl.* 200. *S. C.*

6. Upon the *Venire facias* there were but twenty-three Jurois returned, when there ought to be twenty-four, and the Trial was by ten of the Principal Panel, and by two of the *Tales*; it was insisted, that if the Trial had been by twelve of the Principal Panel, without any of the *Tales*, then it might be good, tho' there was but twenty-three returned, but otherwise it was a Mistrial; this was adjudged to be only a Misreturn of the Sheriff, and so aided by the Statutes 18 *Eliz.* and 21 *Jac.* *Cro. Car.* 162. *Sunkill versus Stocker*.

7. In Trespass the Defendant justified, for that it was the Freehold of *B. G.* and that he entered by his Command; the Plaintiff replied, and set forth, that the *locus in quo*, &c. was Copyhold, and that *R. W.* was seized in Fee by Copy, and that the Land descended to his Daughters, who were admitted, and leased to the Plaintiff; the Issue was joined upon a collateral Matter, and there was a Verdict for the Plaintiff; and tho' it was adjudged, that the Plaintiff had not made out a good Title to *R. W.* because he did not shew, that the Copyhold was granted to him, as he ought to do; yet this being but Matter of Form, was helped by the Statute of *Jeofails*. *Cro. Car.* 137. *Sheppard's Case*.

8. Assault and Battery in *Surrey*, the Defendant justified in *Middlesex*; the Plaintiff replied that the Defendant assaulted and beat him in *Southwark*, which is in *Surrey*, *de injuria sua propria absque tali causa*, and thereupon they were at Issue, which was tried by a Jury in *Middlesex*, and the Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought, it was objected, that the Trial was not good, because the *Venire facias* was from *Middlesex*, when it ought to be both from *Middlesex* and *Surrey*, because here were two Issues to be tried; but adjudged, that by Pleading, the Parties had made it but one Issue, and so the Trial was good, and within the Statute of *Jeofails*. *Styles* 206. *Hill versus Blunden*.

Cro. Car. 282. 9. After a Verdict, it was moved in Arrest of Judgment, that there was no Bill upon the File. *Et per Curiam*, this is helped by the Statute 18 *Eliz.* for a Bill on the File is in Nature of an *Original*, and the Want of that is helped by this Statute, and in the Manner the Want of a Bill is helped. *W. Jones* 300. *Griggs versus Parker*.

10. The Plaintiff entered a Plaint in Replevin in the Lord's Court, which being removed into *B. R.* by on *Accedas ad Curiam*, the Parties were at Issue, and the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that no Pledges were found, and that by the Statute *Westm.* 2. Pledges *de retorn' habend'* ought to be found, and therefore being omitted, 'tis Error. *Sed per Curiam*, there are two Sorts of Pledges, one *pro retorn' habend'*, the other *ad prosequend'* at Common Law; and if these are omitted, 'tis Error, if Judgment is given; but the other Pledges may be found by the Sheriff, or in Court, at any Time before Judgment, but not after; these last are given by the Statute which gives an Action against the Sheriff for omitting them, but doth not make the Proceedings erroneous. *W. Jones* 439. *Grosse versus Boscoe*.

Anteapl.
4.

11. In Debt for Rent, after a Verdict and Judgment for the Plaintiff in *C. B.* and a Writ of Error brought in *B. R.* and Diminution alledged, it appeared, that the Issue was joined between the Parties in *Easter-Term* 21 *Car.* and that the *Venire facias* certified in *placito præd'*, &c. was *Teste in Easter-Term* a Year before; and it being insisted, that this was Error, it was adjudged, that it was helped by the Statute 8 *Eliz. cap.* 14. as if there had been no such Writ, because it was impossible that this should be the Writ in that Action. *Allen* 20. *Brown versus Evering*.

12. Case upon a Promise, and a Verdict for the Plaintiff in the Palace-Court, and upon a Writ of Error brought, the Error assigned was, that the *Habeas Corpus Juratorum* was not returned, but only a Panel of the Names annexed to the Writ; but adjudged, that this is aided by the Statute 21 *Jac.* *Allen* 64. *Morefield versus Webb*.

(B)

In what Cases the Statutes will not help.

1. **I**N Replevin the Parties were at Issue upon a Prescription in *R.* appendant to Land in *B.* and the *Venire facias* was from *R.* only; the Plaintiff had a Verdict, but could never get Judgment, because it was a Mistrial; for where a Matter ariseth in two Places, as here, the *Vifne* must come from both, and this is not helped by any Statute of *Jeofails*. *Goldf.* 38. *Knigh's Case*.

2. The Statute 21 *Jac.* extends to the Christian Names only of Jurors, where their Additions are mistaken, and as to that Matter, if the Sirname is right in the *Venire facias*, which is the first Process, and mistaken in the *Distingas* and *Postea*, this is a Discontinuance which is aided by the Statute; as if in the *Venire facias* 'tis Robert Moor, and in the *Distingas* 'tis Robert Mawre, and it appeareth upon Proof, that Robert Moor is his right Name; but if the Mistake of the Sirname is in the first Process, then 'tis not aided by the Statute, tho' 'tis Right in the other. 5. *Rep.* 42. *Countess of Rutland's Case*. *Ibidem* *Codwell* versus *Parker*. *Cro. Car.* 147. *Downs* versus *Winterflood*, *S. P.*

3. In Waste against the Wife, the Writ was general, that she held *ex dimissione* of her Husband, and the Declaration was Special, (*viz.*) that the Husband made a Feoffment to several, in order to make them Tenants to the *Præcipe*, that a Common Recovery might be had against them, wherein they should vouch the Husband, who should vouch the Common Vouchee, and this was to be to the Use of the Husband and Wife for Life, Remainder over; after Null Waste pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, that this Writ did not warrant the Declaration; and so it was adjudged, and that it was not helped by the Statute 18 *Eliz.* for tho' that helps where there is no Writ, yet where the Writ is good, as in this Case, if it doth not warrant the Declaration, it will not help. *Cro. Eliz.* 722. *Greenfield* versus *Dennis*.

4. In Trespas, the Words *Vi & armis* were left out; adjudged, this was an Essential Part of the Declaration, which entitles the King to a Fine, and that such an Omission is not helped by any Statute, nor by a Verdict. 2 *Cro.* 526. *Willis* versus *Nedder*. 13 *Jac.* *Welfsted* versus *Taylor*, *S. P.* *Ibidem*.

5. An Attorney of *B. R.* was sued by Bill, and the Plaintiff had a Verdict; the Attorney moved in Arrest of Judgment, for that the Bill was not filed; adjudged, that this was not helped by any Statute. *Weeks* versus *Wright*. 1 *Brownl.* 81. *Hob.* 130. *Wilson's Case*. *contra*.

6. Debt against the Defendant as Heir, who pleaded *Reins per Descent, except twenty Acres in R.* the Plaintiff replied, that he had more Lands by Descent in the County of *B.* upon which they were at Issue, and the Jury found, that he had no Lands in *B.* so that the Plaintiff had Judgment for the twenty Acres, which the Defendant had confessed; and upon a Writ of Error brought, the Error assigned was, that there were no Continuances from *Easter* to *Michaelmas-Term*; adjudged, this was Error, and not helped by the Statute 18 *Eliz. cap.* 14. tho' it was after a Verdict, because that Statute must be intended where the Judgment is had upon a Verdict, which was not done in this Case, but upon the Defendant's Confession, that he had twenty Acres, which were Affets by Descent, to which the Verdict had no Manner of Relation, for that was only, that he had none in *B.* 1 *Brownl.* 106. *Mollineux* versus *Mollineux*. *Telv.* 169. *S. C.* 2 *Cro.* 236. *S. C.*

7. The Plaintiff, who was a Bishop, declared upon a Lease made by himself, and the Original was, of a Lease made in the Time of his Predecessor; adjudged, that this is a material Error, and tho' it was after a Verdict, it was not helped by it, or by the Statute 18 *Eliz.* and therefore the Judgment was reversed. 3 *Bullst.* 224. *Young* versus *Bishop of Rochester*.

8. In Trespas, the Original was *Teste 3 January 6 Jac.* and in the Declaration the Plaintiff alledged the Trespas to be done 20 *January* the same Year, which is seventeen Days after the *Teste* of the Original; for which Reason it was adjudged ill, and not amendable by the Statutes of *Jeofails*. *Mich* 7 *Jac.* 2 *Brownl.* 273.

9. The Judgment was reversed, because there were no *Pledges* entered for the Plaintiff, *ad prosequend*, this being in the Case of a Penal Law, which is not within the Remedy of the Statute of *Jeofails*. *Trin.* 7 *Jac.* *Hob.* 101. *Moor* versus *Hussey*.

10. In the *Venire facias* there were 23 Jurors returned, and no more; in the *Habeas Corpora*, which is in the Nature of a Re summons, there were 24, (*viz.*) the 23 which were returned on the *Venire facias*, and one *B. G.* who was not returned; twelve of them were sworn, whereof the said *B. G.* was one, and the Issue was tried by them; and this being assigned for Error, the Court adjudged it was so, and not aided by any of the Statutes, because a Person resummoned is not a Juror, for he was never returned by the Sheriff, and therefore sworn without any Warrant. *Cro. Car.* 202. *Fynes* versus *Norton*.

11. In an Action for Slander, the Plaintiff had a Verdict, and upon Error brought, the Error assigned was, that the Defendant in the Action was an Infant and appeared by his Attorney, when it ought to be *per Guardianum*; the Defendant in the Writ of Error replied, that he was of full Age at the Time of his Appearance, upon this they were at Issue, and a *Venire facias* was awarded of *H.* where the Words were alledged to be spoken; and it was found, that the Plaintiff in

Error was of full Age ; adjudged, that here being no Place at all in the Pleadings from whence the *Venire facias* could be awarded, this was a *Mistrial*, and not helped by the Statute 21 *Jac.* for that helps where the *Venire* is of one Place, when it ought to be of another ; but here is no Place at all. *Latch.* 193. *Tailor versus Tolwin.*

(C)

Where cured by a Verdict.

1. **I**N *Assumpsit*, &c. the Plaintiff had a Verdict ; it was moved in Arrest of Judgment, that he had not alledged any Place where the Promise was made ; but adjudged, that this was helped by the Verdict. *Goldf.* 48. *Trin.* 29 *Eliz.*
2. If Issue is taken upon a Traverse, and tried, tho' the Traverse was ill, yet 'tis aided by the Statute. *Cro. Eliz.* 456. *Bingham versus Smithweak.*
3. So where a Prescription was laid in all the *Occupiers* of such a Close, for that they Time out of Mind have repaired ; this is too general, and therefore ill ; for Tenants at Will, or at Sufferance, *Disseisors*, &c. are *Occupiers* ; yet, because Issue was taken upon the Prescription, and a Verdict had found it, adjudged, that it was helped by the Statute. *Cro. Eliz.* 445. *Austye versus Firwaker.*
4. *Assumpsit*, &c. the Defendant pleaded *Not guilty*, which is an improper Issue to this Action, yet the Plaintiff having a Verdict, it was held, that it was only an *Issue misjoined*, which is aided by the Statute, being after a Verdict. *Cro. Eliz.* 470. *Corbin versus Brown.*
5. *Venire facias Duodecim*, &c. but in the later Part of the Writ it should have been & *habeas ibi nomina Juratorum*, &c. which Words were omitted ; but adjudged, that the last Words were supplied in the first, and this being after a Verdict, was helped by the Statutes. 2 *Brownl.* 167. *Bird versus Stubbings.*
6. Debt upon Bond, conditioned to pay 100 *l.* on the 31st of September, which is impossible, because September hath but 30 Days and no more ; the Defendant pleaded *solvit ad diem*, upon which they were at Issue, and the Plaintiff had a Verdict ; adjudged, that this being a Fault only in the Issue, 'tis helped by the Statute 18 *Eliz.* after a Verdict. *Latch.* 152. *Giblon versus Purchase.*

Illiterature.

(A)

Where it will make an Act void, where not. See *Request* (A) 16.

1 And.
129.

1. **I**N *Trespass*, &c. the Defendant pleaded a Release, &c. the Plaintiff replied, that he was illiterate, that the Release was read to him, and it was only to bar him from the Arrearages of an Annuity, and not of the Annuity it self, and so *Non est factum*, the Jury found a Special Verdict, that there was an Agreement between the Parties, that the Release should discharge only the *Arrears of the Annuity*, and that one who stood by whilst it was reading, said to the Plaintiff, *you will better understand it by telling than by reading* ; then he took the Writing out of the Hand of him who was reading it, and told the Plaintiff *it is but a Release of the Arrears of the Annuity*, who replied, *If it be so, I am contented*, and thereupon he sealed it ; adjudged *Non est factum* of the Plaintiff. *Moor* 148. *Thorogood versus Turner.*
2. Debt upon Bond conditioned, that whereas the Obligor had sold certain Lands to the Oblige, that if he (the Defendant) and his Son should make such an Assurance as the Plaintiff should require, that then the Bond should be void ; the Defendant pleaded, that the Plaintiff brought to him a certain Deed of Release, and required him to execute, which he did, and that the Plaintiff shewed the said Deed to his (this Defendant's) Son, and required him to do the like, but he being illiterate, desired the Plaintiff to leave the Writing with him, that he might be advised whether the Contents were only concerning the Lands which his Father had sold ; and if so, then he would seal and deliver it ; but the Plaintiff refused to leave the Deed with the Son ; and upon a Demurrer this was adjudged an ill Plea ; for tho' this might have been an Excuse to the Obligor himself, yet he shall not plead it as an Excuse to one who was no Party to the Bond. *Moor.* 182.
3. In *Andrew's Case* it was held, that if there is a certain Time limited for the Obligor to seal a Writing, there Illiterature shall be no Excuse, because he might provide a skilful Man to instruct him in the very last Instant ; but where he is bound to seal it upon Request, there he shall have a convenient Time to be instructed. *Postea Request.* 16. *Andrews versus Eden*, and *Moor* 183. *S. P.*

Imparlarice.

(A)

Of a Dies datus and Imparlarice. See *Pleas*. (N) per totum.

1. **D**EBT against the Defendant *John Thynne, & modo adhuc diem in Cro. Sancti Martini venerunt tam præfat' Tho. Stakeley (the Plaintiff) quam præd' Johannes Thynn, per Attornatos suos, & super hoc dies datus est partibus præd' usq; in octab. Hillar. in statu quo nunc salvis partibus, &c.* and afterwards in octab. Hillarii, the Defendant did not appear, yet the Plaintiff shall not have Judgment by Default, because the *Dies datus* is not so strong against him as an Imparlarice; therefore the Plaintiff must take out Process against him for not appearing at that Time. *Moor 79. Stakeley versus Thynn.*

2. After an Imparlarice, the Defendant pleaded, that the Plaintiff was outlawed: *Et per Curiam*, 'tis no good Plea. 2 *Roll. Rep. 59. Baron versus Hayne.*

3. In an Action of Debt upon a Bill, the Defendant, after an Imparlarice, pleaded in Abatement, Payment of Part of the Money after the last Continuance; the Plaintiff replied, that the Defendant did not pay it, &c. the Defendant did not join Issue, but demurred to the Replication; adjudged, that this Plea was not peremptory, tho' pleaded after an Imparlarice and an Issue tendered, it being upon a Demurrer; for tho' after an Imparlarice the Defendant cannot plead in Abatement, yet if he doth, and the Plaintiff tender an Issue, and the Defendant demurs, and the Plaintiff joins in Demurrer, such Plea is not peremptory, because the Plaintiff ought not to have joined in Demurrer, but to have moved the Court, that the Defendant might have been compelled to plead in chief. *Allen 65. Beaton versus Forrest.*

4. *Sci. fa.* by an Administrator *Teste 12 Feb.* the Defendant imparled generally, and afterwards craved Oyer of the Letters of Administration, which were dated 26 March following, and then he pleaded this Matter in Abatement; and upon a Demurrer to this Plea, because the Defendant cannot plead in Abatement after a general Imparlarice, which is very true; but here it appears by the Record it self, that the Plaintiff had brought his Action before he had any Cause; and in such Case the Court *ex officio* will abate the Writ. 2 *Lev. 197. Harker versus Moreland.*

5. The Question was, whether *semper paratus* was a good Plea after an Imparlarice: *Et per Curiam*, it is not, because 'tis inconsistent with the Imparlarice, for that is no more than to say, I will take Time to consider and resolve what to do, which is contrary to be always ready. 2 *Mod. 62. Anonymus.*

6. The Defendant being bound by Recognizance to appear and answer an Information, did appear at the Day, and prayed an Imparlarice; which not being opposed by the Attorney General, the Question was, for how long this Imparlarice should be; it was formerly *from Day to Day*, but now from *one Term to another on the Crown-side*; and ruled, that the Defendant should have the same Time that the * Process would have taken up, if he had stood out till the Attachment or *Capias*; for when he comes in upon that, he must plead *Instante*; the like if he come in upon the first Process. 1 *Silk. 367. The Queen versus Rawlins.*

Mod. Cases 243.

* If Process had been continu'd, he might have been brought in the same Term upon an Attachment, and then he must plead Instante.

Implication by Devise.

(A)

1. **A** Possible or constructive Implication is as aforesaid, where it may be reasonably intended, that the Testator meant as well the one as the other, and in such Case, his Intention shall never be construed in Prejudice to the Heir at Law; as for Instance, the Husband devised Part of his Lands to his Wife for Life, and that it and all the rest of his Lands should remain to his youngest Son, and the Heirs of his Body, after the Death of the Wife; now here was no express Devise of the Rest of the Lands to the Wife, and she shall not have them for her Life by Implication, because the eldest Son, who was the Heir at Law, being not excluded, it may reasonably be intended, that he, as well as the Wife, shall have

Moor 123. S.C.
2 Leon.
226. S.C.
3 Leon.
130. S.C.
Gouldsb.
16. S.C.

have them during the Life of the Wife, and till the Devise to the youngest Son shall take Effect; for 'tis plain he was not to have them till *after the Death of the Wife*, therefore they shall descend to the Heir in the mean Time, and especially in this Case, because there was an expresse Devise of the other Part of the Lands to the Wife for Life, which shews, that no more was intended for her, and so 'tis reported by Serjeant Moor; but Justice Croke, who reports the same Case, tells us, that it was adjudged the Wife should have the Whole. *Cro. Eliz. 15. Higham's Case.*

2. The Testator having two Sons, devised *Part of his Lands* to his eldest Son in Tail, and the other *Part of his Lands* to his youngest Son in Tail; and *if any of his Sons died without Issue, then the Whole should remain to T. P. and his Heirs*; afterwards the youngest Son died without Issue; adjudged, that those Brothers had cross Remainders in Tail by Implication, and that the Survivor shall have all the Lands. 4 *Leon. 14.*

3. So where the Testator was seised in Fee of a Manor, and devised all the *Demesnes thereof to his Wife for Life*, and likewise the *Services to her for fifteen Years*; and by the same Will devised *All the Manor to T. P. after the Death of his Wife*; now, by this last Clause she had not an Estate for Life by Implication in *all the Manor*, but only in that which was expressly devised to her for Life, which were the *Demesnes*, and the *Services* only for fifteen Years, so that after the Expiration of that Term, the Heir at Law shall have the *Services*, tho' the Wife be then living; for that Clause, (*viz.*) *All the Manor of T. P. after the Death of the Wife*, doth not imply, that she shall have an Estate for Life in *all the Manor*, because the *Services*, which are *Part of the Manor*, were expressly devised to her for fifteen Years, which shews, that the Testator intended she should have them no longer; therefore 'tis as possible, he intended the Heir at Law should have them till *All the Manor* came to *T. P.* the Devisee, as that the Wife should have them for her Life. *Moor 7.*

4. But in all these Cases where Estates are raised by Implication in Wills, it ought to be considered what Estate the Testator had in the Thing devised, because as to that Matter there is a great Difference where he was seised in Fee, and where he was possessed only for a Term of Years; for if he had only a Lease for Years, and devised that *after the Death of his Wife*, his Sons shall have the Profits of his Farm, there these Words, *After the Death of his Wife*, do not imply that she shall have an Estate for Life in the Farm, because 'tis impossible to create an Estate for Life out of a Term for Years; 'tis true, in such a Will, if she be made Executrix, she shall have the whole Term as such. *Moor 635. Raymond versus Gold.*

5. The Testator was possessed of a Term for Years, and devised it to his Wife for Life, afterwards to his Son Thomas and Lucy his Wife, if they have no Issue Male, and *if they have Issue Male*, then to be reserved for them; now here was no expresse Devise to the Issue Male; but adjudged, that they had the Remainder of the Term by Implication, which was created by these Words, *If they have Issue Male*; and so 'tis reported in several Books; but Mr. Godbolt tells us, it was against the Opinion of Justice Croke, and that the Testator had an Estate in Fee, but in that he was mistaken, and probably so he was in the other. *Godb. 266. Blandford versus Blandford. Moor 846. S. C.*

6. Justice Croke, who reports the same Case, tells us, that the Devise was to the Wife for Life, and after her Decease to his Sons Thomas and Lawrence, equally and jointly together, if they have no Sons; but if *Both of them have Sons, then to be put out for the Profit of both their Sons jointly, or to one of them, if both have not Male Children, &c.* Thomas had a Son and died; adjudged, that Lawrence would have an Estate for Life, if this subsequent Clause had not been; but since the Testator by that Clause had appointed it *to be put out for the Profit of both their Sons*, 'tis a Devise to the Son of Thomas immediately; and if the Father had been living, his Son should not have waited till after the Death of his Father, and the Death of Lawrence his Uncle. 2 *Cro. 394. Blandford versus Blandford.*

7. Estates likewise in Tail may be raised by necessary Implications in Wills, as where the Testator had three Sons, Thomas, Richard, and Gilbert; the eldest Son died, leaving his Wife with Child, to whom the Testator devised an Annuity *in Ventre su mere* for twenty Years; and if my Son Richard die before he hath any Issue of his Body, Remainder over, &c. adjudged, that by these Words Richard had an Estate-tail by Implication. *Moor 127. Newton versus Bernardine.*

8. There seems to be no material Difference between the Case last mentioned and Gilbert and Witty's Case, and yet there was a contrary Resolution in that Case, which was thus: *ff.* The Testator having three Sons, devised an House to his eldest Son and his Heirs, another House to his middle Son and his Heirs, and another House to his youngest Son and his Heirs: Provided, *if all my Children die without Issue of their Bodies, then all my Houses shall be to Margery and her Heirs*; the two eldest Sons died without Issue, the youngest had Issue a Daughter; adjudged, that Margery shall have the Houses of the two Sons who were dead, because that Clause, *If all my Children die without Issue* did not make cross Remainders in Tail to them by Implication, so as to entitle them to the Houses of each other, and the Reason was, because each of them had an House expressly devised to him in Fee in the first Part of the Will, and so had the Daughters in the Case last mentioned, for the Lands were devised to them and *their Heirs, equally to be divided.* 2 *Cro. 655. Gilbert versus Witty.*

9. In a Special Verdict in Trespas, the Case was: *ff.* The Testator having three Daughters, devised his Lands to his two youngest Daughters for Life, Remainder to the next of Kin of the Blood of

2 Roll.
Rep. 281.
S. C.

Bridgm.
14.
2 Roll.
Rep. 256.
S. C.

of the Testator; the Question was, whether this Remainder shall be to the *eldest Daughter*, or to all of them equally; and adjudged, that it shall be to the eldest alone, because the express Estate devised to the two youngest Daughters, shall exclude both them and their Issue, from Taking any Estate by Implication. *Palm. 11, 303. Perriman versus Peirce.*

10. So where the Testator having two Daughters, devised his Lands in *Derbyshire* to them and their Heirs, equally to be divided; and if *they die without Issue, then all his Lands* to his Nephew Francis in Tail, afterwards the youngest Daughter died without Issue; and the Question was, whether the Nephew shall have her Part, or whether the surviving Sister should have an Estate-tail in it by Way of Remainder by Implication; and adjudged, that *these Daughters had several Estates-tail by Moieties*, and that the Survivor shall have the Whole by Way of Cross Remainder by Implication; for 'tis plain that the Nephew should have no Benefit by the Death of one of the Daughters dying without Issue, because the Words of the Will are, *If they die without Issue, so that both must die without Issue, before the Land shall go to him.* *Raym. 452. Holmes versus Meynell.*

T. Jones
172.

11. Implication is either *necessary or possible*, and wherever an Estate is raised by that Means in a Will, it must be by a *Necessary* and not by a *possible* Implication, (*i. e.*) the Devisee must necessarily have the Thing devised, and no other Person whatsoever can have it; as for Instance, the * Husband devised his Goods to his *Wife*, and that *after her Decease his Son* shall have them and *his House*; now, in this Case, the *House* was not devised to her by express Words; but adjudged, that she had an Estate for Life in it by a *necessary* Implication, because no other Person could have it whilst she was living; for 'tis plain, that his *Son and Heir* was excluded, for he was to have nothing till *after her Decease*; but if he had devised *the House to a Stranger after the Death of his Wife*, and not to his *Son*, in such Case the Son and Heir should have it whilst the Wife is living, because 'tis not a Devise of the *House* to her by any *necessary* Implication; for tho' the Stranger would have it *after the Death of the Wife*, yet since the Heir is not excluded *during her Life*, it may as reasonably be intended, that he shall have the House as the Wife, till the Devise to the Stranger shall take Effect in Possession, and therefore it shall descend to him in the mean Time. *1 Vent. 223. Smartle versus Schollar.* See *2 Cro. 74. Horton versus Horton*, and *Moor 7. S. C. Postea Legatee. (C) 12. S. C.*

* 2 Lev.
207.
Jones 28,
98.
Vaugh.
262.
1 Mod.
189.

(B)

Where an Estate shall be determined by Implication, and where an Estate in Fee shall not arise.

1. **D**evise to his Wife for Life, Remainder to his Son in Tail, Remainder over in Fee: Provide, that if his Wife clearly depart out of *London* and dwell in the Country, *that then she shall have a Rent* out of the House thus devised to her for Life; she left the City and dwelt in the Country, and the Heir at Law before any Entry made, gave her a *Release*, and so did the Executor; adjudged, that this *Release* did not enure to her Estate for Life, because that was determined by the Breach of the Condition before any Entry made, and then she was but Tenant at Sufferance; for tho' there are no express Words in the Will to make her Estate void, yet this being in a Will is implied in the Words, *That then she shall have a Rent out of the House*, which could not be if her Estate for Life was not determined. *Cro. Eliz. 238. Allen versus Hill.* *3 Leon. 152. S. C.*

2. *T. P.* seised of Lands in Fee, had issue two Sons, and devised Part of his Lands to his *eldest Son in Tail*, and the other Part to his *youngest Son in Tail*, and then he adds this Clause, (*viz.*) *That if any of his Sons died without Issue, then the whole Land should remain to W. R. in Fee*; the Testator died, the Sons entered into the respective Lands to them devised, and then the youngest Son died *without Issue*, and after his Death *W. R.* to whom the Fee was devised, entered; adjudged, that his Entry was unlawful, and that the eldest Son surviving had an Estate-tail by Implication. *4 Leon. 14. pl. 51. See Holmes versus Meynell.*

3. The Testator being seised in Fee of two Houses, one in the Parish of *St. Michael Queen-hirbe*, and the other in the Parish of *St. Michael Fleish-Shambles*, which last Parish was united to the Parish of *Christ-Church* in *London*, devised his House in *St. Michael Fleish-Shambles* to his Wife for Life, Remainder to *T. P.* and *A. R.* and the Heirs of their Bodies, and for *Default of such Issue* to the right Heirs of the Testator, who died; then *T. P.* died without Issue, and *A. R.* had Issue, and she died; the Question was, whether the whole House should go to such Issue, or only a Moiety thereof, and the other Moiety to the Heir of the Testator; there is no Judgment upon this Question, tho' this differs from the Case last mentioned, and from *Holmes and Meynell's* Case; for here the Estates-tail were not limited to the Children or Kindred of the Testator, but to meer Strangers; and *Dyer*, who reports the Case, tells us, that the Stress lay upon the Pleading, that the House lay in the Parish of *Christ-Church*, when the Will says, in the Parish of *St. Michael Fleish-Shambles*, without averring the Union of those Parishes; and *1 And. 21.* says, the Stress of the Case was upon the Apportionment of the Rent. *Dyer 326. a. Huntley's Case.*

4. An Estate in Fee-simple shall not arise by Implication in a Will, tho' there is a perpetual Charge imposed by the Testator on the Devisee, as where he devised, that a Chaplain shall be

always

always maintained, and that he shall have the yearly Stipend of eight Marks out of the Profits of such a House, to be provided and found for him by the Parson of the Parish and four of his Parishioners, and that the Residue of the Profits of the House shall be bestowed by them to buy Ornaments and Books for the Church; now 'tis plain, that here was a perpetual Charge to be defrayed by the Parson, &c. out of the Profits of the House; and yet it was held, that this was not a Devise of the House to him by Implication. *Bridg. 103. Standish versus Short.*

5. Devise to W. R. for Life, Remainder to his first Son in Tail Male, and so to the tenth Son; and if the said W. R. die without Issue Male of his Body, Remainder over; and by a Codicil the Testator recited, *Whereas I have given an Estate-tail to W. R. adjudged, that where a particular Estate is devised, as in this Case it was to W. R. for Life expressly, a contrary Intent shall never be implied by any subsequent Clause, and therefore these Words, If the said W. R. die without Issue Male of his Body, shall be construed a Dying without such Issue Male, as are expressed in the Will; for there is a wide Difference between a Devise to W. R. and if he die without Issue, Remainder over, and a Devise to W. R. for Life, and if he die without Issue, Remainder over.* 1 Salk. 236. *Popham versus Banfeild.*

(B)

1. Ejectment for a Rectory, in which the Plaintiff declared, that he was *Rector Ecclesiæ, &c. & adhuc seifitus existit de Rectoria*, which last Words are a sufficient Implication, that the Rector was living at the Time of the Demise. *Dyer 304. pl. 59.*

2. Ejectment, &c. in which the Plaintiff declared upon a Lease for five Years, *If the Lady Morley so long lived*, and that the Defendant entered and ejected him *Termino suo prædicto nondum finito*, which Words imply, that the Lady Morley was then living; for if she had been dead there had been an End of his Term. 2 Cro. 622. 1 Roll. Rep. 50. S. C. 2 Bulst. 67, 263. S. C.

3. In Rescous, &c. the Defendants pleaded, that the Bishop of Norwich was seised in Fee of the Manor of N. and that the said *Nuper Episcopus* and his Predecessors, Time out of Mind, had the Liberty of Faldage, &c. for 300 Sheep on the Plaintiff's Closes at certain Times, &c. and that the Bishop demised the said Liberty, &c. to the Defendants, by Virtue whereof they entered and were possessed of the said Liberty, &c. at the Time of the supposed Trespass, &c. after a Replication and Rejoinder, and a Verdict for the Defendant, it was moved in Arrest of Judgment, that the Plea was ill, because the Defendant had laid the Prescription *in nuper Episcopo, &c.* and then they set forth, that the Bishop had demised to them, which must be *nuper Episcopus*, and that Word implies, that he was either dead or translated; or at least, that he was not Bishop at the Time of the Lease made, and so it was adjudged in the 10th Rep. 59. B. upon the second Exception to the Bishop of Salisbury's Case; but adjudged, that admitting it is so, yet it doth not appear that he was dead or translated before, but rather after the Trespass committed, because the Defendants have pleaded, that by Virtue of the Demise they entered and were possessed of the Liberty of Faldage at the Time of the supposed Trespass, which Words imply, that the Bishop was then living. 2 Lutw. Rep. 1249. *Sharp versus Bechenow.*

Imprisonment.

See *Dures's*, pl. 6. *False Imprisonment per totum. Habeas Corpus per totum.*

(A)

1. Several Persons being committed at Pleasure, and without just Cause, were discharged by the Courts in *Westminster*, at which some great Persons being offended, procured a Mandate to the Judges, commanding them to do so no more; however, the Judges proceeded to discharge Persons from such Commitments; and drew up Articles, which they all subscribed, and delivered to the Lord Chancellor and Treasurer, as followeth:

Desiring, that Order might be taken, that the Subjects might not be committed by the Command of any Nobleman or Counsellor against Law, or that the Judges might have Access to the Queen to be Suitors to her for such Order.

That several have been committed for suing at Common Law, till they have been forced to relinquish their Suits and put them to Arbitration, even after Judgment and Execution.

That Writs of *Habeas Corpus* have been directed to those who had the Custody of Persons unlawfully imprisoned; and no good Cause of their Commitment being returned, they have been discharged from their Imprisonment, and some of them have been recommitted to secret Places.

and not to any Common Gaol, or to any lawful Officer, so that upon Complaint made, the Judges do not know to whom to direct the Queen's Writs, and by this Means Justice cannot be done.

That Serjeants, and other Officers, in London, have for lawfully executing the Queen's Writs, been so terrified, that they dare not execute any more.

That several of the Subjects have been brought up to London by Messengers, from remote Dwelling-Places, and compelled to withdraw their Suits, and to pay the Messengers great Sums of Money.

And whereas their Lordships have required the Opinion of the Judges concerning Commitments by the * Privy Counsel, they were all of Opinion, that where a Person is committed by the Queen's Personal Command, or by Order from the Council-Board, or by two of the Council for High Treason, such Person cannot be delivered by the Courts at Westminster, without due Trial; but that the Judges may grant an *Habeas Corpus* to bring such Person before them, and if the Return be good in Law, then they cannot discharge him. 1 *And.* 297.

* 1 Roll. Rep. 219. Sir Sam. Saltingstow's Case.

2. Judgment against the Defendant in *C. B.* which was affirmed in Error in *B. R.* and afterwards he exhibited a Bill in Chancery, and was committed to the Fleet for disobeying a Decree, and upon the Return of the *Habeas Corpus* it appeared to be, that he was committed on 28 Nov. 1608. * *propter contemptu' extra Curiam Cancellaria eidem Curia Commisssu' & per mandatu' Domini Cancellarii*; adjudged, that this Return was ill, because it was too general, it not appearing what the Contempt was, nor when done; for it ought to be certain, that the Court may judge whether the Person was lawfully imprisoned, or not; so he was discharged. 1 *Roll. Rep.* 192, 218. *Apsey's Case*.

* 1 Roll. Rep. 192, 218. *Rufsell's Case*.

3. Upon the Return of an *Habeas Corpus* it appeared, that *Glanvill* was committed 7 Maii 1615, *per mandatum Tho. Elsmere Cancellarii Angliae*, without shewing any Cause for which he was committed; and this was adjudged too general and ill. 1 *Roll. Rep.* 219. *Glanvill's Case*.

4. The Return of an *Habeas Corpus* was, that the Defendant was committed by a Warrant from the High Commission-Court, for reproachful Words of their Proceedings, which being drawn up into Articles, he refused to answer; adjudged, that this Return was ill, because too general, for he ought to shew what the Articles were, for they might be such which were cognisable at Common Law; besides no Time was alledged, when the Words were spoken, and it might be before a General Pardon; so he was bailed, and afterwards discharged. 1 *Roll. Rep.* 245. *Codd's Case*.

5. A Prohibition to the Admiralty was delivered to the Judge in Court, who commanded the Person who delivered it to call a Register, who replied, he was not commanded so to do by the Writ; the Judge once more commanded him to call a Register, which he refused, and thereupon he was committed, and the Judge told him, that he would throw the Prohibition after him; and upon Affidavit of this Matter, the Person prayed an *Habeas Corpus*, and an Attachment against the Judge for a Contempt; the *Habeas Corpus* was granted, and upon the Return thereof the Judge appeared, and the Affidavit appeared to be true, only the Words, that he would throw the Prohibition after him, were left out in the Return; adjudged, that here was no Cause of Imprisonment; so the Party was discharged, and the Judge was favoured, for that an Attachment was not granted. 1 *Roll. Rep.* 315. *Bruistone versus Baker*.

6. Upon the Return of an *Habeas Corpus* it appeared, that the Cause of the Commitment was, for that the Defendants were demanded by the High Commission-Court, whether they would conform themselves to the Church of England, and receive the Sacrament Kneeling, and for not answering directly to the Question, they were committed by a Warrant, &c. commanding the Gaoler to receive them, till the Court should farther order; which is ill, for it should be till they shall be delivered by due Course of Law. 1 *Roll. Rep.* 337, 415. *Holt versus Dighton*.

DURESS.

See 2 *Brownl.* 276. where a Father shall avoid a Deed made by the Durefs of his Son, and where a Son shall avoid a Deed made by the Durefs of his Father; but a Servant shall not avoid a Deed made by the Durefs of his Master, nor *e converso*.

But the Husband shall avoid a Deed made by the Durefs of his Wife, because they are but one Person in Law. 2 *Brownl.* 276. 1 *Brownl.* 66.

If two enter into a Bond by Reason of Durefs done to one of them, this shall not avoid the Bond, because it shall stand good as to him to whom no Durefs was done, tho' it may be avoided as to the other. 1 *Brownl.* 66. *Montall versus Worthington*.

Durefs of Imprisonment is intended only where the Party is wrongfully imprisoned till he seal or execute a Deed, and not where a Man is lawfully imprisoned. 3 *Leon.* 239. *Knight versus Norton*.

Therefore, where a Man was taken by a Process out of a Court that had no Power to grant it, and for his Enlargement gave a * Bond, this may be avoided; and so it was adjudged in an Action brought upon such a Bond, into which the Obligor entered, who was taken upon an Attachment under the Seal of the Court of Requests; for that Court had not Power to award such Process. *Cro. Eliz.* 646. *Stepney versus Lloyd*.

* He cannot plead Non est factum, because 'tis his Deed;

but he must plead Specially, Judgment si actio, &c. 5 *Rep.* 119.

So where a Man being falsely charged with a Felony, and is taken by Virtue of a Warrant of a Justice of Peace. *Allen* 92.

But

But where after Judgment the Defendant, (tho' he had no Cause of Action) arrested him who had obtained the Judgment, and threatned that he should lie in Prison till he released the Judgment, and thereupon he did release it; adjudged, that this Release should not be avoided by Dureis, because he was in Custody by Course of Law by the King's Writ. 1 Lev. 69.

7. In all Actions *Quare vi & armis*, if Judgment is given against the Defendant, he shall be fined and imprisoned, for to every Fine Imprisonment is incident; therefore where the Defendant is fined for a Contempt to any Court of Record, he may be imprisoned till the Fine is paid. 8 Rep. 60. In *Beecher's Case*.

8. But some Courts may fine and not imprison, as the Court-Leet; some cannot fine nor imprison, but amerce, as the County-Court, Court of the Hundred, and Court-Baron, and no Court which is not a Court of Record; some may imprison and not fine, as a Constable may imprison any one making an Affray in the Sessions; some Courts can neither imprison, fine or amerce, as the Spiritual Courts, for they can do neither, their Proceedings being according to the Civil and Canon Law; and some Courts may fine, imprison and amerce, as the Case requireth, and these are the Courts of Record at *Westminster*. 11 Rep. 41. in *Godfrey's Case*.

9. Where a Man is committed by the Privy Council, and afterwards brings an *Habeas Corpus*, and is committed by the Court, he shall then be said to be imprisoned by the Order of the Court, and not by the Privy Council. *Goldf. 133. Arrundell's Case*.

10. Upon an *Habeas Corpus*, it was returned, that the Mayor of *Liskerret* in *Cornwall* committed the Defendant for misbehaving himself, and for using indecent Speeches to him; adjudged, that this Return was too general, for he ought to have returned the Special Cause, and for how long Time he was to be imprisoned; but as this Return was, his Imprisonment was indefinite, and for no certain Cause, and therefore illegal. *Hodges versus Mayor of Liskerret. 2 Bulst. 139. Hill. 23 Car. Style 90. Smith's Case*.

11. A Prisoner escaped out of the Counter, and the Sheriff being in Pursuit of him, met the Plaintiff in the Night-Time, who gave him ill Language, and thrust him against the Wall, and thereupon he committed him for this Misdemeanor; and in an Action of False Imprisonment brought against him, the Sheriff pleaded all this Matter; it was adjudged, a good Justification of the Imprisonment, both for the Matter, and the Manner of it; for the Sheriff hath the Custody of the County, and is, *conservator pacis* in it; therefore where there is a Breach of Peace, or any Violence offered to his Person, he may commit the Offender; for 'tis certain that a Constable may commit one for a Breach of the Peace upon himself; and if he may do it, a fortiori the Sheriff may do the like; besides, a Magistrate is not to be abused with approbious Words in the Execution of his Office, tho' there was no Breach of the Peace. 2 Bulst. 328. *Clare versus Sheriffs of London*.

12. Certain Brewers were committed by the Council, and upon an *Habeas Corpus* brought, the Return was, that they were committed *per concilium Regis pro quibusdam causis Regem & servitium suum tangentibus*; it was objected, that this Return was ill, because *per concilium Regis* is incertain what Council was meant, either the Council of State or Council at Law; but *per Curiam*, it shall be intended the Council of State; and by the Statute IV. 1. he who is committed *per mandatum Regis*, is not bailable; and *Stamford* tells us, that *Mandatum* is *Concilium Regis*. 1 Roll. Rep. 134. *The Brewers Case*.

13. Two Justices of Peace may View a Force, and make a Record of it, and then may commit the Offenders; but this must be done *flagrante crimine*, for if they do not commit upon View of the Force, they cannot do it afterwards. 2 Brownl. 266.

14. One *Harrison* was indicted, for that he 4 die *Maii* the Courts at *Westminster* being then sitting, came to the Bar of the Court of Common Pleas, and there said, *I accuse Justice Hutton of High Treason*; he was found guilty, and fined 5000*l.* and to be imprisoned during the King's Pleasure, for so the Entry must be, and not Imprisonment for Life, but where the Judgment is, that he shall forfeit his Lands for Life. *Cro. Car. 362. Harrison's Case*.

15. One *Webberly* being in the King's Bench for Debt, agreed with his Creditors, and they discharged him; but the Marshal still kept him in Custody for his Fees; and upon Motion the Court would not discharge him, but said he might bring an Action of False Imprisonment against him, or indite him for Extortion, if his Fees were excessive. *Webberly versus Sir John Lenthall, Style 454*.

16. A Man was committed for Words spoken by him against the Parliament, and indicted, convicted and fined 500*l.* and ordered to remain in Prison till he found Sureties for his Good Behaviour; and upon an *Habeas Corpus* he prayed he might be discharged, because pardoned by the General Pardon. *Style 454. Morrice's Case*.

17. *Isibell Peel* was examined upon Articles by the Ecclesiastical Commissioners, for that she, in the Years 1622 and 1623, was assisting to Sir *J. H.* to have Acquaintance with the Countess of *Purbeck*, with whom he committed Adultery, &c. for which Cause she was sentenced to be guilty of Bawdry, and fined 200*l.* and to be imprisoned till she find Sureties to perform the Order, and for that Reason a Prohibition was granted; for tho' the High Commission-Court, by Virtue of the Statute 1 *Eliz.* may alleas Fines, or award Imprisonment for an Offence, yet they cannot commit a Person, there to remain till he hath paid the Fine, or until he find Sureties to perform their Order; for they ought to certify the Fine into the Exchequer; besides, Suits for or concerning Adultery ought to be brought before the Ordinary, and not before the High Commissioners. *Cro. Car. 80. Isibell Peele's Case. Postea Pardons. (B) 7. S. C.*

18. Information against the Defendants before the Council of the Marches in *Wales* for an unlawful Practise and Combination in marrying a Servant Maid to the Son of a Gentleman, &c. they were *fined and imprisoned quousq;* and upon an *Habeas Corpus* brought they were remanded, because it appeared that they had not paid the *Fines*, and nothing was said to the Matter of the Return. *March 52. Shield's Case. See Bethell's Case.*

19. The Defendant was committed by a Secretary of State, and the Return of the *Habeas Corpus* was, that he was committed by the Lord *Conway*, Secretary of State, without *assigning any Cause*, &c. adjudged, that he ought to be discharged for that Reason; but then another Warrant was returned of the same Secretary, in which the first Warrant was recited, and that upon farther Examination, he commanded the Gaoler to keep him safely for *Suspicion of High Treason*; and it was said, this was no Cause to detain him, because this second Warrant refers to the first, which is no Warrant at all; besides there is no Special Cause of Suspicion alledged, nor for what Species of Treason. *Palm. 558. Melvin's Case.*

20. The Defendant was committed by the Lord Mayor of *London*, for that he contemptuously and unseasonably served him with a *Subpœna*, when he was executing his Office as a Magistrate, in examining Persons suspected of High Treason, in Derogation of Magistracy, and in Disturbance of the due Execution of Justice; and all this Matter appearing upon the Return of an *Habeas Corpus*, it was moved, that he might be discharged, but it was denied, because the Process was served at an *unseasonable Time*; tho' it did not appear by the Return, that the Lord Mayor was then a *Justice of Peace*, and no Objection was made against his Power to commit for a Contempt to his Person. *Hardr. 182. Prince's Case.*

21. Upon the Return of an *Habeas Corpus*, it appeared, that *Grafton* being a Draper, was committed by the Master and Wardens, for that being chosen of the Livery, he refused to serve; it was ruled, that they might fine him, and bring an Action of Debt for the Fine; but they could not commit him, as the Court of Aldermen may, for refusing the Office of an Alderman because they are a Court of Record; the Prisoner was discharged. *1 Mod. 10. Grafton's Case.*

22. Upon the Return of an *Habeas Corpus*, it appeared, that *Coates* was committed by the Lord Mayor and Court of Aldermen, for that being admonished to desist from Forestalling the Market, he declared to the Court, that he would not obey their Order; whereupon they committed him to *Newgate*, until he should signify to the Court, that he would conform, or otherwise be delivered by due Course of Law; adjudged, that this was a Commitment for a Contempt, and good; for they are a Court of Record, and have Power to do it. *1 Vent. 115. London City versus Coates.*

23. Indictment for suffering a Person to escape, who was committed by the Justices of Peace, &c. upon the Statute for a Forcible Entry; after a Verdict for the King, a Writ of Error was brought, and the Error assigned was, that it doth not appear how this Commitment was made, whether upon View of the Justices, or upon an Indictment; and 'tis not said, that *Debito modo commissus fuit*; but adjudged, that this was only an Inducement to the Offence, upon which this Indictment is framed; and that after a Verdict, it shall be intended, that the Commitment was legal. *1 Vent. 169. The King versus Wright.*

Indictments.

Against Accessories. (A)	Inns and Innkeepers indicted. (S)
For Assaults and Batteries. (B)	Justice of Peace, Judge and Constable indictable. (T)
Against Bakers. (C)	Manlaughter and Murder, and on the Statute of Stabbing. (V)
Concerning Baptism, and not with the Sign of the Cross. (D)	Nuisances indictable. (W)
For Barretry, and Bawdry, and Blaphemy. (E)	Oath of Allegiance, refusing. (X)
About Bridges. (F)	Perjury and Subornation. (Y)
For Burglary. (G)	Poisoning. (Z)
For Fighting in the Church or Churchyard. (H)	Rape indictable. (Aa)
Common Prayer, depraving it, and about Preaching and Religion. (I)	Rescous and Riots, and Robbery, indictable. (Bb)
Coroner, Indictments before him. (K)	Slandorous Words indictable. (Cc)
Cottages, Inmates and Vagabonds, Indictments about them ; Deer-stealing. (L)	Trades, using them, not being Apprentices. (Dd)
Demise of the King, Indictments after it. (M)	Water-Courses, stopping them. (Ee)
Extortion, Indictments for it. (N)	Pleas to Indictments, good and not good. (Ff)
Forgery, Indictments for it. (P)	<i>Westminster-Hall</i> , striking in it. (Gg)
Game, Indictments about it, and about the Highways. (Q)	Witchcraft indictable. (Hh)
Ingrossing and Forestalling. (R)	Quashed upon Exceptions, and on Writs of Error, and not quashed. (Ii)
	Indictments for Misdemeanors. (Kk)

(A)

Against Accessories.

1. **T**HE *Lord Sancher* of Malice forethought, procured one *B. G.* in *Middlesex*, to kill *John Turner*, who associating to him *R. N.* killed the said *Turner* in *London* ; in this Case it was resolved, that an Indictment of an Accessary in one County, to a Felony committed in another, need not recite, that the Principal was indicted in the other County, because an Indictment is no direct Affirmation, that the Principal did commit the Fact, 'tis no more than an Accusation in Behalf of the King, which, as it may be true, so it may be false ; but it must recite, that the Felony was actually committed in that other County ; resolved also, that if the Principal be attainted erroneously, the Accessary may be arraigned, because the Attainder is good till it is reversed ; but if the Accessary be hanged, and afterwards the Attainder against the Principal is reversed, in such Case the Heir of the Accessary shall be restored to all which his Ancestor lost. 9 Rep. 117. *Lord Sancher's Case*.

(B)

For Assaults and Batteries.

1. **I**NDICTMENT for Assault and Battery taken before Justices of Assize, Oyer and Terminer, and General Gaol-Delivery ; but it did not appear by which Commission it was taken, and for that Reason it was quashed. *Style* 228. *Falconbridge's Case*.

2. The Defendants were convicted of an Assault and Battery upon an Indictment brought against them, wherein the Fact was, they sent for the Prosecutor *Mr. Gott* to an Ale-House, who coming thither, *Tully*, one of the Defendants, immediately went out of the Room, and left *Mr. Gott* alone with *Macbell*, who beat him (*Mr. Gott*) in a barbarous Manner, and for no other Reason, but because he would not consent, that *Macbell* should marry his Sister ; *Macbell* was

was fined 1000 *l.* and *Tully* 500 *l.* and to be imprisoned for a Month without Bail, and to find Sureties for their Good Behaviour for seven Years. *Sid.* 165. *The King* versus *Machell*.

3. Indictment for an Assault and Battery, the Evidence was, that the Defendant spit in the Prosecutor's Face: Ruled *per Holt* Ch. Just. that this is a Battery, and tho' *Son assault Demesne* is not pleadable to an Indictment, yet he may give it in Evidence, upon Not guilty; and if 'tis proved he shall be acquitted. *Mod. Cases* 172. *The Queen* versus *Cotesworth*.

(C)

Against Bakers.

1. **I**ndictment against a Baker for using *facultatem Pistoris*, and did not say *Panis humani*; it was likewise for Baking *Panem tritici*, Anglice *Houshold-bread*, whereas *Panis tritici* signifies Bread of Wheat, and not *Houshold-bread*, for that may be made of any Corn. *Pasch.* 23 *Car. Style* 24.

(D)

Concerning Baptism, and not with a Cross.

1. **A** Curate was indicted upon the Statute 1 *Eliz. cap.* 2. for that he, at *Chelmsford* in *Essex*, did baptise a Child without the Sign of the Cross, and the Indictment did not set forth where the Child was baptised, but generally at *Chelmsford*, for which Reason it was quashed. *Hill.* 29 *Eliz. Goldsb.* 119.

(E)

For Barrettry and Bawdery.

1. **T**HE Defendant was indicted, for that he on such a Day, and on several Days before and after, was a common Barretor & *perturbator Pacis*, and did not shew any particular Action or Place, yet the Indictment was held good, for the Place is not material, for if he is a common Barretor, he is so in every Place; and the Trial shall be *de corpore Comitatus*. *Mich.* 33 *Eliz. Cro. Eliz.* 195. *Parcell's Case*, *pl.* 4. *contra*.

2. The Defendant was indicted, for that he was and yet is a common Barretor, but there was no Place alledged where he was a Barretor; and farther, that he did move and stir up several Contentions and *Jurgia*, and no Place alledged where he did stir them up; for which last Reason principally the Indictment was quashed. *Godbolt* 383. *Mann's Case*. *Latch* 194. *S. C.*
Palm.
450. *S. C.*

3. The Defendant was indicted, for that he was *communis Barreſtator*, &c. *in magnum contemptum Domini Regis*, omitting the Words *contra pacem Domini Regis & contra formam statui*, and for this Reason it was quashed, because an essential Part of the Indictment was left out. 2 *Cro.* 527. *Palfry's Case*.

4. Indictment, for that the Defendant was and is a common Barretor, and neither the Time when he stirred up Suits, or * Place where, &c. was alledged, and for this Reason it was quashed. *Thomas's Case*. *Mich.* 21 *Jac.* and *Dallison*, *Rep.* 133. *Latch* 194. *Mann's Case*. *S. P.* * *Pl.* 1.
contra.

5. Indictment for Barrettry certified by *Certiorari* thus, (*viz.*) *Inquisitio capta coram A. B. C. Justitiariis Domini Regis ad pacem in, &c. necnon, &c.* but did not set forth *necnon ad diversas felonias & transgressiones, &c. terminand' assign'*; and for this Reason the *Certiorari* was quashed, for Barrettry is an Offence of a mixed Nature, of which the Justices of Peace cannot hold Plea by their Commission of the Peace. 2 *Roll. Rep.* 151.

6. One *Cornwall* was indicted for a Common Barretor, and also that he was *Communis publicator secretorum Dominae Reginae, & sui ipsius, & diversarum aliarum personarum cum ipso impanellatarum, &c.* adjudged, that this Indictment was not good, it being for an Offence which doth not lie in Community, no more than *Communis forestallator*, without shewing particularly what Thing he did forestal; besides, 'tis not alledged that he was sworn to keep the Queen's Secrets, nor what those Secrets were which he discovered. *Moor* 302. *Cornwall's Case* 451. *S. P.*

7. Error to reverse a Judgment upon an Indictment against a common Barretor, which concluded *contra formam diversorum Statutorum*, and that was assigned for Error, because Barrettry is an Offence at Common Law, and there is no Statute to punish it; besides, the Judgment was, that the Defendant be *in misericordia*, when it should be *capitur*; but adjudged, that Barrettry is an Offence against several Statutes, as against the Statute of Maintenance, &c. and 'tis the usual Course to conclude Indictments for this Offence after that Manner; and as to the other Exception, the Record was, *Ideo committitur Gaole*, for the Defendant was present in Court, so there was no Occasion to enter *quod Capitur*. *Cro. Car.* 248. *Chapman's Case*.

8. Indictment at the Sessions, for that the Defendant being of *ill fame*, &c. *fuit nocte Vagans*; and farther, that on such a Day, &c. he frequented a Bawdy-house; it being removed into the King's Bench, upon Not guilty pleaded, there was a Verdict against him; it was moved, that this Indictment was ill, because it appeared that this Bawdy-house was out of the Liberty of the Justices, and the later Part of the Indictment, being for *Night-Walking*, is no Offence, for a Man may have a lawful Occasion to walk in the Night; 'tis true, a common Night-walker is an Offender, but the Indictment is not so; adjudged, that since it was alledged, that the Defendant was a Man of *ill Fame & nocte Vagans*, it shall be intended that he was a common Night-walker. *Trin. 2 Car. Latch 173. Willow's Case.*

1 Mod. 71. 9. Information against the Defendant, for that he is *Communis perturbator & oppressor vicinorum & tenentium*, &c. by Taking of them *excessive Distresses*, &c. after a Verdict for the King, it was insisted in Arrest of Judgment, that this Information was ill, both in Matter and Form, for it ought to shew some Offence in particular; and it ought to have expressed on what Tenants those Distresses were taken; and so it was adjudged. *1 Vent. 97, 104. The King versus Ledgingham. 2 Mod. 77.*

Raym.
193.
1 Lev.
299.
1 Mod.
288.

10. Indictment against the Defendant at Sessions, for that he was a Promoter of Suits, & *communis vicinorum suorum oppressor*; upon Not guilty pleaded, he was acquitted of the first Part, but found guilty of the last, and had Judgment against him, and was fined 200 *l.* and upon a Writ of Error in *B. R.* that Judgment was reversed, because the Word *Barretrator* was omitted, and the Word *Oppressor* is of incertain Signification; but the Finding that he is *communis oppressor vicinorum*, is good Evidence to find him guilty of Barretry, therefore he was ordered to find Sureties for his Good Behaviour, and to be indicted *de novo* with the Word *Barretrator*. *Sid. 282. The King versus Hardwick.*

11. Upon an Indictment for Barretry, the Evidence was, that one *G.* was arrested at the Suit of another in an Action for 4000 *l.* when in Truth he owed him nothing; and coming before the Lord Chief Justice to put in Bail, the Defendant solicited against him: *Sed per Curiam*, this is not Barretry but Maintenance; but where a Man is arrested by another, not with a Design to recover his Right, but to oppress him, this is Barretry; so is Lending Money to promote and stir up Suits; in this Case it appearing that the Defendant did entertain the Prosecutor in his House, and brought several Actions in his Name where nothing was due, he was found guilty of Barretry. *3 Mod. 97. Anonymus.*

12. Where the Defendant is indicted for Barretry, he must have a Note of the Particulars, that he may know for what he is charged, otherwise they will not proceed to Trial. *5 Mod. 18. The King versus Grove.*

13. Indictment against Husband and Wife for Keeping a common Bawdy-house; it was objected, that the Keeping, &c. could not be the Keeping of the Wife; but adjudged, that the Wife may be guilty of a Crime with her Husband; that the Keeping a Bawdy-house is a common Nuisance, and that the Charge for such a Nuisance is against both; that Keeping in this Case is not to be understood renting in Point of Property, but the Managing a House in such a disorderly Manner as to become a Nuisance. *1 Salk. 384. The Queen versus Williams.*

Hob. 95.

14. Indictment, for that the Defendant was *communis Leua, ac male dispositas personas in domibus lupanaribus convenire, & scortationes & fornicationes committere, pro suo lucro proprio illicite procuravit*; upon Not guilty pleaded, the Defendant was found guilty, and Judgment against her; but it was reversed on a Writ of Error, because, tho' a Bawdy-house is indictable, yet a bare Sollicitation of Chastity is not; so 'tis actionable to say a Woman keeps a Bawdy-house, but 'tis not for calling her Whore. *1 Salk. 382. The Queen versus Pearson.*

For Blasphemy.

1. TWO were jointly indicted for Blasphemy and convicted; it was objected, that the Indictment ought not to be joint but several, because the Words were spoken severally; but adjudged, that it being for one and the same Offence, a joint Indictment will lie, altho' it doth not for several Felonies; and the Words shall be taken *reddendo singula singulis*, that is, each Words to each of them, as they were spoken. *Style 312. Tawney versus Norwood.*

2. Information against the Defendant for Blasphemy, (*viz.*) That *Jesus Christ was a Bastard, a Whore-master, that Religion is a Cheat, and that he neither feared God, the Devil, or Man*; at his Trial he acknowledged the Speaking the Words, except Bastard, and endeavoured to extenuate them, alledging, that he meant, that *Christ was the Master of the Whore of Babylon*; but he was found guilty, and had Sentence to stand in the Pillory three Times, to pay 1000 Marks, and to find Sureties for his Good Behaviour during Life. *1 Vent. 293. Taylor's Case.*

(F)

About Bridges.

1. **T**WO were indicted for not repairing a Bridge, but the Indictment was quashed, because it was not alledged, that the Bridge was over the Water, or that it was ruinous and decayed, or that the Defendants *debent & solent reparare ratione tenuræ*, for a Prescription cannot be against a common Person to repair a Bridge, unless it be *ratione tenuræ*. *Goldsb. 346. Bridges versus Nicholls.*

2. The Defendant was indicted for not repairing a Bridge on such an Highway, which he ought to repair, by Reason of his Lands adjoining, setting forth, that it was so ruinous *quod ligeii Dominæ Regina per eum transire non possunt*, and concluded *ad nocumentum eorum*; it was objected, that this Indictment was not good, because it did not conclude *ad nocumentum omnium subditorum*, for without such a Conclusion this might be a private Way where the Bridge was, and so an Action on the Case would lie for the particular Person who was injured; but adjudged, that the Words *Ligeii Dominæ Regina* shall be intended all the Liege People of the Queen, which all her Subjects ought to be, and then *ad nocumentum eorundem* amounts *ad commune nocumentum subditorum*. *Mich. 32 Eliz. 2 Leon. 183.*

3. Indictment against T. S. for that he commanded F. H. to take up a Bridge in *Via Regia*, leading, &c. and against F. H. for Taking up the Bridge at the Command of the other; the last Indictment was held ill, because there was no Place alledged where the Command was given; the other Indictment was held good, tho' it was not said to be a common Bridge, because that is supplied by the Words *Via Regia*. *4 Leon. 42.*

4. Information against the Inhabitants of the County of Nottingham, for not repairing a Bridge upon the Trent, between Newark and Mansfield, which Time out of Mind they ought, &c. Two of the Inhabitants in the Name of themselves and of the rest, plead, that the Lord Limington and other Persons, Owners of Lands called *Bridglands*, ought to repair *ratione tenuræ*, and traverse, that the Inhabitants, &c. Time out of Mind, ought, or have, &c. The Attorney General replied, that the Inhabitants ought, and traversed, that the Lord Limington, &c. ought; the Defendants rejoined, that the Lord Limington, &c. ought, upon which they were at Issue; and *ex assensu partium*, it was tried at Bar by a *Middlesex* Jury, and the Defendants were found guilty: *Nota*, The Defendants did not plead Not guilty, but that another ought to repair, and this was well pleaded, that here was a Traverse upon a Traverse, and Issue joined on the last Traverse, and the Defendants found guilty upon the Issue tendered on the first Traverse, that the Inhabitants ought to repair; and all this by the Direction of *Hale* Ch. Just. *2 Lev. 112. The King versus Inhabitants of Nottingham.*

(G)

For Burglary.

1. **A**LL the Judges of England met at *Serjeants-Inn*, and agreed, that if one breaks a Panel Moor of Glass in a Dwelling-house, and draws out any Thing, with an Intent to steal it, in the Night-time, this is Burglary, tho' he enters the House in no other Manner; so likewise if Thieves in the Night-time come to a Dwelling-house, and the Door is opened by one within, and being open, one of the Thieves intending to kill a Man, shoots off a Pistol loaded with Powder and Bullet, but misses the Man, and breaks a Hole on the other Side of the House with the Bullet, this is not a Burglary: But where in the Night-time one intending to kill another being in the Dwelling-house, breaks a Hole in the Wall, and perceiving where the Person was, he shot at him thro' the Hole, but missed him, this is Burglary, for 'tis breaking the House in the Night-time to commit Felony, which makes the Offence Burglary: But Breaking the Wall with a Bullet is not Breaking the House with an Intent to commit Felony. *1 And. 114, 302.*

2. The Defendant was indicted, for that he *felonice & Burglariter fregit * domum mansionalem* W. Jones *Ed. Vaughan*, and from thence feloniously took divers Goods; upon Not guilty pleaded, he was found guilty, but prayed his Clergy: But by all the Judges of England this was held to be Burglary, for 'tis not material whether any Person is in the House, or not, for if no Body is within 'tis still *Domus mansionalis*, and the Breaking it in the Night, with an Intent to commit Felony, makes it Burglary. *1 And. 302. Evans versus Finch.* 66.
Postea
4. S. C.

3. The Indictment was, for that the Defendant *Burglariter fregit Ecclesiam in nocte ad spoliand' & depredand' bona parochianorum*, &c. but he took nothing away; adjudged Burglary, and the Indictment good. *Pasch. 1 Mar. Dyer 99.*

4. Indictment, for that the Defendant, about twelve of the Clock in the Forenoon, broke open Mr Audley's Chamber in the *Middle Temple*, and stole from thence 40*l.* adjudged, that the Chamber was *Domus mansionalis*, and that this was Burglary without Benefit of Clergy, that being taken away by the Statute 39 *Eliz.* *Cro. Car. 340. Evans versus Finch.* Antea 2.
S. C.

5. *I. F.* was indicted by the Name of *I. F.* of *Aldrington*, *alias dict' I. F. of Aldrington, &c.* *Yeoman*, for that he *felonice & burglariter domum, &c. fregit*; this Indictment was held ill, because the Addition of *Yeoman* came after the *Alias dictus*, when it should have been added before; and also because it was not set forth, that *noctanter fregit, &c.* whereupon the Party was acquitted. *Mich. 40 Eliz. Cro. Eliz. 583. Fuffe's Case. 2 Leon. 183. Hooper's Case. S. P.*

6. Indictment for Burglary, setting forth, that the Defendant *Burglariter domum cujusdem Richardi fregit*, leaving out the *Surname* of the Party; and this being moved as an Exception to the Indictment, it was adjudged, that the Indictment was good. *Moor 466. Cole's Case.*

1 And.
114. 323.
Poph. 43.
52.

7. Resolved by all the Judges, *Anno 36 Eliz.* that breaking a Dwelling-house in the *Night-time*, with an Intent to rob or kill, is Burglary, tho' no Person was in the House; and if a Man hath two Dwelling-houses, and lives in them by Turns, and a Thief breaks open that House in the Night-time, wherein the Owner is not, but in the other, this is Burglary; and the antient Indictments for Burglary were *noctanter & felonice, &c.* without saying any one was *put in Fear*, as the late Indictments are; and the Reason is, because by the Statute 23 *H. 8.* Clergy is taken from a *House-breaker, putting in Fear or Dread, the Owner, his Wife, Children, or Servants then being within.* *Moor 660.*

8. *Turner* and his Wife and two Sons were indicted for Burglary, and taking away Money and Jewels to the Value of 2000*l.* the Father was found guilty of Burglary, and hanged in *Cheapside*, and one of his Sons was found guilty of Felony, and the other acquitted; adjudged, that the Finding was void as to the Felony, because they cannot find one guilty of Burglary, and the other of Felony upon the same Indictment. *Sid. 171. The King versus Turner & al'.*

(H)

Concerning Fighting in Church or Church-yard. Burning a House, see (K k) 1.

4 Leon.
49. S. C.

1. **T**HE Defendant was indicted upon the Statute 5 *E. 6.* for drawing his Dagger in the Church of *B.* against *W. R.* but did not set forth, that it was with an Intent to strike him, and for that Reason it was held void in all, for it cannot be an Offence at Common-Law, because the Indictment was on the Statute, and therefore it shall not be good for an Assault. *Pasch. 33 Eliz. Cro. Eliz. 231. Penhallo's Case.*

2. Indictment against the Defendant, for that he *insultum fecit* (upon *B. G.*) in *Ecclesia in Shoreditch praed'*, and the aforesaid *B. G.* then and there in the said Church, did beat and wound *contra formam Statuti*; after the Defendant was found guilty, it was objected, that this was an Offence at Common Law, and therefore it was ill to conclude the Indictment *contra formam Statuti*, for 'tis not an Offence by any Statute, unless he strike with a Weapon, or draw a Weapon with Intent to strike in the Church; and by the second Clause in the Statute, *finiting and laying violent Hands* is Excommunication *ipso facto*, and for these Reasons the Indictment was quashed. *C. o. Car. 334. Chomley's Case.*

3. By the Statute 5 *Ed. 6. cap. 4.* 'tis Felony for any Man *malitiously to strike another, or to draw any Weapon with an Intent to strike another in the Church or Church-yard*; the Defendant was indicted on this Statute, for that he on such a Day *extraxit gladium* against *B. G.* in the Church-yard, *& ipsum percussit*; but he did not set forth, that *extraxit gladium ad percutiendum*; 'tis true, the Indictment set forth, that *ipsum percussit*, but that will not do, without saying *malitiose*, which was left out here. *Trin. 4 Car. Noy 171.*

(I)

About Common Prayer and Preaching, and Religion. See Recusancy.

1. Indictment against *B. G.* Curate of the Parish of *L.* &c. for that he spoke against the Common Prayer-Book, and that he refused to use the Common Prayers, and to administer the Sacraments (but did not say as appointed by the Book of Common Prayer), upon Not guilty pleaded by the Defendant, he was found guilty, and the Judge of Assize gave Judgment, that he should be deprived; but upon a Motion in Arrest of Judgment, it was adjudged, that the Indictment was not good, and that the Judgment was erroneous; first, as to the Indictment, it did not appear by it, that the Defendant was Curate of the Parish where he refused to use the Common Prayers and administer the Sacraments; and if he was not Curate there, he is not punishable by the Statute; then, as to the Judgment, tho' the Statute saith the Offender shall be deprived *ipso facto*, yet the Temporal Judges cannot give Judgment of Deprivation, because 'tis a spiritual Act, for which Reasons the Judgment was stayed. *Mich. 40 Eliz. Goldsb 162.*

2. The Defendant was indicted upon the Stat. 23 *Eliz. cap. 1.* for withdrawing several of the Queen's Subjects from the Religion established in *England*, and to promise Obedience to the Church of *Rome*; and for that he himself was withdrawn from the Obedience of the Queen; the Prosecution by this Indictment was not within a Year and a Day after the Offence; and there is a

Provifo

Proviso in the Act, that all Offences, &c. shall be prosecuted within the Year, but adjudged that must be such Offences which concern the Supremacy and Causes Ecclesiastical; but this Indictment is for an Offence not mentioned in the Proviso. 1 *Leon.* 238. *Guriford's Case.*

3. Indictment upon the Statute 23 *Eliz.* of Recusancy, in which the Words of the Statute *non habens aliquam rationabilem causam* were omitted; but adjudged, that the Indictment was good, for if he had any reasonable Cause for not coming to Church, it ought to be shewed on the other Side, and not to be alledged in the Indictment. 2 *Leon.* 5. *Dormer's Case.*

4. The Defendant was indicted upon the Statute 23 *Eliz.* for Recusancy, by the Name of *William Scott of Southwark*, Gent. and there being a Verdict against him, a Writ of Error was brought, and the Error assigned was, that in the Indictment, he is not named of any Parish, but of *Southwark* generally; and in *Southwark* there are many Parishes; and since by the Statute the Penalty is to be applied towards the Relief of the Poor of that Parish where the Offence was committed, therefore it ought to appear in what Parish the Defendant lived; but adjudged well, for the Penalty belongs to the Queen, and the Inhabitants of the Parish where the Offence was done, are to apply to the Exchequer for the third Part, upon a Suggestion, that the Offence was done in their Parish. *Pasch.* 28 *Eliz.* 2 *Leon.* 167. *Scott's Case.*

5. Error to reverse a Judgment upon an Indictment before Justices of the Peace, for these Words, *The Religion now professed is a new Religion within these fifty Years; Praying is but Praying, and Hearing Sermons read, more edifying than two Hours Preaching*; he was convicted, and fined 100 *l.* the Error assigned was, that it was not an Offence punishable by Indictment before Justices of Peace, but only before the High Commission-Court; and the Judges were of that Opinion. 2 *Cro.* 421. *Atwood's Case.*

6. Information, &c. *tam quam*, &c. against a Recusant for 20 *l.* per Month, for not coming to Church; the Defendant pleaded several Statutes, and among the rest, the Statute 35 *Eliz.* that no Part should be paid to the Informer; adjudged, that the Statute 28 *Eliz.* did not take away the Liberty which the Informer had by the Statute 23 *Eliz.* for it was made for the more speedy Execution of it, and it doth not alter the Suit of the Party, but of the King, which by that Statute is now confined to the Courts at *Westminster*, or to the Assises, and leaveth the Informer as he was before; besides, it doth not extend to Informations, (as this is) but to Indictments; neither doth the Statute 35 *Eliz.* take away the Action popular given to the Informer by the said Statute 23 *Eliz.* for before that Statute, if a *Feme Covert* had been convicted of Recusancy upon an Indictment, the Forfeiture could not be levied upon her Husband, because he was no Party to the Suit; but it was otherwise either in an Action of Debt, or upon an Information; so that the Statute 35 *Eliz.* was made for the more speedy and effectual Recovery of Forfeitures made by married Women. 11 *Rep.* 58. *Dr. Foster's Case.*

7. Information, &c. *tam quam*, &c. against Husband and Wife for 20 *l.* per Month for the Wife not coming to Church; upon Not guilty pleaded by her, she was convicted; it was moved in Arrest of Judgment, that an Information did not lie against Husband and Wife, for the Recusancy of the Wife, because the Statute 7 *Jac. cap.* 6. appoints, that upon such Conviction she shall be committed, and if the Husband will redeem her, he shall pay the Forfeiture; so that this subsequent Statute abrogates the former; but adjudged it did not, for it only appoints, that where a *Feme Covert* is convicted, and doth not conform within three Months after such Conviction, she shall be committed, unless the Husband will pay 20 *l.* for every Month she shall be out of Prison, and not conform. 2 *Cro.* 529. *Parker versus Curfon.*

8. Error to reverse a Judgment upon an Indictment for Recusancy against the Lord *St. John*, and several Errors were assigned, but all over-ruled; especially since by the Statute 3 *Jac.* 'tis expressly provided, that such Indictments shall not be void or discharged for Default in Form, until after Conformity to the Church; but because the Word *Capiatur* was omitted in the Judgment, the Court held, that it was an apparent Injury to the King; and for that Reason it was reversed. *Cro. Car.* 361. *The Marquess of Winton's Case.* See Recusancy. (A) 14. S. C.

9. Indictment upon the Statute 13 *Car.* 2. against a Parson for Preaching, that *the Government of the Church of England is Popish, Superstitious and Will-Worship, and who hath required these Things at your Hands*; he was found guilty, and it was excepted against the Indictment, for that it was concerning an Ecclesiastical and not a Civil Matter, and not tending to defame the Civil Government; but adjudged, that the Civil and Ecclesiastical Government are so incorporated, that one cannot subsist without the other, and that both center in the King; and therefore to speak against the Church is within the Intent as well as the Words of the Statute; the Judgment was, that he should be disabled to have any Office Ecclesiastical or Civil, and fined 500 *l.* and committed till he paid it. *Sid.* 69. *The King versus Feild.*

(K)

Before Coroner. Of Constables, see postea (T).

1. **I**Nquisition taken before *B. G. coronator in Com' præd'*, it should have been *de Com' præd'*, for every Coroner of a County is a Coroner *in* every County where he is, but not of every County; but adjudged, it shall be intended that he is Coroner *of the County*, and this is proved by the Writ *De Coronatore elegendo*; which is thus, ff. *Quia B. G. nuper unus Coronator nostr' in Com' tuo diem clausit extremum, &c.* 4 Rep. 41. in *Heydon's Case*.

2. The Coroner cannot take an Inquisition, but it must be *super visum Corporis*; therefore if a Man is drowned, and cannot be found, the Coroner cannot enquire of his Death; but in such Case the Inquisition ought to be taken before the Justices of the Peace, to entitle the King to the Forfeiture of his Goods. *Hill. 2 Car. Popb. 200.*

3. Indictment for killing a Woman within the Verge; the Truth was, she was beaten within the Verge, but she died out of it; in such Case the Coroner of the County, and the Coroner of the Verge, ought to join in taking the Inquisition *super visum Corporis*, but here the Inquisition was taken before the Coroner of the Verge only; and for that Reason it was not good. *Styl. 76. The King versus Savage.*

(L)

Concerning Cottages, Inmates and Vagabonds.

1 Mod.
290. con-
tra.

1. **T**HE Defendant was indicted for building a Cottage *pro Habitatione*, contrary to the Statute 31 *Eliz. cap. 7.* it was objected, that the Indictment did not set forth, that any Person *lived* in it; but it was adjudged good, for Building the Cottage is an Offence. 2 *Bulst. 264. The King versus Phillips.* 1 Mod. 295. *The King versus Nevill, contra.*

2. The Defendant was indicted for erecting a Cottage at *H.* and not laying four Acres of Land to it at least; but did not conclude *contra formam Statuti*, and for that Reason the Indictment was quashed. 2 *Roll. Rep. 38 Harrison's Case.*

2 Cro.
377.

3. *T. S. and others* were indicted for having Inmates in their Houses; but it was quashed, because it was joint against them all, when there ought to be several Indictments against each of them. 2 *Roll. Rep. 164.*

4. *T. S.* was indicted, for that he being an Inhabitant at *Brentford in Middlesex, fuit circumferarius, Anglice a Pedlar, & otiosa & Vagra persona diversis locis & temporibus in patria Vagans, & apud Hackney & diversa alia loca privata, & non in mercatis aut Fieriis, diversas Mercimonias personis venditioni exposuit*, mentioning several small Things which he had sold, &c. it was objected, that this Indictment was ill, because it did not set forth, that the Defendant was taken wandering according to the Words in the Statute 39 *Eliz. Sed per Curiam*, 'tis the Wandering, and not his being taken Wandering which makes the Offence. 2 *Roll. Rep. 172. The King versus Hollingworth.*

For Deer-stealing.

1. **T**HE Defendant was indicted and convicted for Deer-stealing out of the Forest of *Rockingham*, and the Exception to it was, that the Fact was laid to be *in Foresta, &c. usitata* for keeping Deer, and that the Defendant killed a Deer without the Consent of the Keeper; which may be very true, and yet he might have the Consent of the Ranger; besides, the Word *usitata* imports, that it might be used long since for keeping Deer; but adjudged, that the Leave of the Ranger is the Leave of the Keeper, and that *Usitata* implies the present Time as well as past. 1 *Salk. 377. The Queen versus Smith. Farr. 77. S. C.*

2. The Defendant was convicted upon the Statute 13 *Car. 2. cap. 10.* for Deer-stealing: The Memorandum was, that upon the 23d of September, &c. *Hall* came before three Justices of the Peace, and informed, that the Defendant with Grey-Hounds chased, &c. and that then *Hall and Marshall made Oath of the Truth of the Premises*, and that upon the said Oath the Defendant *Pullen* was convicted; *Ideo consideratum est*, that he forfeit 20 *l.* one Half to the Informer, and the other to the Owner of the Park, *secundum formam Statuti*; in this Case it was adjudged, that making Oath generally *de veritate præmissorum*, without setting forth the Special Matter, was well enough; that the Judgment for distributing the 20 *l.* was likewise good, tho' the Statute gives it *after Execution*; that the Time of the Offence, and also of the Conviction, must be set forth, because the Prosecution must be within six Months after the Offence committed; thereupon the Conviction was affirmed; upon which a *Fieri facias* against the Goods is a proper Execution, and in Default thereof a *Capias ad satisfaciend'* against the Person of the Deer-stealer, and a *Fi. fa.* was awarded accordingly. 1 *Salk. 369. The Queen versus Pullen.*

3. The Defendant was convicted for Deer-stealing on the Statute 3 & 4 *Will. 3. cap. 10.* by one Justice of Peace, who came into a Glover's Shop, and seeing a Deer-Skin there, asked him how he came by it; the Glover replied, he bought it of *W. R.* who not giving an Account how he

he came by it, was convicted; and adjudged, that the Justice might enter and convict the Person who sold it; for the Statute might be easily eluded, if the Deer-stealer should discharge himself by a Sale. 1 Salk. 383. *The Queen versus Jennings*.

4. Upon a *Certiorari* on a Conviction for Deer-stealing, it was objected, that it appeared to be a Year after the Day of the Information; but adjudged well enough, because 'tis not from the Conviction, but from the Information, that the Time is to be computed; for if the Information is in due Time, the Conviction may be at any Time afterwards; then it was objected, that the Party was not summoned; but that was disallowed, because the Defendant appeared, which cures the want of Summons; lastly, it was objected, that by the Conviction there was no Distribution of the Penalty, viz. 10 l. to the Party grieved, 10 l. to the Poor, &c. and 10 l. to the Informer; it was only *convictus est & forisfaciet* 30 l. but adjudged, that the Judgment in such Cases seldom makes a Distribution; 'tis enough to say, that *convictus est & forisfaciet, &c. juxta formam Statuti*. 1 Salk. 381. *The Queen versus Barrett*.

5. Exceptions were taken to a Conviction on the Statute 3 & 4 Will. cap. 10. for Deer-stealing, in which the Court is to see, that the Fact is an Offence within the Act; resolved, that the Fact need not be laid *contra pacem*, for in these Summary Proceedings, so much Formality is not required: That *inter such a Day and such a Day* he killed three Deer, is sufficient; for if a certain Day had been alledged, the Informer is not tied to that Day, but he is confined to give Evidence of killing within those Days, so that 'tis more certain and better for the Defendant; 'tis true, 'tis otherwise in Informations at Common Law, because every distinct Offence creates a new Penalty; but in Trespasses, a Fact may be laid *diversis diebus & vicibus*, between such a Day and such a Day, because 'tis not a new Action, but in Aggravation of Damages; that an *unlawful Killing* is sufficient, without shewing how, or setting forth any *Hunting*; that *Ideo consideratum est quod convictus est*, is sufficient, without saying, *Quod forisfaciet*, because that is the Consequence of the Conviction; that if the Owner of the Park died before Execution, and after the Conviction is affirmed, his Executors, (upon *Affidavit* made) shall have a *Levati facias*; and so may the Church-wardens, without Suggestion or *Scire facias*; and so may the King. 1 Salk. 378. *The King versus Chandler*. 5 Mod. 446.

6. On a Conviction affirmed in B. R. a *Levati facias* was awarded to the Sheriff, who levied and sold the Goods; and adjudged well enough, for the Record cannot be sent back to the Justices; and as the Court have Power to affirm the Conviction, by Consequence they have Power to award Execution, which must be to the Sheriff, and not to the Constable, because the one, and not the other, is the proper Officer to the Court; and it must be by *Levati facias*, for the Words of the Statute are, that the Offender shall forfeit 40 l. to be levied by *Distress*; and where ever the Law gives a *Distress* for a Publick Benefit, the Officer may sell. 1 Salk. 379. *The King versus Speed*.

7. *W. R.* was convicted for Deer-stealing, and a Warrant was directed to the Defendant, to levy the Forfeiture by *Distress*, by Virtue whereof he distrained the Cattle of *W. R.* and sold them to *W. W.* but before he paid the Money to the Prosecutor, he was informed, that the Act of Parliament would not justify him in selling the Cattle; thereupon he restored the Money to *W. W.* and the Cattle to *W. R.* and now the Prosecutor moved for a *Mandamus*, to compel him to pay the Money to him; but it was denied, tho' it was insisted for him, that he could not charge the Defendant in an Action, without giving the Warrant in Evidence, which he could not do, because it was in the Custody of the Defendant: It was held in this Case, by the Court, that a Copy of the Warrant was good Evidence; that these Words in the Statute, (viz.) *To be levied by Distress*, must be understood by *Distress and Sale, &c.* that tho' a *Certiorari* was brought after the Warrant issued forth, and thereby the Record removed into B. R. yet that could not hinder the Execution of it; that if the Warrant was not made returnable, the Officer need not return it; that if 'tis made returnable before the Justices, tho' the Record of Conviction is removed by *Certiorari*, yet they may call the Constable to an Account upon the Warrant; that if before the *Certiorari* comes, Execution is done in Part, the Office may go on. Mod. Cases 83. *Morley versus Stacker*.

* Sessions may fine him for not returning it.

(M)

After Demise of the King.

1. Before the Statute 1 Ed. 6. if a Man had been indicted and convicted of any Treason, Murder, or any Felony whatsoever, and the King had died before Judgment; in such Case no Judgment could be given at all, because it was at the Suit of the King, and the Authority of those Judges who should give the Judgment, was determined by his Demise; but now by that Statute Judgment may be given in the Time of another King, which could not be done before. 7 Rep. 29. in Case of a Discontinuance of Process, and 3 & 4 Maria, Dyer, Smith's Case. and 1 & 2 Eliz. Palmer's Case, S. P.

(N)

For Extortion.

1. **T**HE Mayor of Lynn was indicted for Extortion, for that he received 24 s. of B. G. to give Judgment for him in an Action depending before him *in contemptum Domine Regine, & contra formam Statuti*; it was objected, that there was no Statute to punish a Judge in such Case, and that *satis est pœnæ Judici quod Deum habet ultorem*; but adjudged, that if the Indictment had been *contra pacem* instead of *contra formam Statuti*, it had been good. 1 Leon. 295. Mayor of Lynn's Case.

2. The Clerks of the Markets took a Penny only for viewing the Measures, without any Fault found in them, and without Sealing them; but if they sealed them, then they took 2 d. for every Measure or Vessel; adjudged by all the Judges at *Serjeants-Inn*, that this was Extortion. Moor 523.

W. Jones 378. 3. A Bailiff was indicted, for that he took *colore officii extorsive* of the Prosecutor 20 s. to which he pleaded, and was convicted on the same Day; and upon Error brought, the Judgment was reversed, for the Sessions cannot try and determine Offences in one and the same Sessions, in which the Offenders are indicted, and have pleaded; now the Judgment in this Case was, that he should be committed, and pay a Fine of 40 l. to the King, and *treble Damages* to the Party grieved; and upon a Writ of Error brought, this was adjudged erroneous; for tho' such Damages might be assessed by Virtue of the Statute 23 H. 6. yet it must not be done by the Court till the Jury have found the single Damages, and then the Court may treble them. Hill. 11 Car. Cro. Car. 438, 448. Bumsted's Case. W. Jones 378. S. C. by the Name of *the King versus Lamferne*.

4. Error to reverse a Judgment upon an Information for Extortion, at the Assises in Oxford; for that the Defendant being a Taylor, took more Money with an Apprentice than he ought; the Error assigned was, that Justices of Assise have no Power to determine Offences of this Nature; but adjudged, that as Justices of Oyer and Terminer they have Authority, &c. the Judgment was *Ideo Consideratum est*, leaving out *per Curiam*; and for that Reason it was reversed. Style 430. Richardson's Case.

2 Roll. Rep. 263. quashed, for that it was servus five Depuratus of the Chancellor.
* 21 H. S.

5. The Defendant being a Clerk of the Chancellor of a Bishop, was indicted for taking 10 s. *extorsive*, for writing Letters of Administration *contra formam Statuti, &c.* * By which 'tis enacted, that *if the Goods are under the Value of 5 l. nothing shall be taken; if above that Value, and under 40 l. then 2 s. 6 d. but if above 40 l. 'tis casus omissus* out of the Statute; now it was moved to quash this Indictment, because it did not set forth, that the Goods were under or over the Value of 40 l. for if over the Value, then 'tis not punishable in a Temporal Court, because the Administration is an Ecclesiastical Cause; adjudged, that this Indictment was ill, because it did not set forth the Value of the Goods; but if it had been framed upon the Common Law, and not upon the Statute, it had been otherwise. Palm. 318. Smith's Case.

6. The Defendant, who was Bailiff of the Hundred of Sparkford in Com' S. was indicted for Extortion, for that *colore Officii* he took 50 s. &c. upon Not guilty pleaded, he was found guilty, and the Indictment being removed into B. R. it was insisted, that it was ill, because it did not mention *for what Cause* he took this 50 s. for that is issuable; but adjudged well enough, because 'tis said *colore Officii*, and probably he might demand it as Bailiff of the Hundred; but it might have been ill upon a Demurrer. Sid. 91. The King versus Cover.

Sid. 455.

7. Information against an Attorney for Extortion *contra formam Statuti*; it was moved in Arrest of Judgment, that Attornies are not within any of the Statutes of Extortion; but adjudged, that they are within the Statute 3 Jac. cap. 7. and the Ch. Just. Keyling held, they were within all the Statutes; but this Information was quashed, because it set forth, that Troy being an Attorney of the C. B. did at M. cause one Collop to be impleaded for 9 s. at the Suit of D. S. *ad grave damnum* of the said Collop, but did not set forth *in what Court* he caused him to be impleaded. 1 Mod. 5. Troy's Case.

(P)

For Forgery.

1. **I**NDICTMENT for Forgery upon the Statute 5 Eliz. taken before W. N. and R. B. Justices of Peace, *neqnon ad diversas felonias, &c. audiend' & terminand' assignat'*; adjudged, that they had not Power to take this Indictment; for the Statute which directs, that Offences shall be enquired, &c. before Justices of Assise, or Justices of Oyer and Terminer, intend those who have a general Commission, and not those who have only a Special Commission. Mich. 40 Eliz. Cro. Eliz. 601. Wilson's Case.

2. Information against B. G. setting forth, that he had forged a Lease of several Lands, Parcel of the Possessions of Serborne, in the Name of Sir Walter Rawleigh, naming the Lands, and amongst the rest Long-Mere, and in the Lease there were no Lands called Long-mere, but all the rest were there; upon Not guilty pleaded, the Defendant was acquitted, because he could not be guilty

of Forging the Lease set forth in the Information, for that was a Lease of Lands called *Long-mere*, and the Lease pretended to be forged, was another Lease, in which no such Lands were contained. *Hob. 272. Meyer's Case. 2 Cro. 272. S. C.*

3. *Blake* put his Son Apprentice to *Allen*, and entered into a Bond of the Penalty of 100 *l.* to *Allen* for his Good Behaviour, during the Apprenticeship; afterwards the Master himself rased out the Word *Libris* in the Bond, and put in *Marcis*; adjudged in the Star-Chamber, that this was not Forgery, because the Master had injured no Body but himself in diminishing the Sum. *Moor 619. Blake versus Allen.*

4. Indictment for Felony, being for a second Forgery, after a Conviction for another Forgery, on the Statute 5 *Eliz.* for Writings concerning Lands, &c. the Defendant had a Copy of his Indictment, and being convicted, had Sentence to be perpetually imprisoned; now, in such Case he is not bailable by any other Court; adjudged also, that there are no Accessaries in Forgery. *Moor 666. Booth's Case.*

5. Indictment for forging and publishing Letters of Credence to collect Money; the Defendant was convicted upon his own Confession, and fined 160 *l.* & *quod capiatur*; it was objected, that it doth not appear in the Indictment, that he received any Money on the counterfeit Letters; but adjudged, that the Indictment was good, for the Substance of the Offence was Forging and Publishing, &c. and not the Collecting, &c. and tho' it was not said, that he *falso contrafecit*, yet the Word *contrafecit* necessarily implies *falso*. *Style 12. Savage's Case.*

6. Information for a Forgery against an Attorney, setting forth, that he had framed a Writing in Form of a Release at *Sherbourn*, and that he *published* and gave it in Evidence at *Dorchester*, and the *Venue* came from *Dorchester*, and this was held to be *Mis-trial*, tho' it was insisted, that the *Publishing*, and not the Framing, was the Crime; and it being in an Information, it was not aided by the Statute 21 *Fac.* or by any other Statute. *1 Vent. 17, 35. Perry's Case.*

7. Error to reverse a Judgment in an Indictment for Forgery, upon the Statute 5 *Eliz. cap. 4.* for that the Defendant *subdole & scienter & falso fabricavit quoddam falsum factum & scriptum indentatum*, &c. there were several Exceptions to the Indictment, but no Judgment given. *1 Vent. 23. The King versus King.*

8. Three Defendants were indicted for forging and malicious contriving and conspiring an Entry of a Marriage in the Register of *East Greenwich*, between *Sir Robert Dudley* and *Frances Walsor*, one of the Maids of Honour to Queen *Elizabeth*, and this was in Order to impeach the Title of Dower of the true Wife of the said *Sir Robert Dudley*, and to deprive his Daughters of their Inheritance; one of the Defendants, *viz. Charles Dudley* was found guilty, and *Sir James Crofts* and *Richard Masters* were found Not guilty; and it was objected in Arrest of Judgment, that one could not be guilty of a Conspiracy: But adjudged, that this Indictment was good without the Conspiracy, and that was only an Inducement to the Fact; that this Register-Book is Evidence at Law, and the Falsifying it is punishable; the Defendant was fined 200 Marks, and *Sir James Crofts's* Name was rased out of the Record. *2 Sid. 71. Dudley's Case.*

9. The Defendant was indicted, for that he *fabricavit, vel fabricari causavit* a Bill of Loading; and upon a Demurrer to this Indictment it was held ill, because it ought to be certain and positive. *1 Salk. 342. The King versus Stokoe.* For in an Indictment or Information, the Fact must not be laid in the Disjunctive. 5 Mod. 147.
2 Cro. 345.
Sid. 134.

10. Upon a Demurrer to an Indictment for Forgery, the Caption was, that *per Sacramentum* of the Jury, &c. *onerat' existentes presunt' existit*, that the Defendant *falso fabricavit & contrafecit quoddam scriptum obligatorium*; it was objected against the Caption, that *triat' jurat' & onerat' existentes* was Nonsense, because there was no Verb to these nominative Cases; and a Judgment had been reversed upon a Writ of Error for Want of a nominative Case to a Verb; but adjudged, that this Indictment is to be considered as if it was for High Treason; and if so, 'tis good notwithstanding the Caption, for that did not make any Uncertainty in the Charge; then it was objected, that the Crime for which the Defendant was charged was the *Forging falsly*, whereas it could be no Crime, if not truly forged; but if it was truly forged, it could not be *scriptum obligatorium*, because a forged Writing is not obligatory, therefore it should be *scriptum* purporting a Writing obligatory: But adjudged, that to say *falso fabricavit* is, that he being a false Man, did forge, or that the Thing forged was false; and as to *scriptum obligatorium*, the Writing is not binding in Reality, but only in Shew and Appearance, so that 'tis an Obligation, tho' a false one. *1 Salk. 342. The Queen versus King.*

11. Indictment for forging a Deed of Assignment of a Lease, with the Mark of one *Goddard*, the pretended Assignor, *cujus tenor sequitur*, &c. but did not set forth the Mark of *Goddard* made to this Assignment; and it was, that without it this was no Forgery; but the Objection was disallowed. *1 Salk. 342. The Queen versus Smith.*

12. Information, &c. setting forth, that whereas on such a Day, &c. Three or more Commissioners of the Treasury caused Exchequer-Bills to be issued *ad receptum Scaccarii*, according to the Form of the Statute, &c. and that *Knight* the Defendant *existen' nuper receptor generalis*, &c. did fraudulently and falsly *indorse* twenty Bills at the *Custom-house*, as if they had been received for Customs, and paid them into the Exchequer, *as if they had been truly indorsed in deceptionem*, &c. of the King; upon Not guilty pleaded, the Defendant was convicted, but Judgment was arrested, because *nuper receptor* did not import that he was the King's Officer at the Time of the *Indorsing*, but rather the contrary, and if so, then he is a private Person, and by Consequence this *Indorse-*

Noy 99. ment was not criminal, because it hurt no Body but himself; besides, the Word *Indorse* is not sufficient, for that imports a Writing on the Backside of a Thing, but not putting his *Name* to it; it should have been, that the Defendant put such a Person's Name on the Back of the Bill, *ubi revera*, there was no such Person, or not ordered to put his Name; then the Words *Quasi receptæ essent pro Custumis*, import only an argumentative Crime, when all criminal Charges ought to be very certain; 'tis true, the Information is, that *falso indorsavit in deceptionem Regis*, and 'tis so found by the Jury; but a Fact cannot be made criminal by an Adverb of Aggravation, and the Words *In deceptionem*, &c. are only Matter of Conclusion; here is no express Charge, for 'tis not sufficient to say, that the King was cheated, but he must shew how; and lastly, it should have been, that the Defendant made a false Indorsement *continen'*, &c. for tho' here is a Fallacy, yet nothing is charged which is criminal. 1 *Salk.* 375. *The King versus Knight.*

13. Indictment was found at Sessions for forging a Letter in the Name of *W. R.* which being removed by *Certiorari* into *B. R.* it was quashed, for that an Indictment of Forgery would not lie before Justices of Peace, because their Power being created by Act of Parliament, they have no Authority but what is given thereby; and the general Words of their Commission *De omnibus aliis transgressionibus & malefactis quibuscunq;* extend only to such Crimes as they have Power to examine by the several Statutes which created or enlarged their Jurisdiction. 1 *Salk.* 406. *The Queen versus Yarrington.*

(Q)

About the Game.

1. Indictment upon the Statute 23 *Eliz. cap. 10.* for taking *Partridges*, it was laid to be *cum Retis*; and it was objected, that there was no such Word, for it ought to be *cum Retis*, and for that Reason it was held ill. 3 *Bull.* 178. *The King versus Rivett.*

About Highways. See (W) per totum.

1. *Serjeant Hoskyns* was indicted for not repairing the Highways in *St. John's Street*, *ante Tenementa sua*; it was quashed, because it did not set forth *how* he became chargeable to repair, nor that he was seised of any House there, or that he lived there. *Goldsb.* 400. *Serjeant Hoskyns's Case.*

2. Information for Stopping a Highway, setting forth, that Time out of Mind there was a common Highway, &c. The Defendant confessed there was such a Way, but says, that it was so foul and drowned with Water, that People could not pass, and that he being seised of a Close adjoining, did, for their Profit and Ease, lay out another Way more commodious for Passengers; and that before he laid it out, he brought a Writ of *Ad quod damnum*, to enquire whether it was to the Damage of the People, &c. and it was found, that it was not any Damage, &c. this was held an ill Plea, both as to the Matter and Form of it, because it did not appear by what Authority the Defendant made this new Way, for the Writ *Ad quod damnum*, and the Inquisition upon it, will not excuse him, because it doth not appear that he had any License from the King to bring that Writ, so that the Laying out this new Way is only at his Pleasure. and the Subject hath no Interest in it, for he may stop it again when he will. *Cro. Car.* 193. *The King versus Wurd.*

3. Indictment against the Defendant, for that he *apud K.* with a Brick-Wall, stopped up the King's Highway leading from *London* to *K.* this was adjudged ill, because the *Stopping* is alledged to be at *K.* and the Way is from *London* to *K.* so that *K.* is excluded; then he was indicted again, and the *Stopping* was alledged to be *in alta Via Regia in K.* but did not say leading from such a Town to such a Town, nor any Boundaries; adjudged, that it need not, where the *Stopping* is alledged to be in a Highway, but it must where the *Stopping* is in a common Way. *Trin. 2 Car. Latch* 183. *Hully's Case.*

4. Indictment against the Inhabitants of *Mile-End* in the Parish of *S.* for not repairing a Highway; it was objected, that *Mile-End* was but an *Hamlet* in the Parish, and that such an *Hamlet* cannot be charged to repair an Highway, unless by Prescription, because of common Right the whole Parish is liable, and so it was adjudged. *Style* 163. *Mich.* 1649.

5. Indictment for not repairing the Highways was quashed, for that it set forth, that the Defendant ought to repair it, by Reason of his Tenements, which is very uncertain; it should have been either *ratione tenuræ* of his Tenements, or that he and all those whose Estate he had in the Tenements, have used to repair. *Style* 400. *Hill.* 1653.

(R)

About Ingrossing and Forestalling. See Ingrossing per totum.

1. **A**N Information against the Defendant, upon the Statute 5 Ed. 6. cap. 14. for engrossing *diversos Cumulos grani*, it ought to have been so many Bushels or Quarters; but the Word *Cumulus* is so incertain, that the Information was held ill. 1 Bull. 317. *The King versus Whicher.*

2. The Defendant was indicted and convicted by the Name of *T. Davis, Fishmonger*, for Buying and Engrossing several *Salmons*, which he held and sold at an unreasonable Price; it was objected, that by the Statute * 5 Ed. 6. cap. 14. Fishmongers are excepted, and that they may buy * W. and sell at Pleasure: *Sed per Coke*, they are punishable for ingrossing Fish going to Market. 1 Roll. Jones 320. *The King versus Davis.*

The King versus Salmo. S. P.

3. The Defendant was indicted upon the Statute 5 Ed. 6. for Forestalling; the Indictment set forth, that he met with *T. S. and R. H.* at *D.* near *Bristol*, and bought so much Lead of them, which was to be sold at *Bristol-Market*; it was objected, that this Indictment was ill, because it did not set forth, that *T. S. and R. H.* were coming towards the Market with their Lead; for the Statute requires, that the Forestalling must be a Buying a Thing of Persons coming to the Market, for a Thing may be sold in a Market, and not coming to the Market at that Time; and for this Reason the Indictment was quashed. 1 Roll. Rep. 421. *The King versus Hook.*

4. Several were indicted, for that they engrossed *magnum quantitatem Straminis & fœni* at *R.* with an Intent to sell it at dearer Rates: adjudged, that this was altogether incertain, for it ought to set forth how many Loads of each, and therefore it was quashed. Mich. 10 Car. 1 Cro. 277.

5. Information on the Statute 5 Ed. 6. for ingrossing 100 Bushels of Salt to sell again; upon a Demurrer to the Information, adjudged, that *Salt* is not *Viçtuals* intended by that Statute; but if any Man will engross Salt, to sell it at unreasonable Prices, he may be indicted at Common Law and fined; neither are *Hops* to be intended *Viçtuals* within this Statute. Cro. Car. 167. *Maynard's Case.*

6. Information in the Exchequer against the Defendant for engrossing Butter and Cheese; upon Not guilty pleaded, the Defendant was found guilty; and upon a Writ of Error in the Exchequer-Chamber, it was assigned for Error, that this Information was exhibited 13 Octob. in *Michaelmas-Term*, 20 Jac. and that was on a Sunday: *Sed per Curiam*, tho' 'tis not *dies juridicus* to award any judicial Proceß, yet 'tis good to receive an Information upon any special Law. W. Jones 156. *Bede versus Alp.*

7. The Defendant was indicted at the Assises in *Kent*, upon the Statute 5 Ed. 6. for engrossing Apples and Cherries; adjudged, these were not *Viçtuals* intended by the Statute, and so the Indictment was discharged. Style 190. Hill. 1649.

(S)

About Inns and Inn-keepers.

1. **S**everal were indicted for erecting and keeping several Inns, but the Indictment did not conclude *ad nocumentum commune*, and therefore it was quashed, for if 'tis not a publick Injury, 'tis lawful for any Man to build an Inn. Trin. 21 Jac. Goldf. 345.

2. An Inn-keeper was indicted upon the Statutes 13 R. 2. and 4 H. 4. for that the common Price of Oats in the Market of *R.* between the First of March, 17 Jac. and the First of March, 19 Jac. was not *ultra* 20 d. the Bushel; and that the Defendant *existens* a common Inn-keeper, &c. sold *diversis subditis*, &c. and did not say *hospitibus*, in *domo mansionali* in *Ho'bora*, and did not say *infra hospitium*, two Hundred Bushels of Oats for 2 s. 8 d. per Bushel, *contra formam Statuti*: It was excepted against this Indictment, for that the Word *Existens* imports, that he was a common Inn-keeper at the Time of the Indictment, and not at the Time of the Offence; then the Price, &c. was alledged to be *non ultra* 20 d. *pro quolibet modio*, which is very incertain; it should have been *pro modio*, or *pro aliquo modio*, and not *pro quolibet modio*; then 'tis said that he sold, &c. in *domo mansionali*, but left out *infra hospitium*; and he likewise left out the Word *Hospitibus*, for unless he sold to his Guests, 'tis no Offence; but notwithstanding these Exceptions the Indictment was held good. 2 Cro. 609. *Johnson's Case.*

(T)

Of a Justice of Peace, Judge, Constable, &c. See *Extortion*. Of a Juror. See *Barretry*. (E) 6.

1. **A** Constable was indicted, for that a Burglary was committed in the Night-time, and that he had *Notice of it*, and was required to make Hue and Cry, but refused; adjudged, that the Indictment was ill, because it did not shew *the Place* where the Notice was given. *Cro. Eliz.* 655. *Crowther's Case*.

2. A Constable was indicted, for that having *taken one* upon a Warrant for a Burglary, he afterwards at *D. &c.* let him escape; this Indictment was quashed, because there was not any Place alledged where the Constable took him, and therefore if he should plead Not guilty, the *Vifne* must come as well from the Place where the Taking was, as where the Escape was, which could not be done by Reason of this Omission. *Mich.* 33 *Eliz.* *Cro. Eliz.* 200. *Bouch's Case*.

3. The Defendant was indicted, for that being a Constable, and that he had arrested *W. R.* for a Felony, and voluntarily let him go at large, but did not shew for *what Felony* the Person was taken, nor *when* it was committed, and for these Reasons the Indictment was held ill, for it ought to shew *what Felony*, otherwise the Defendant cannot traverse it; and it must shew when committed, because it may be before the general Pardon, and then 'tis not Felony to let him go at large. *Pasch.* 42 *Eliz.* *Cro. Eliz.* 752. *Plowman's Case*.

2 Roll. Rep. 247. 4. The Defendant was indicted, for that he took upon him the Office of a Justice of Peace, not having Lands of 40 *l. per Annum*, and that he sent his Warrant to bring one before him to find Sureties for the Peace; adjudged, that because the * Statute appointed a Penalty for doing a Thing which was no Offence before, and appoints how it shall be recovered, the Party must be punished in that very Manner, and not by Indictment; besides, it was not shewed, that the Defendant had any Commission, or did act by Virtue of a Commission, as a Justice of Peace. 2 *Cro.* 643. *Castle's Case*.

* 18 H. 6. cap. 11.

(V)

Manlaughter and Murder, and upon the Statute of Stabbing. See *Appeals*. (A) per totum.

1. **A** PPEAL of Murder, the Writ was, *ad respondendum B. G. alias dictus B. W. fratri & heredi* of the Deceased, and the Declaration was, that the Defendant *percussit* the Deceased, *1 die Marti, &c.* of which he languished at R. three Weeks, and there died, and so the Defendant *die & anno supradicto, &c. prefat'* the Deceased *murdravit*, which must refer to the Day of the Stroke, and not of the Death, and so 'tis wrong; but the Defendant was discharged for the first Cause, (*viz.*) for that the Name of *Brother and Heir*, which enabled him to bring the Appeal, was after the *Alias dictus*, and what follows the *Alias dictus* is never accounted Part of his Name. *Mich.* 33 *H. 8.* *Dyer* 50. *Warriford's Case*.

2. The Husband intended to kill his Wife, and for that Purpose he advised another to Poison her, who accordingly bought Arsenick and delivered it to the Husband, and he put it into a roasted Apple and gave it his Wife, who eat Part of it, and she gave the rest to her Child in the Sight of her Husband, of which the Child died, this was adjudged Murder, for the Law couples the Event to the Intention, which was malicious against the Wife; but he who bought the Poison was not Accessary to the Murder of the Child, because his Assent was not that the Child, but the Mother should be poisoned. *Plowden* 473. *Saunders's Case*.

3. Where the Words *ex malitia sua premeditata* are left out of an Indictment, yet if the *Murdravit* is in, that will supply the Want of these Words; but where the Word *Murdravit* is omitted, the Killing is no more but Manlaughter, and 'tis within the General Pardon, tho' Murder is excepted therein. *Pasch.* 7 *Ed.* 6. *Dyer* 68. 1 *Mur.* *Dyer* 99. *S. P.* *Mich.* 14. *Eliz.* *Dyer* 304.

4. Indictment against the Servant for the Murder of his Master, and the Word *Proditorie* being omitted, tho' the Defendant was convicted, yet he was reprieved, by Reason that Word was wanting. *Mich.* 7 *Eliz.* *Dyer* 235.

5. In an Appeal of Murder, Exception was taken to the Indictment, because it doth not set forth, that the dead Man was *in pace Dei & Domine Regine*; but adjudged, these are only Words of Form to aggravate the Offence; then it was objected, that the Depth of the Wound was not shewn, which, as this Case was, could not be, because the Pan of the Knee was cut off; it was also objected, that the Indictment was *tempore felonie prad' & muredredi*, when it should be *murdri*; but adjudged, the first Word was sufficient, and *muredredum* being insensible, shall be rejected; and lastly, it was excepted against, for that the Wound was on the *fourth of August, &c.* and the Death on the *nineteenth of December* following; and the Indictment is, that *predi'* T. M. & W. M. &c. *tempore felonie & muredri prad' fact'*, (*viz.*) 4 *die Augusti felonice fuer' presentes & auxiliantes*, when the Murder was done on the *fourth of August*, for the Man was then living, and

con-

continued so till the 19th of December ; to which it was answered, that the Stroke being given on the 4th of August, the Death which followed thereupon shall have Relation to the Stroke ; but the Court was of a contrary Opinion ; and the Chief Justice *Wray* said, that Indictments had often been adjudged insufficient, where the Stroke was on one Day and the Death on another Day ; and the Jury conclude, that the Murder was done on the first Day, as in the Principal Case the Stroke was on the 4th of August, the Death on the 19th of December, and the Indictment was, that *T. M. &c.* at the Time of the Felony and Murder aforesaid, (*viz.*) 4th of August, was present and helping, &c. & sic præd' *T. M. apud R. præd', modo & forma* (which must be on the fourth of August) præd' *E. S. felonice murdraverunt*, when he was then alive, and several Months after. 4 Rep. *Heydon's Case*, 41. *Wrote versus Wigg. Postea S. P.* 5 Rep. 42. *Hume's Case. S. P.*

6. In an Appeal of Murder, the Defendant pleaded, that at another Time he was convicted of Manlaughter, and had his Clergy allowed, in which Case it appeared, that the Arraignment for Manlaughter was after the Writ of Appeal, and before the Return, and the Conviction was by Confession of the Fact ; adjudged this was a good Plea in Bar to the Appeal, for all is the same Felony, and that the Word *Attaint* in the Statute 3 H. 7. cap. 1. extends as well to a Conviction by Confession, as by Verdict ; for he who is *attainted* is convicted, and more ; and tho' the Conviction was pending the Appeal, yet since it was before the Defendant could be compelled by Course of Law, to plead to the Appeal, 'tis good. 4 Rep. 45. *Wrote versus Wigg. Cro. Eliz.* 276. S. C. *Cro. Eliz.* 464. *Penryn versus Corbett, S. P.* *Moor* 407. S. C.

7. In an Appeal of Murder, the Defendant pleaded Not guilty, and was found guilty of Manlaughter, and had his Clergy ; afterwards he was indicted for Murder, and pleaded his former Conviction in the Appeal ; adjudged a good Bar at Common Law, and not restrained by any Statute, because the Life of a Man shall not twice be put in Danger. 4 Rep. 40. *Wetherel versus Darby.*

8. Indictment for Murder, taken before *B. G. Coronatore Domine Regine, infra libertatem. Villæ Domine Regine de Corsham*, and it did not set forth, that the Vill of *Corsham* was within the Liberty of *Corsham* ; 'tis true, that Indictments, which are Declarations for and in Behalf of the King, ought to be certain, but not to every particular Intent ; for *nimia subtilitas* is not required, and therefore it shall be intended, that the Vill of *Corsham* is within the Liberty of *Corsham* ; then it was objected, that *dedit ei vulnus super anteriorem partem corporis super mamillam*, with a single *m*, when it should be *mammillam* ; but adjudged, that false *Latin* shall not quash an Indictment, if the Words are sensible, as these are, (*viz.*) *super mamillam*, but they are superfluous, because the precedent Words import, that the Wound was given under the Pap, and between that and the Thighs ; it was also objected, that *Vulnus* was not a proper Word to express the Wound made by a Bullet, it should have been *Plagam* ; but adjudged, these Words were synonymous ; it was also objected, that the Depth of the Wound was not shewed ; but it was answered, that it did penetrate all his Body ; so that shewed it to be mortal ; then it was objected, that it was very improper to say, that the Wound did penetrate all his Body, when it was the Bullet, and not the Wound ; but that was held to be significant enough ; but the Word *percussit* being omitted, the Indictment was quashed for that Reason, it being adjudged, that in all Cases of Death, except Poisoning, that Word ought to be in the Indictment. 5 Rep. 120. *Long's Case.*

9. Adjudged, that where two are fighting, and several looking on them, who do not endeavour to part them, if one of those who was fighting is killed, those who look'd on may be indicted and fined. *Pasch.* 44 *Eliz.* *Noy* 50. *Wilbore's Case.*

10. A Butcher and others quarrelled, and in the Affray the Butcher was hurt ; about three Days afterwards one of those with whom he had quarrelled came by the Butcher's Shop, and made a wry Mouth at him, who immediately came out of his Shop, and with a Sword cut him on the Calf of his Legg, and he died of the Wound ; this was adjudged Murder, because there had been a former Quarrel between them, which continued for three Days ; but if the Stroke had been given upon a sudden Provocation of making a wry Mouth, without any Intention of killing, tho' Death ensued, 'tis not Murder. *Cro. Eliz.* 694, 778.

11. If an Officer is slain in the Execution of Process, 'tis Murder, tho' there was no former Malice ; and so 'tis if any one is killed in the assisting an Officer ; and if there is any Error in awarding the Process, or a mistake of one Process for another, and any Person is killed in the executing such Process, the Defendant shall not take Advantage of it. 9 Rep. 66. *Mackallie's Case* 2 *Cro.* 294. S. C.

12. If one gives a Cause of Provocation and sends a Challenge to another, and is killed, this is Murder in him who accepted the Challenge ; for 'tis not material who began the Quarrel, because where a Quarrel is begun the Malice continues till the last Stroke is given, and where Time and Place are appointed to fight, each Party carries Malice with him. 1 *Bulst.* 69, 86. *Morgan versus Egerton.* 3 *Bulst.* 171. * *The King versus Taverner.*

13. Two Prize-Players, or two Soldiers in mustering, and one kills another in that Action, 'tis Manlaughter only, because not done *Felonice*. *Hob.* 134. *Weaver versus Warner.* *Postea* pl. 36. S. P.

14. If one put Poison in a Potion, with an Intent to poison another, and a third Person by Accident drinks it, and dieth, this is Murder ; for the Law couples the Event with the Intention. *Agnes Gore's Case.* 9 Rep. 81.

15. But the Omission of the Word *Felonice* is not supplied by the Word *Murdravit* ; therefore it must be *Felonice percussit*, otherwise the Indictment is naught. 1 *Bulst.* 93. *Penruddock* versus *Langford*.

16. Indictment for Murder, setting forth, that the Assault was on the 12th Day of *February* at *R.* and that the Prisoner gave the Deceased a mortal blow on the Right Side, *adunc & ibidem* ; but did not say at *what Place*, and for this Reason the Indictment was held insufficient. 1 *Bulst.* 203. *The King* versus *Clerke*.

17. The Son of *B. G.* fighting in the Fields with another Boy, and being beaten by him so that his Nose bled, went home to his Father, being about a Mile, and complained to him, who thereupon went into the Field with a Cudgel, and there beat the Boy, of which Blows he died ; adjudged this was only Manslaughter ; for the Father going thither upon the Complaint of his Son, not having any Malice before, the Law will adjudge it was upon that sudden Occasion, and without any Malice, and tho' it was at that Distance of Place, it was all but one Passion. 2 *Cro.* 296. *Royley's Case*. See *postea* *pl.* 41.

18. Resolved by all the Judges, that if an Officer, who hath the Execution of any Process, be killed in doing his Duty, 'tis Murder, for the Law presumes there was Malice, because the Offence was *contra potestatem Regis & Legis* ; and that, if there should be any Error in the Process, or other Mistake, he who killed the Officer shall not take Advantage of it. 9 *Rep.* 65. *Mackallin's Case*. 2 *Cro.* 281. *S. C.*

19. Exception to an Indictment for Murder, because it was laid, that the Stroke was *super finistram partem lueris*, and did not shew in what Part, and therefore 'tis uncertain ; but adjudged, that 'tis certain enough, for *Latus* is a Part well known. 2 *Cro.* 97. *Hall's Case*.

20. Indictment for Murder, for that the Defendant *in sinistra parte collis percussit* the deceased, when it should have been *collis* ; adudged, that if the Party had not been outlawed, this had been a good Exception to quash the Indictment upon a Motion ; but now he must bring a Writ of Error. 1 *Bulst.* 109. *The King* versus *Lemman*.

21. The Lord *Dacres* and another, agreed to enter into a Park and hunt the Deer, and to kill all those who should oppose them, and accordingly they entered into the Park, and being asked by one, what they had to do there, that Person who came with the Lord *Dacres*, killed him, when the said Lord was about a Quarter of a Mile from the Place where the Man was killed, and knew nothing of it ; yet this was adjudged Murder in him. *Moor* 86. *Lord Dacre's Case*. 10 *Eliz.* See *pl.* 35.

22. There being a Quarrel between Sir *Rich. Mansfield* and one Mr. *Herbert*, concerning a Wreck ; they appointed to fight, and Mr. *Herbert* with his Servants, came to Sir *Rich. Mansfield's* House to fight him ; a Gentlewoman, who was Aunt to them both, perswaded them to be Friends, and one of Mr. *Mansfield's* Servants threw a Stone at Mr. *Herbert*, which casually hit the Gentlewoman, and killed her ; this was adjudged Murther, by Reason of the Malice he had to Mr. *Herbert*. *Moor* 87. *Sir Rich. Mansfield's Case*.

23. A Maid Servant conspired with another Person to rob her Mistress ; the Man came in the Night-Time, and hid himself in the House, and soon afterwards killed the Mistress ; adjudged Murder in him, and Petit Treason in the Maid-Servant. *Tim.* 10 *Eliz.* *Moor* 91.

24. Indictment at the Assises for Murder ; the Clerk of the Assises hearing it read by his Deputy, and that it was done on the 31 Day of *June*, when there are only thirty Days in that Month, and not discovering it to the Court at the Trial, by Reason whereof afterwards the Judgment and Execution was respited ; he was fined 40 *l.* and committed. *Moor* 555. *Lewin's Case*.

25. Husband and Wife having lived many Years together, and both of them in a lewd Manner, and the Estate being almost spent, and both very Poor, the Husband told the Wife, that he was weary of his Life, and that he would kill himself ; the Wife replied, she would do so too, thereupon he desired her to buy some Ratsbane, and that they would drink in together ; accordingly the Wife bought the Poison, and put it into the Drink, and they both drank it ; but afterwards the Wife drank Oil, which made her vomit, and prevented the Poison ; but the Husband died ; the Question was, whether this was Murder in the Wife. *Moor* 754.

3 *Bulst.*
206. *S. C.* 26. Two were indicted for Murder, and the Grand Jury found *Billa vera* as to one, and *Billa vera* as to the other for Manslaughter ; the Case was thus, *ff.* Two were fighting upon a sudden Quarrel, and *F.* a third Person, seeing them fighting, came up and killed one of them ; it was a Question, whether this was Murder or Manslaughter in *F.* & per *Coke* *Ch. Just.* 'tis only Manslaughter in *F.* and in the other that was fighting with the Person killed ; but there must be a new Indictment upon this Finding, or the Words *ex malitia præcogitata* must be struck out of the Indictment. 1 *Roll. Rep.* 407. *Sir Matthew Carew's Case*.

Palm.
545.
Jones
198.

27. A Boy got on a Tree, and cut some Wood in a Park, the Woodward commanded him to come down, which he did, and then he struck the Boy, who had a Cord about his Middle, and the Woodward tied one End of it to his Horse's Tail, at which the Horse being frightened run away, and dragging the Boy on the Ground, killed him, and the Woodward threw him over the Park Pales into some Bushes ; adjudged Murder, because he was killed when he made no Resistance. *Cro. Car.* 131. *Holloway's Case*.

28. An Officer coming towards the Defendant, with a Warrant to arrest him, tho' he did not use the Words, *I arrest you*, but offering to lay Hands on him, and no other Provocation or Violence, if he is killed, 'tis Murder. *Cro. Car.* 132. *Pew's Case*.

29. An Officer having an Execution against the Defendant, hid himself all Night in an W. Jones Outhouse adjoining to the Dwelling-house, and in the Morning called him to open the Doors, 429- which he refusing, the Officer broke the Windows, and endeavoured to force open the Door; and thereupon the Defendant shot him; adjudged only Manslaughter; for tho' he killed an Officer, yet it was not in Execution of his Process, but in doing an unlawful Act, (*viz.*) in endeavouring to break open a Door to execute a Writ at the Suit of the Subject. *Cro. Car.* 437. *Cook's Case.* 4th Rep. *Seaman's Case.*

30. A Maid-Servant let a Chare-Woman into her Master's House, without his Knowledge, and she in the Night-time by Negligence, let Thieves into the House, and then cried out, Thieves; the Master hearing the Noise, came down with his Sword drawn, and the Chare-Woman not willing to be seen, because she came thither without the Knowledge of the Master, hid herself behind the Dresser, and being spied by the Master, she was killed with his Sword; this was adjudged neither Murder nor Manslaughter; not Murder, because there was no Malice; nor Manslaughter, because he supposed her to be a Thief. *March 5. Lovell's Case.* *Cro. Car.* 387. *S. P.*

31. The Earl of *Arundell* and the Lord *Chandos* were indicted for killing Mr. *Compton*, and found guilty of *Manslaughter*, and thereupon they were delivered over to the Marshal, for the Court would not allow them to be bailed. *P.* 371. *Style Rep.* and *p.* 1654. *The Protector versus Summers, S. P.*

32. Indictment for Murder quashed, because it did not set forth upon which Part of the Body the Wound was, but generally, that it was upon the *Hinder Part*; nor of what Length and Breadth it was; so that it could not be known, whether the Wound was mortal, or not. *Style* 76. *The King versus Savage.*

33. Indictment for Murder, setting forth, that the Defendant *apud Weston-down in Com. H. insultum fecit, &c.* on the Deceased, & *quod ibidem habuit & tenuit quendam gladium in dextra, & prae* (the Deceased) *percussit*, and did not say *ibidem percussit*; for 'tis not a necessary Intendment, that the Stroke was at the same Place where the Assault was first made; then it follows *de quo instantur obit*, which is no Certainty of what he died; and for these Reasons it was quashed. *Heil.* 35. *Goodridge's Case.*

34. Indictment for Murder at *Durham*, removed into *B. R.* where the Defendant pleaded a Pardon in these Words, *Homicidium, feloniam, interfecionem, necem, seu quocunq; alio modo ad mortem deveniret*, with a *non obstante* to any Statute made to the contrary; the Question was, whether the King could pardon Murder; it was argued he could not, because 'tis *contra justitiam*, and that he cannot dispense with the Statute of 13 R. 2. *cap.* 11. because he is bound by it in Point of Justice; besides, a Pardon of all Felonies will not extend to Murder; on the other Side it was argued, that it was a Prerogative which was not taken away by any Statute, and that the Words *quocunque alio modo, &c.* did extend to all Manner of Deaths; the Case was not adjudged. *Mich.* 213. *Rickaby's Case.*

35. *Wormole*, and three more in his Company, entered into *Hide-Park* with Arms, to steal 2 Roll. Deer, in the Night-Time, but being opposed by the Keeper and his Servants, they ran away, Rep. 120. and being pursued one of them was wounded by a Shot; whereupon they came back, and *Wormole* killed one of his Servants, for which they were all indicted, and found guilty of Murder; because they came into the Park to do an unlawful Act, and the Event shews their Malice to kill any one who should oppose them, they being armed for that Purpose. *Palm.* 35. *Wormole's Case.* See *pl.* 21.

36. *Sir John Chichester* and his Man fencing with Foiles, the Chape of his Sword fell off, and he thrust his Man thro' the Belly and killed him, for which he was indicted of Manslaughter, and the Court directed the Jury to find it so, because such Fencing was not warranted by Law, and therefore the Parties at their Peril ought to take Care to prevent any Mischief which might ensue; and tho' there was no Intention of doing any Hurt, yet the Act being voluntary, it was an Assault in Law, and Death ensuing, 'tis Manslaughter. *Allen* 12. *Sir John Chichester's Case.* *Pl.* 13. *S. P.*

37. *W. R.* was indicted on the Statute of Stabbing, and the Indictment set forth, that he stabbed the deceased, and that *Page* and *Horewood* (who were likewise indicted) were present, and abetting him *contra formam Statuti*; they were all found guilty at the Assises in *Nottingham*, and *W. R.* was executed; but *Roll's* doubting whether those two were within the Statute, it was adjourned into *B. R.* and adjudged, that they were not within the Statute; for tho' in Judgment of Law every one present is a Principal; so that the Indictment may recite, that any of them made the Thrust; yet in Construction of Law, which is so Penal, it shall extend only to him who actually did it; now tho' all are found guilty *secundum formam Statuti*; and those two being not within the Statute, yet the Verdict shall be taken as it may stand with the Law; therefore the Substance being found, the rest is but Surplusage, which shall not hurt the Verdict; especially since the Indictment had been good without concluding *contra formam Statuti*, because the Statute did not alter the Nature of the Offence, but only took away the Privilege which the Common Law allowed; so these two had their Clergy, and were burned in the Hand. *Allen* 43. *Page and Hurwood's Case.*

38. The Defendant was indicted upon the Statute 1 Jac. against Stabbing, &c. for that he did kill and stab one *Ward* with a Knife, and that the said *Ward prius non percussit* Byard *contra*

formam Statuti, &c. Upon Not guilty pleaded, the Evidence was, that there being some angry Words between the Parties, *Byard the Defendant* did first strike the said *Ward*, and afterwards *Ward* did strike *Byard*, and there were several Blows between them in the Scuffle; *Byard* drew his Knife and stabbed *Ward*; two Judges were of Opinion, that *Byard* was not within the Statute, because *Ward* had struck him before the Stab; but the other ten Judges held, that the Statute ought to be expounded thus, (*viz.*) that the first Stroke must be construed to be the first Stroke given, and not to any Stroke given by the Party slain before he was stabbed. *W. Jones* 340. *Byard's Case*.

Cro. Car. 371. 39. The Sheriff upon a Bill of *Middlesex* made a Precept to the Bailiff of *Westminster*, to arrest *Sir Henry Ferrers Knight*, and he made a Warrant to his Under-Bailiff to arrest him, who in executing the Process was killed by the Servant; for this both the Master and Servant were indicted for Murder; the Master pleaded, that he was a Baronet, and no Knight, and pleaded over to the Felony; it was adjudged, that this being no legal Warrant, it was not Murder either in the Master or Servant. *W. Jones* 346. *Sir Henry Ferrer's Case*.

40. In a Special Verdict on an Indictment for Murder on the Statute of Stabbing, the Jury found, that *David Williams* being a *Welshman*, and having a Leek in his Hat on *St. David's Day*, and being angry at one *Redman a Porter*, for pointing at a *Jack-a-Lent* in the Street, with a Leek, and saying to the said *Williams*, look on your Country-man, did suddenly take up a Hammer, and violently threw it out of his Right Hand, at and towards the said *Redman*, with an Intention to hit him, and not *Francis Marbury*, and with the said Hammer did then and there hit the said *Francis*, there sitting in his Shop, on the Fore-part of his Head, &c. the said *Francis* then not having any Weapon drawn, nor then having first stricken the said *David*, who gave him the mortal Wound mentioned in the Indictment, of which he died; adjudged this was not within the Statute of Stabbing; so the Defendant had his Clergy. *W. Jones* 432. *David Williams's Case*.

* Pl. 17. 41. Indictment for Murder, and a Special Verdict found, that the Defendant coming into his House, found *Mivers* in the Act of Adultery with his Wife, and that the Defendant immediately took up a Joint Stool, and struck him on the Head, of which Blow he instantly died; and the Jury found, that the Defendant had no precedent Malice to the Deceased, this Verdict being found at the Assizes in *Surrey*, the Record was removed into *B. R.* by *Certiorari*, and the Prisoner *Maddy* brought up by *Habeas Corpus*; and adjudged only Manslaughter, by Reason that the Provocation was so great, and that it was a stronger Case than * *Royly's Case*. 1 *Vent.* 158. *Muddy's Case*. *R.ym.* 212. *S. C.*

42. *Sir Cha. Stanley* and *Andrews* were indicted for the Murder of a Bailiff, and upon a Trial at Bar, the Court held, that all who were present and assisting *Sir Cha. Stanley* knowing he was arrested, were Principals in the Murder; that tho' *Sir Charles* was forced out of the Company by the Bailiffs before the mortal Wound was given, yet he was a Principal in the Murder; but if any Person see two Persons fighting with Swords drawn, and in order to prevent Mischief, assists the Person arrested, and a Bailiff is killed, 'tis not Murder in him. *Sid.* 159. *The King versus Stanley*. See the *Queen versus Wallis*.

43. *Mr. Nevill* came to an Inn in *Croyden* where on *Hucker* and another quarrelled with his Servants, and beat them; after this Affray was over, *Mr. Nevill* being informed of the Matter, beat them who had quarrelled with his Servants, but they threw him on the Ground, and one of his Servants drew his Sword in Defence of his Master, and in the Scuffle *Mr. Nevill* was wounded with that very Sword, of which Wound he soon after died; the Servant who drew the Sword, was found guilty of Murder upon the Coroner's Inquest, and the other acquitted; but he was indicted at the *Old Bayly*, and found guilty of Manslaughter; and the Servant was likewise indicted upon the Coroner's Inquest, and found guilty likewise of Manslaughter. *Sid.* 254. *The King versus Nevill*.

1 Lev. 181. 44. One *Bromidge* was indicted for the Murder of *Hastings*; the Fact was thus, (*viz.*) there was a Quarrel between the Lord *Morley* and *Hastings*, in the *Fleece-Tavern* in *Covent-Garden*, where *Bromidge* drew his Sword, and about two Hours afterwards they went into *Lincolns-Inn-Fields*, where the Lord *Morley* and *Bromidge* drew their Swords against *Hastings*, but he was killed by my Lord *Morley*, and there was no Malice proved on either Side; the Court directed the Jury thus, that the Difference between Murder and Manslaughter was, that the one is upon Malice pre-pensed, the other upon a sudden Provocation, that it hath been doubtful what shall be a sudden Provocation; some have been of Opinion, that Words without Blows are not a Provocation; but if there is a Provocation in an House, and they fight there, and one is killed, 'tis only Manslaughter; but if after such Provocation they agree to fight elsewhere, that being not a convenient Place, because in an House, and one is killed, 'tis Murder; because their Reason was so far sedate as to judge of the Inconvenience of one Place, and the Convenience of another; but the Jury found the Defendant guilty of Manslaughter only. *Sid.* 276. *The King versus Bromidge*. See the *King versus Morley*.

45. In a Special Verdict on an Indictment for Murder, the Case was, in *Hillary-Term*, 1659. a *Latitat* issued to arrest *Thurston*, returnable in *Easter-Term* following, and on the 29 *May* he was arrested, but the Bailiff was killed; afterwards an Act was made to confirm all judicial Proceedings; which Act related to the first Day of the Parliament, (*viz.*) to the 15th of *April*, 1660, now the Writ, issuing before the King was restored, being illegal, and the Act of Parliament making it afterwards legal, the Question was, whether this Killing was Murder, for if it had not been for this

this Statute, the Killing had been upon an illegal Arrest; now it was insisted for the King, that 'tis Murder, because by Relation to the first Day of the Parliament, all the Process is made Good, which is true, but not to such an Intent as to make that Murder *ex post facto*, which was not so when it was actually done; but the Defendant afterwards pleaded his Pardon. 1 Lev. 91. *The King versus Thurston*.

46. A Special Verdict was found at the Sessions in the *Old Bailey, London*, and the Matter being referred to all the Judges, was thus: *ff. David Hunter* was indicted upon the Statute 1 Jac. 1. of Stabbing *Adrian De Loy*, not having any Weapon drawn, which happened thus, (*viz.*) *Hunter* called *De Loy* lying Sot, who thereupon called *Hunter* Scotch Dog, who instantly struck *De Loy* in the Face with the Back of his Hand, thereupon *De Loy* attempted to draw his Sword, but was prevented by the Company; soon afterwards *De Loy* threw a Pot at *Hunter*, but missed him, who drew his Sword, and gave *De Loy* the Wound of which he died; the Question was, whether *Hunter* should have the Benefit of Clergy, or not; and this Doubt did arise upon the Words of the Statute, (*viz.* *not having a Weapon then drawn*); all the Judges admitted, that as long as the Pot was in *De Loy's* Hands, it was a Weapon drawn against *Hunter*; but five of them held, that after he had thrown it out of his Hand, it was then no Weapon drawn at the Time of the Wound given; for they held, that the Words *then drawn* must refer to the Time of the Wounding; but five others held, that he should have the Benefit of Clergy, for the Words *then drawn* shall relate to the Beginning of the Fighting, and not to the Instant of Wounding; for if two Men are fighting, and one drops his Sword, or 'tis struck out of his Hand, and then he is immediately killed by the other; or if one darts his Sword at the other, who instantly wounds him, of which Wound he afterwards dies, the Person shall have the Benefit of Clergy, for he who was killed had a Weapon drawn at the Time of the Fighting, and did all the Mischief he could with it, and it was his own Act that he had it not at the Time of the Wound given: The Recorder who reported this to the King, was of the Opinion with the five last Judges, and so was the King himself, so *Hunter* had his Clergy. 3 Lev. 255. *The King versus Hunter*.

47. The Defendant was indicted at Common Law, and likewise upon the Statute of Stabbing, for the Murder of one *James Wells*, and the Jury found a Special Verdict at the Assises in *Wilts*: *ff.* That the Person slain was the Defendant's Gardener, and being in a Room near the Kitchen in the Defendant's House, he sent one *Phillips* to demand the Key of the Garden-Door of *Wells*; but he refusing to deliver it, the Defendant went into another Room and fetched his Sword, and then came to *Wells* and expostulated with him about the Delivery of the Key, and *Wells* giving some rude Answer, the Defendant struck him on the Head with his Sword, and *Wells* having a Snead of a Scythe in his Hand, struck at his Master several Times, whereupon the Defendant killed him with his Sword; it was argued that this was Murder, for tho' Death might not be intended at first, yet the Master in this Case being doing an unlawful Act, and Death ensuing, the Law will imply Malice from the Nature and Manner of Doing it; now the Master was doing an unlawful Act, (*viz.*) correcting his Servant with a drawn Sword, which is a very improper Instrument for that Purpose; and the first Act being unlawful, the ill Event is coupled to that Act; besides, the Law implies Malice where a Man is killed without any Provocation, for the Striking his Master was in Defence of himself and subsequent to that unlawful Act which his Master did begin, (*viz.*) the Striking him with his naked Sword: But on the other Side it was argued, that where a Man is doing an unlawful Act, and Death ensues, the Law will not imply Malice, unless the Act it self extended to Death; for 'tis an unlawful Act to commit a Trespass, or to beat a Man, but yet if Death ensues, it will not be Murder; 'tis an unlawful Act to fight a *Duel*, but yet if two Men fall out and presently fight, and one is killed, 'tis only Manslaughter; besides, the unlawful Act must not only extend to Death, but it must be voluntary and done *sedato animo*; for if 'tis involuntary and in Passion, 'tis not material who was the first Aggressor; therefore the Cases of *Shooting* at a Deer and killing a Man, and the Entering into a Park to steal Deer and killing the Keeper, are not applicable to this, for the Shooting, &c. was not only unlawful, but voluntary, and the immediate Cause of Death; so was the Entering into the Park with a malicious Intention to steal Deer, or to kill those who opposed them; the better Opinion was, that this was not Murder. 5 Mod. 287. *The King versus Keate*.

48. Captain *Kirk* was found guilty of the Murder of *Conway Seymour* upon the Coroner's Inquest, and also upon an Indictment by the Grand Jury, and afterwards rendered himself to Prison; and the first Term after his being in Prison, he moved to be brought to his Trial or bailed: *Holt* Ch. Just. was of Opinion that it ought to be granted, because the Prosecutor had been too dilatory in the Prosecution; this was a Fault at Common Law, and therefore it was redressed by the Statute 3 H. 7. by which it appears, that Justice ought not to be delayed: But the other Judges were against him, because after he had surrendered himself, he did not give the Prosecutor timely Notice, and therefore could not be tried this Term, nor bailed; 'tis true, the Court may bail in Murder, but 'tis never done, unless in extraordinary Cases. 5 Mod. 454. *Capt. Kirk's Case*.

49. *Tho. Howard*, Brother to the Earl of *Carlisle*, and his two Servants *Naylor* and *Mills*, were convicted for the Murder of one *Proby*, Servant of a Horse-keeper, and being brought to the Bar, they pleaded the King's Pardon, in which all the Proceedings upon the Indictment were recited, and that the King pardoned the Killing and Felony, but the Word *Murder* was omitted, and there was no Writ of Allowance; whereupon Mr. *Howard* was advised to get a better Pardon, for otherwise this might be repealed upon a *Scire facias* seven Years hence, and he might be executed,

and afterwards he produced a better Pardon and a Writ of Allowance. *Raym.* 13. *Mr. Howard's Case.*

50. Indictment in *Surrey* for a Murder, upon Not guilty pleaded, the Jury find, that the Defendant *Manning* took his Wife in the Act of *Adultery* with the Person slain, and that he immediately flung a Joint-stool at him, and with the same killed him; adjudged only *Manſlaughter*, and he was burnt in the Hand, and very gently, by the Order of the Court, for that there could not be a greater Provocation. *Raym.* 212. *Manning's Case.*

51. Upon an Indictment for Murder, the Case was, the Defendant being a Collector of the Hearth Money, came to one *Huſt's* House to demand the Money, but there being only a Maid Servant in the House, and she having no Money, the Defendant distrained a silver Cup, and the Maid endeavouring to stop him from carrying it away, stood in the Door-way, thereupon the Prisoner beat her so against the Door-Posts that she died within three Weeks; adjudged, this was only *Manſlaughter*, for it was a Provocation to obstruct him going out with the Distress. 1 *Vent.* 216. *Goffe's Case.*

52. *Dangerfeild* was convicted for publishing a Libel against the King, and was sentenced to pay 500 *l.* and to be whipp'd on Thursday from *Aldgate* to *Newgate*, and on Saturday following from *Newgate* to *Tyburn*, which was done; and as he was returning in a Coach from *Tyburn*, some Words passed between him and the Defendant, who run him into the Eye with a small Cane, of which Wound *Dangerfeild* died on the Monday following, and *Frances* the Defendant was convicted of the Murder and executed. 3 *Mod.* 68. *Dangerfeild's Case.*

53. Indictment against *A. B.* for the Murder of one *Cooper*, and likewise against *C. D.* and *E.* for that they were present *assisting, aiding and abetting A. B.* therein: *E.* being arraigned on this Indictment, pleaded Not guilty; and upon the Trial the Evidence was, that *Cooper* who was killed was a Constable in the Execution of his Office with several Constables in *May-Fair*; that the Prisoner at the Bar was the first who drew his Sword, and with about forty other Persons fell upon the Constables; that this Riot continued about an Hour, in which *Cooper* was killed, but by whose Hand it was not known; but it appeared that *A. B.* had been tried and acquitted upon this Indictment; adjudged, that this Indictment is against the Prisoner as *aiding and assisting A. B.* who was acquitted of the Murder; yet where several Men make a Riot, and one is killed, all are *Principals*, and as well he who began the Riot, as the Person who actually did the Fact. 1 *Salk.* 334. *The Queen versus Wallis.*

(W)

For Nuisances.

1. **A**N Indictment will not lie for Stopping a Way on his own Lands, nor for enclosing a Ground where another ought to have Common, but an Action on the Case. 2 *Leon.* 117. *Willoughby's Case.*

So for Stopping a Way *Valde necessariam*, is ill; besides, there was no Addition to the Defendant's Name. 4 *Leon.* *Keen's Case.*

2. Indictment for a Nuisance in the Highway *ad commune nocumentum ligeorum prope inhabitantium*, quashed, because it ought to be general, and not restrained to the Inhabitants near it. 1 *Roll. Rep.* 406. *The King versus The Vill of Hornsey.*

3. Two Indictments were preferred against the Defendant for erecting Purprestures, and two more for continuing them in the Highways; upon Not guilty pleaded, he was found guilty of continuing them, but acquitted of the Erecting; therefore it was insisted, that he could not be guilty of the Continuing, which may be true, if the Erecting and Continuing had been in one Indictment; but certainly a Man may be guilty of Continuing that which was erected by another. *Style* 148. *Gunter's Case.*

4. Indictment for Building a Barn on a Highway *ad nocumentum* of the Subjects passing that Way, but did not conclude *contra pacem*, for which Cause it was held insufficient; then it was made a Question, whether it should be quashed before the Defendant produced a Certificate, that the Nuisance was removed; and by the better Opinion it was quashed. *Cro. Car.* 422. *Leyton's Case.*

5. Four Men were indicted for setting up Signs on their Houses and keeping Inns, &c. and for selling Victuals to Travellers *ad commune nocumentum*, &c. and upon Demurrer it was objected against this Indictment both as to the Matter and Form, for that it was a Nuisance, and that four could not be joined in one Indictment, when their Offences were several; but adjudged, that 'tis lawful to set up an Inn, and that by putting up a Sign he becomes chargeable to the Publick; and therefore if he refuses Lodging to a Traveller, an Action on the Case lies against him; that Four might be joined in an Indictment, if it had set forth, that they *separaliter* had set up Inns, but that for Want of that Word this Indictment was ill; that where an Indictment is preferred for a Thing which is *malum in se*, there it must conclude *ad commune nocumentum*; but if 'tis for Abusing or Misusing a Thing, which in itself was lawful, there the particular Mis-user must be alledged, as in the principal Case, that the Place where the Inns were set up is dangerous; that there were too many before; that they harboured Thieves, &c. and for these Reasons this Indictment was quashed. *Palm.* 367, 373.

6. Indictment for erecting Posts and Rails in the Highway; 'tis necessary to prove, that the Party indicted set them up; for continuing them, or not suffering them to be removed, will not support such Indictment. 1 Vent. 183. *Austin's Case*.

7. Indictment for a Nuisance, setting forth, that *Billinggate-Dock* was a *common Dock*, to which all small Ships coming with Provisions to the Markets in *London* were brought, but that no great Ship ought or used to come there; that the Defendant brought a great Ship there of 300 Tuns, *Ad commune nocumentum* of the Queen's Subjects; it was objected, that it was inconsistent to say a Place is a *common Dock*, and that it is a Nuisance for a great Ship to come there, because a *common Dock* is free for all Ships, for otherwise it cannot be Common; but ruled, that a Dock may be Common only for small Ships as well as a Highway be common only for Pack-Horses, or a Horse-Way, and if Carts should pass in such a Way, and make it inconvenient for Horses and their Riders, this would be a Nuisance, and indictable; besides, Indictments for Nuisances are seldom quashed, but if removed into *B. R.* and the Indictment confessed, it will be a Mitigation of the Fine, and it may be proper to have Affidavits to lessen the Offence; the Defendant in this Case demurred to the Indictment. *Mod. Cases* 145. *The Queen versus Leich*.

(X)

Oath of Allegiance, refusing.

1. **T**HE Lord *Vaux* was indicted for refusing to take the Oath of Allegiance, being lawfully tendered to him, and he being above eighteen Years old; this was certified to *B. R.* under the Hands of several of the Privy Council, and he being brought into Court, and the Oath read to him, he prayed to have Counsel, but it was denied; and being pressed to plead to the Indictment, he confessed it, and thereupon he had Judgment of *Præmunire*, according to the Statute 16 R. 2. (*viz.*) *to be out of the King's Protection*, to forfeit his Lands, Tenements, Goods and Chattels for ever to the King, and to be imprisoned during Life. 1 Bulst. 197. *Lord Vaux's Case*.

2. The Defendant was indicted for maliciously and seditiously saying, *He that speaketh against the Pope is a Rogue, for the Pope is above the King and this Kingdom*; he was committed and remanded for Want of Bail. *Palm.* 426. *Matchett's Case*.

(Y)

For Perjury and Subornation.

1. **A**N Information was exhibited against a Sheriff for *Perjury*, for returning one who was not elected Knight of the Shire; it appeared, that by the Persuasion of *B. G.* he did not take an Oath at the Entrance into his Office, yet both the Sheriff and the said *B. G.* were fined and committed by the Court for their Contempt. *Trin.* 1 Eliz. *Dyer* 168. *Bronker's Case*. *Hill.* 5 Car. *Long's Case*. *S. P.*

2. The Oath was made in *Middlesex*, and the Indictment for Perjury on the Statute, was in *Staffordshire*, setting forth, that he was examined upon certain Articles in the Star-Chamber, and that he *falso & voluntarie deposuit*, and did not shew in what Matter, nor in what Action, for which Reason it was quashed. *Cro. Eliz.* 137. *Stedman's Case*.

3. Indictment on the Statute, for that the Defendant *apud Castrum Leicester falso deposuit*, and did not shew in what County the Castle was, and the proper Conclusion was omitted, (*viz.*) *& sic falso & voluntarie perjurium commisit*, for which Reasons it was quashed. *Cro. Eliz.* 137. *Richard versus Thomas*.

4. * Two were indicted, for that they *falso & corruptive deposuere*, whereas the Statute is *wil-* 2 Leon.
fully; and the Indictment concluded *& sic voluntarium commiserunt perjurium*, for this Reason it 211.
was quashed. *Cro. Eliz.* 147. *Lembro versus Hamper*. * Palm.

5. The Defendant was indicted on the Statute, for that there was a Suit in Chancery between the Parties for the *Manor of Staverton* in *Devonshire*, and a Commission was awarded to examine Witnesses in that Cause; and that the Defendant being examined, did swear, that a Feoffment of the *Manor* was delivered as an Escrow, *innuendo Manerium prædict'*, when it was delivered absolutely, and this was assigned for the Perjury; but the Indictment was quashed, because it did not appear that the Defendant made Oath of the Delivery of a Feoffment of the *Manor of Staverton*, but of the *Manor* generally; 'tis true, 'tis made certain by the * *Innuendo*, but a Man shall not be punished for Perjury by an *Innuendo*. *Cro. Eliz.* 428. * See The King v. Greep.

6. Indictment for Perjury, setting forth, that the Defendant *falso deposuit* so and so, and concludes, *& sic voluntarie corrupte & falso deposuit*; adjudged naught, for *voluntarie & corrupte* should be alledged with the Fact. 3 Cro. 201. *Somerset's Case*.

7. The Defendant was indicted for Perjury in an Affidavit made before *Sir Robert Rich*, *contra formam Statuti* 5 Eliz. and because it was not alledged, that *Sir Robert Rich* was then a Master in Chancery, it was adjudged, that Perjury in this Affidavit was not within the Statute. 3 Bulst. 332. *The King versus Bell*.

8. The

8. The Defendant was indicted upon the Statute for Perjury, for that he being produced as a Witness for the King at a Trial upon an Information, and sworn, did falsely swear, &c. setting out the Oath and the Falsity; it was excepted against the Indictment, that a Witness for the King could not be punished by Indictment, because that is likewise at the Suit of the King; and 'tis not reasonable that he should punish his own Witnesses, and so it was adjudged. 2 Cro. 120. *Price's Case*.

9. Indictment on the Statute 5 Eliz. cap. 9. setting forth, that there was a Suit in Chancery, and that a Commission issued to examine Witnesses, and an interrogatory being administered to the Defendant, whether he knew (setting forth the Interrogatory) he falsely and corruptly deposed, &c. (setting forth the Oath) whereas in Truth, &c. the Indictment was quashed, because it did not appear * what was the Issue in Chancery, nor that what he swore tended to the Proof or Disproof of the Issue, so as it might appear to be a Damage to the Prosecutor. 2 Cro. 257. *Sharp's Case*.
 * 2 Roll. Rep. 427. Mandy's Case. S. P. Cro. Eliz. 184. S. P. and 428. S. P. 2 Leon. 40. *Green versus Edwards*. S. P.

10. Indictment was quashed, for that it set forth, *tallo per se sacro Evangelio falso deposuit*, which is not a positive Allegation that he was sworn. 2 Cro. 105. *Dinlton's Case*.

11. The Defendant was outlawed upon an Indictment on this Statute; and upon Error brought it was assigned for Error, that he was indicted by the Name of *B. G. de Parochia de Algate*, and did not shew in *what County Algate was*, tho' *Middlesex* was in the Margin; adjudged, that shall be referred to the Place where the Offence was committed, and not to the County in which the Defendant dwelt, and for that Indictments shall not be taken by Intendment, it was reversed. 2 Cro. 167. *Leeche's Case*.

12. Error to reverse an Outlawry upon the Statute of Perjury, the Error assigned was, that the Statute was misrecited, for 'tis *quod quilibet attentus de tali offensa amitteret & forisfaceret* 20 l. and for this Cause it was reversed. 2 Cro. 133. *Parker's Case*.

13. Upon a Deposition made in the Court of Requests, in a Cause there depending, concerning a Title to Lands, tho' the Party swear a Thing which is false, yet he cannot be punished for Perjury; for 'tis a vain and not a corrupt Oath, because that * Court cannot examine Titles of Lands.
 1 Bullst. 107.
 * But an Indictment in a Court-
 Tel. 111. *Paine's Case*. Moor 627. *Agard's Case*. S. P. See *Postea* 36.
 Leet for Taking a false Oath coram Seneschallo, was held good. 4 Leon. 105, and *ibid.* 25. *Newman v. Sheriff*.

14. There was a Bill and Answer in Chancery filed, and by an Order of Court one L. was made a Party to the Bill; and upon a Commission to examine Witnesses in a Cause between the Plaintiff and the Defendant, and the *aforesaid* L. a Witness was produced and examined on the Part of L. who deposed directly for him, and thereupon a Decree was made against the other Defendant, who brought an Action of Debt against this Witness, upon the Statute 5 Eliz. of Perjury, as a Party grieved by his Oath; but adjudged, that the Action did not lie, because there was no Issue between the said L. and the Defendant in Chancery, for he was made a Party to the Bill by a collateral Order; and there was no Bill brought by or against him so out of the Statute; and it being a Penal Law, shall be taken strictly. Tel. 22. *Brode versus Owen*.

15. A Bill in Chancery was exhibited against two Defendants; one of them, after he had put in his Answer, made Affidavit, that the other was very sick, and could not travel without Danger of his Life; when the Cause came to be heard, the other Defendant came into Court, and affirmed, that he was not sick at that Time when the other swore he was, but that it was a Contrivance of that Defendant, that he should go to Bed and feign himself sick, that when he came to London he might affirm that he left him sick in Bed; whereupon the Lord Keeper Egerton ordered both Parties to be examined upon Interrogatories, and one affirmed that the other was sick, which the other positively denied; and Witnesses were also examined, who proved the Practice, which was not only a Contempt to the Court, but double Perjury, for which he was fined and committed, and ordered to pay Costs of Suit. Moor 656. *Bullen versus Bullen*.

16. The Defendant was indicted for Perjury, for that he being asked by the Judge, in giving Evidence, whether T. S. brought such a Number of Sheep from one Town to another *altogether*, he answered that he did, when in Truth he did not drive them *altogether*, but at several Times: *Et per Curiam*, he shall be discharged, for 'tis not material whether he brought them *altogether*, or not, for the Substance was, whether he brought them, or not, and not the Manner of bringing them. 2 Roll. Rep. 42. *Laiſton's Case*.

17. The Defendant was to prove a Matter concerning himself, and he with one W. procured O. a Knight of the Post, to swear that he knew T. S. did such a Fact, and the Truth was, that he did it, but O. who made the Oath did not know it, nor ever saw T. S. before, and this was adjudged Perjury, and punishable in B. R. the Indictment being by Order of the Lord Keeper, and the Oath being made in the Court of Chancery, and this is punishable at Common Law; therefore the Objection, that it did not conclude *contra formam Statuti*, was not allowed. 2 Roll. Rep. 244. *Whickſley's Case*.

18. Exceptions to an Indictment for Perjury, for that it was *in plena Sessione* generally, without shewing what Sessions, either the Quarter-Sessions, or not, and for that it did not set forth, that any of the Justices before whom it was taken were of the *Quorum*. Style 124. *Trin.* 24 Car.

19. It was a Doubt to the Chief Justice Roll, whether a Man might be bailed upon an Indictment of Perjury, tho' the Clerks of the Crown-Side affirmed that he might. *Hill.* 1652. Style 368.

20. Indictment against *O.* for Perjury, and that *W.* was consenting and abetting to it; for that *W.* had made an Oath in Chancery, that certain Articles exhibited in that Court for the Good Behaviour were true, when he did not know the Parties to those Articles, or that any Part of them were true; the Defendants were found guilty; and now it was moved, that the Indictment was ill, because it did not conclude *contra formam Statuti*; and at Common Law a Man is not punishable for swearing what he doth not know to be true, unless 'tis false; but adjudged, that it is Perjury at Common Law to swear without Knowledge, tho' the Thing is true. *Palm. 294. Ockley and Whitley's Case.*

21. Indictment for Perjury, setting forth, that one *Sotherton* had brought an Action of Trespass against *T. S.* for a Trespass done by his Sheep in *Sotherton's Close*, (reciting the whole Record) and that *T. S.* had pleaded Not guilty, and at the Trial *G. D.* (the Person now indicted) *falso, malitiose & corruptive* gave Evidence to the Jury thus, (*viz.*) *I saw thirty or forty of T. S.'s Sheep in Mr. Sotherton's Close, and I knew them to be his Sheep, because they were marked with a Five on the Shoulder, and all his Sheep are marked with a Five*; when in Truth his Sheep were not marked with a Five; it was objected to this Indictment, that the Perjury was assigned in a Thing immaterial to the Issue; for that was, whether the Sheep of *T. S.* were in the Close or not, and the Perjury was, that *All his Sheep* were marked with a *Five*; now, tho' they were not marked with a *Five*, yet they might be in the Close; but adjudged, that the Perjury was well assigned; for when he had sworn generally, that he had seen the Sheep in the Close, he gave a Reason how he knew them to be the Sheep of *T. S.* and that being False, it was a Means to induce the Jury to give a Verdict against *T. S.* and he was prejudiced thereby. *Palm. 382, 535. Jury and King.*

22. The Defendant was indicted for Perjury and convicted for swearing, that he was Servant to *W. R.* when in Truth he was Servant to the Servant of *W. R.* he was fined 10*l.* whereas one *Tyler* was fined only 5*l.* for the like Offence. *Allen 79.*

23. There was a Verdict for the King upon an Information for Perjury against the Defendant, for giving Evidence falsely in *B. R.* upon a Trial between *Dun* and *Dawson*; the Information was, *Memorandum*, that *Sir Tho. Fanshawe* giveth the Court to understand, and to be informed, that in *Hillary-Term 1659, in Rotulis continetur sic*, that *Dun* brought an Action, and so recites the whole Record and the Trial, and that the Defendant *Read falsum præstitit Sacramentum*, at the said Trial; and now it was moved in Arrest of Judgment, that to say in *Rotulis continetur*, that *Read* took a false Oath, is not a positive Charge; it ought to be thus, after the Recital of the Proceedings, *&c. & ulterius dat Curia hic intelligi* that *Read* took a false Oath; but adjudged, that the Record it self being a Record of that Court, the Judges will consider and take Notice what is positive in it. *Raym. 34. The King versus Read.* In this Case, the Defendant was acquitted, and upon a Motion for a New Trial, for that some of the Witnesses were absent, it was not granted. *See the King versus Fenwick.*

24. Information for a Perjury, setting forth, that *Sir John Lee* brought an Action of Trespass in *C. B.* against one *Garward*, for felling Trees, and at the Trial *Wright* the Defendant swore, that *Garward* on such a Day, did fell 60 Trees of the Value of 80*l.* *ubi revera* he did not fell sixty Trees of the Value of 80*l.* Upon Not guilty pleaded, there was a Verdict for the King, and it was moved in Arrest of Judgment, that in Recital of the Action brought in the Common Pleas, and the Issue joined, 'tis said, that it was awarded *quod Venire faceret hic Duodecim*, which is the Form of the King's Bench; so the Trial was *coram non iudice*; and if so, Perjury cannot be committed; then 'tis said, that in the Action *Jurata ponitur in respectu coram Domino Rege*; so that the Action was begun in the Common Pleas, and tried in the King's Bench; but this was over ruled, and the Defendant was fined 20*l.* and to stand in the Pillory. *Raym. 74. The King versus Wright.*

25. Information for Perjury; upon Not guilty pleaded, the Record of the Action in which the Perjury was supposed to be committed, was produced at the Trial, and it varied from that which was laid in this Information; and thereupon at the Assizes this Matter was found Specially; and upon arguing this Special Verdict, it was adjudged, that the Jury at the Trial of this Information, could not have Conscience of the Variance between the Record and the Information, but that the Judge ought to have determined that Matter at the Trial; and therefore a *Venire facias de novo* was awarded. *Raym. 202. The King versus Sykes.*

26. The Defendant was found guilty in an Information for Perjury, and upon several Affidavits the Court was moved for a new Trial; but it was denied, unless the King's Council would consent, tho' it appeared to the Court, that there was Cause for a new Trial. *Sid 49. Read versus Dawson.*

27. Indictment for Perjury will not be quashed for any Insufficiency till the Merits are tried; and 'tis Time enough to move to quash it after a Verdict; the like for Forgery; the like for an Information for either of these Offences, and no *Certiorari* shall be to remove an Indictment for either of these Offences; for when 'tis removed they seldom proceed. *Sid. 54.*

28. Information at Common Law was exhibited for Perjury, and the Defendant was found guilty; and it was moved in Arrest of Judgment, that the Perjury was supposed to be committed in answering to several Interrogatories in Chancery; which is very uncertain, because he did not set forth in what Interrogatory the Defendant was perjured; but adjudged, that the Information was good, for every Perjury is punishable at Common Law; but upon the Statute 5 *Eliz. cap. 9.* more Certainty is required. *Sid. 106.*

29. A Bill was exhibited to discover a Fraud in making a Will, and one Question was, whether the Defendant *did sollicite to have it proved in Chancery*; to which he answered, that he *did not sollicite in Chancery to prove the Will, &c.* and for this Answer he was indicted at Common Law for Perjury, and the Evidence at the Trial to prove him guilty, was, *that he did sollicite, but did not pay any Fees*; he was found guilty, and it was moved in Arrest of Judgment, that this was not Perjury, for if false it was in a Thing not material; for the soliciting or not soliciting to have a Will proved, is very insignificant; but adjudged, that Perjury at Common Law may be in an immaterial Thing in an Answer in Chancery; but if one swear false to an Interrogatory, in a Thing not materially charged therein, this is not Perjury at Common Law, because he who administered the Oath had not Power to administer it, but in Matters charged in the Interrogatory. *Sid. 274. The King versus Druc.*

Raym.
74.

30. The Defendant was convicted in *B. R.* for Perjury on a Record in *C. B.* and it was moved to stay Judgment, because the Record in *C. B.* and which was recited in the Indictment, was erroneous; but the Defendant was fined 20 *l.* and to stand in the Pillory; for there was no Error in the Indictment, tho' there might in the Record in the *C. B.* and if there were, the Defendant should not take any Advantage of it. *Sid. 148. The King versus Wright.*

Jones
163.
Lev. 124.

31. Upon a Trial at the Assises in *Cumberland* Sir John Jackson was acquitted of a great Debt by the Perjury of *Fenwick* and *Holt*, for which they were indicted, and the Trial being appointed in that County, the Witnesses who could prove the Perjury, were arrested for great Sums, and committed, so that they could not be present at the Trial and thereupon the Defendants were acquitted; all this Matter being made evident, the Court was moved for a new Trial of the Perjury; and especially since an Information had been exhibited against Sir John Jackson, at whose Contrivance the Witnesses were arrested in going to the Assises, and he was found guilty of the Misdemeanor; but the Court would not grant a new Trial in Perjury, because the Record of the Acquittal was before them; but Justice Wyndham was of Opinion for a new Trial, because tho' a Man is not to be put in Jeopardy twice for his Life, for one and the same Offence; yet this is a Crime which doth not reach Life; and therefore he was for extending Justice, that the Innocent might not be punished by the Guilty, especially when the Means by which the Party escaped Justice is a greater Crime than the first; so Sir John Jackson was fined 1000 Marks, and committed for a Month without Bail. *Sid. 149, 153. The King versus Fenwick and Holt.*

32. Information against *Buckworth* for Perjury, and against *T. and G.* for Subornation; the Case was thus, *Mr. Dormer* being Tenant for Life of Lands of a considerable yearly Value, Remainder to his first Son in Tail Male, Remainder to his Daughters, married a Woman, and they both came to London from *Lincolnshire*, and lodged in *Chancery-Lane*, where *Mr. Dormer* soon afterwards died, and the Widow pretending she was with Child, and lately delivered of a Daughter; upon a Trial at Bar in Ejectment, between this Infant and those in Remainder, and the Birth of it was proved with the usual Circumstances of Women in Labour; but *Mrs. Buckworth* the Midwife gave Evidence, that it was not the Child of *Mrs. Dormer*, but of a poor Woman in *St. Giles's* Parish, which she bought of the Mother for 2 *s.* 6 *d.* which Child was brought by this Midwife at a Time appointed to *Mrs. Dormer*, who was thereupon to cry out, and pretend her self in Labour, and it was put to her into the Bed, and into her Bosom, and taken from thence by its Thighs; and that there was a Bladder of Blood and Lambs Purtenances provided, and shewed for the After-birth to those who were present at this pretended Labour, and afterwards burnt; *Mrs. Buckworth* was prosecuted by this Information, for giving this Evidence, and to prove her guilty, that she had received 50 *l.* of *T. and G.* and several Treats at Taverns, and so they were guilty of Subornation; and several Circumstances were proved to this Purpose; but on the other Side the Mother of this poor Child gave Evidence, that the Midwife had it from her at such a Time, and that she could give no Account what became of it afterwards, unless this was the Child, and there was great Proof made by others, that after the Child was christened at *St. Giles's*, the Mother gave it to the Midwife; and it appeared, that Money had been given to the Witnesses on both Sides; but upon the whole Matter the Defendants were acquitted of the Perjury, and afterwards, at a Trial at Bar by a *Lincolnshire* Jury, the Plaintiff had a Verdict, (*viz.*) that this was a Supposititious Birth. *Sid. 377. The King versus Buckworth, & al.*

33. Indictment for Perjury, for that he swore at a Trial by *Nisi prius*, that *W. R.* was on such a Day in London to be arrested, and this was material, because the Issue to be tried was concerning the arresting *W. R.* by the Sheriff, and it was proved, that *W. R.* was in *Southwark* at that Time; now *Southwark*, according to the general Acceptation, is London, but not where the Sheriff of London can arrest; and the Defendant being found guilty, and it seeming to be sworn by Inadvertency, and not maliciously, he was fined only 20 *l.* *Sid. 404. The King versus Leven.*

34. Moved to amend an Information for Perjury; it was granted, giving Notice to the Defendant what they would amend, and he to shew Cause why it should not. 1 *Lev. 189. The King versus Goffe.*

35. At a Trial at Bar, in an Information for Perjury, supposed to be committed in an Answer in Chancery, and upon Exceptions taken to it for Insufficiency, another Answer was put in and sworn before another Master, in which second Answer the first was explained, (*viz.*) the first was, *that she received no Money, &c.* the second was, *that she received no Money before such a Day*; and this was assigned for Perjury, upon Proof of her second Answer; but adjudged, what is explained in the second Answer, shall not be assigned for Perjury, because it clears that Matter which would

have

have been Perjury by the first Answer ; that nothing which the Party offers upon his *Belief* is assignable for Perjury ; that tho' a Recital of a Deed in other Cases is Evidence, yet 'tis none to prove a Perjury ; nor a Letter written by the Party indicted, upon the Evidence, that the Witness believes it to be his Hand. *Sid.* 418. *The King versus Lady Carr.*

36. Upon a Motion to quash an Indictment for Perjury, it appearing, that the Oath was made in the Spiritual Court, that being not a Court of Record, and so no Perjury ; it was denied, because a false Oath in that Court, or in a Court-Baron, is Perjury, tho' neither of these are Courts of Record, and punishable at Common Law by Indictment. *Sid.* 454. *See Antea* 13. *S. P.* 1 Mod. 55.

37. Indictment for Perjury, reciting a Record of a Trial in which the Perjury was committed, and this was upon a feigned Issue out of Chancery, in which the Declaration set forth, that there was a Discourse between the Lord *Wharton* and four more, concerning the Boundaries of such Lands, and that my Lord affirmed *O.* to be the Boundary, and that *three of the four* affirmed, that it was not ; whereupon a Wager was laid, and mutual Promises between the Lord *Wharton*, and the other *four Persons, &c.* and now at the Trial of the Indictment, it was objected against it, that there was a Variance between the Record recited in the Indictment, and the Indictment it self ; for the Affirmation laid in the Record, that *O.* was not the Boundary, was made by four, but the Affirmation recited in the Indictment was, that it was made only by three, omitting the fourth ; another Variance was, that the Lands in the Record were called *Barnap*, and in the Indictment *Barnep* ; and in the Record it was, *ex orientali parte*, but in the Indictment it was *orienti* ; besides, the Record of the Trial in which the Perjury was supposed to be committed, was not entered up, and so it did not appear, that there was any Trial ; then they offered the Minutes of it to be read as Evidence, which the Court denied ; but these Faulty Descriptions of the Record in the Indictment made it ill, and for that Reason he might be indicted *de novo* ; for even an Acquittal upon a bad Indictment had been no Plea to a good one ; but an Acquittal upon a good one had been peremptory. *Mod. Cases* 167. *The Queen versus Carter.*

38. An Information against the Defendant for Perjury in a Deposition in Chancery, taken before Commissioners in the Countrey : Upon a Trial at Bar, the Question was, whether the Return of the Commissioners, that the Defendant made Oath before them, might be sufficient Evidence, without their being in Court to testify that the Defendant was the very Person ; the Court was divided ; thereupon the Attorney General insisted to enter a *Nolle prosequi*, tho' the Jury was sworn, which was done accordingly. 3 *Mod.* 116. *Anonymus.*

39. Indictment, setting forth, that a Conventicle was held at such a Place, and that the Defendants *movebant persuadebant & subornaverunt T. S.* to swear, that several Men were there, who really were in another Place at that Time : Upon Not guilty pleaded, they were found guilty ; and upon a Writ of Error brought, the better Opinion was, that the Judgment ought to be reversed, because the Indictment did not set forth, that an Oath was made ; for 'tis not enough to say, that one Man suborned another to commit Perjury, but he ought to shew what Perjury it is, which cannot be unless an Oath is made ; therefore to make it Subornation, the Person must swear what the other persuaded him to swear. 3 *Mod.* 122. *The King versus Hinton, & al'.*

40. Indictment at *Hicks's Hall* for Perjury was removed into *B. R.* and it was against *Edward S.* and so he was named throughout the Indictment, till the Conclusion & *sic præd' Johannes S. commisit perjurium* ; it was insisted, that it might be amended, because they do not certify the Original, but the Transcript ; but the Court would consider before they gave Leave to amend. 1 *Vent.* 13.

41. Information of Perjury, alledged to be committed in *Middlesex*, and this was in an *Affidavit* taken before a Judge in his Chamber in the *Inner Temple*, and therefore ought to be tried in *London* where the Offence was done ; the Court agreed, that if this had been an Indictment, it had been local, but otherwise upon an Information. 1 *Vent.* 182. *Maynard's Case.*

42. Indictment for Perjury, for swearing before a Justice of Peace, that *W. R.* was present at a Conventicle ; it was objected, that it did not appear, that there were five Persons then present ; and if so, then 'tis no Conventicle, and by Consequence the Justices have no Power to take an Oath. But adjudged, that they may punish unlawful Assemblies, and hat a Man may be indicted for Perjury upon a voluntary and extrajudicial Oath ; as where a Man stole the Daughter, and made Oath before a Justice of Peace, that he had her Father's Consent, and this in order to get a License to marry her ; in the Principal Case the Defendant was ordered to plead. 1 *Vent.* 369.

43. The Defendant was convicted in an Information, for Subornation of Perjury, and Judgment entered *quod Capiatur* ; afterwards he was taken upon the *Capias*, and brought into Court, and would have moved in Arrest of Judgment, but it was denied, because the Judgment *quod Capiatur* before it was entered, was final, and the Entry of it was only for the Certainty of the Time. 1 *Salk.* 78. *The Queen versus Darby.*

44. Upon a Motion for an Information against one *Dummer* for Perjury committed on a Trial between the *King and Fitch*, in answering this Question, Whether he had received 800 *l.* in passing his Accounts ; it was denied, because the Question was not fair, it being in Effect to answer, whether he was guilty of Bribery or not ; you may indict him, but the Court would not grant an Information. 1 *Salk.* 374. *The King versus Dummer.*

45. Indictment will not lie at Sessions for a Perjury at Common Law ; but it will for a Perjury upon the Statute 5 *Eliz.* because that Statute gives the Justices Jurisdiction. 1 *Salk.* 406. *The Queen versus Yarrington.*

5 Mod.
343.

* There
must be an
Averment,
that what
he swore
was not
true, other-
wise the
falso is not
sufficient.

46. Information for Perjury, setting forth, that the Defendant, upon the giving a Lease and Release in Evidence, bearing Date the 15th and 16th Days of July, 1681, executed at *Albemarle-House*, to which *Mr. Stroud* was a Witness, *falso* swore, that *Mr. Stroud* about the middle of July 1681, was at *Newnham*, *Innuendo Newnham in Devonshire*, when in * Truth he was not, &c. there was a Verdict for the King; but the Judgment was arrested, because the Word *Newnham* was an *individuum vagum*, and might be as well in one Place and County as in another; and 'tis not restrained by the *Innuendo* to *Newnham in Devonshire*, because 'tis no Averment; it may serve for an Explanation of some Thing precedent, but never to add new Matter, or to make a new Charge, or change the Sense of the precedent Words; and if so, then this must be a constructive Perjury, which the Law will not allow; 'tis true, this is an *Information* upon the Statute, but that ought to be as certain as in an *Indictment*; the Difference is, if the Party be convicted on the Statute, Disability is Part of the Judgment, but if at Common Law, then the Disability is the Consequence of the Conviction; therefore in the last Case a Pardon restores him to his Testimony, but not in the other; for there he must reverse the Judgment before he can be restored. 2 *Salk.* 513. *The King* versus *Greep*. See *Cro. Eliz.* 428. *Hob.* 3, 6, 45. 2 *Bull.* 81, 82. *Hutt.* 44. *Yelv.* 11. *Cro. Car.* 321. *Allen* 32. The Chief Justice *Holt* denied *Goulds.* 191. to be Law, and held, that where a Man gives Evidence to the Credit of a Witness, tho' 'tis not to the Issue, if his Evidence is false, 'tis Perjury.

(Z)

For Poisoning.

1. **O**NE *Vaux* was indicted for poisoning *Ridley*, but because the Indictment did not set forth expressly, that *Ridley* received and did drink the Poison, it was quashed; the Indictment was thus, *Quod prædict' N. Ridley, nesciens præd' potum cum veneno esse mixtum, sed fidem alhibens persuasioni dict' T. Vaux, recepit & bibit*, but did not say *Venenum præd'*; and tho' the subsequent Words import, that he did receive the Poison, (*viz.*) *per quod præd' N. Ridley immediate post receptionem veneni præd', &c.* yet that is not sufficient, because the Indictment ought to be full and certainly expressed, and shall not be maintained by Inferences or Implications. 4 *Rep.* 44. *Vaux's Case*.

(A a)

For Rape. See Rape per totum.

1. **I**NDICTMENT for a Rape of a Girl of the Age of seven Years, setting forth, *quod ipsam felonice rapuit & carnaliter cognovit*; the Court doubted, whether a Girl of that Age, and no more, could be ravished; if she had been nine Years old she might. *Mich.* 14 *Eliz.* *Dyer* 304. *Cro. Car.* 242. *Page's Case*. S. P.

(B b)

For Rescous. See Rescous. (D) per totum.

1. **I**N an Indictment for a Rescous, the Words *vi & armis* were omitted, and there was no Place laid where the Fact was done; but it was adjudged, that the Place shall be taken to be where the Arrest was; and because the Word *percussit* was in the Indictment, it was held good enough without *vi & armis*. 2 *Cro.* 345. *Cramlington's Case*. *Godb. Pasch.* 16 *Jac.* S. P. See Rescous. (D) 1. S. C.

2. Indictment for a Rescous, the Defendant was found guilty; and now a Writ of Error was brought, and the Errors assigned were, for that the Defendant set forth, that a Warrant was directed to three *conjunctim & divisim* to arrest *W. R.* and that two of them did arrest him; so they had not pursued the Warrant, and if so, the Arrest was void; for this being a ministerial Act, it must be one which answers the Word *divisim*, in the Warrant, or by *all three*, which answers the other Word *conjunctim*; therefore where two arrested him, it was not according to the Warrant; besides this Indictment was against three Defendants for a Riot, &c. and the Jury found one of them guilty; which cannot be, for one alone cannot be guilty of a Riot; the Indictment was quashed. *Mich.* 2 *Car. Poph.* 202. *Harrison* versus *Errington*.

Riots.

Riots.

1. **T**HE Attorney General exhibited an Information against several Justices of Peace, upon the Statute 13 H. 4. cap. 9. for not making Enquiry of a very great Riot done by several Persons, in burning Hedges, &c. within a Month after the Fact done; 'tis made a *Quare* in *Dyer*, whether they were within the Statute, having no Notice given them of the Riot; and it was the better Opinion they were not. *Dyer* 210. 4 *Eliz.*

2. Several were indicted for a Riot, and no *Addition of Place* to any of them but to the last, and he was called *B. G. de Huttoft*, Yeoman; adjudged, that the Word *Yeoman* went to them all, but *not the Place*, for which Reason the Indictment was quashed. 1 *Bulst.* 183. *Hastings's Case.*

3. A Bill was exhibited in the Star-Chamber for a great Riot, and upon hearing the Cause, it appeared, that one who was hurt in the Riot died soon afterwards of the same; adjudged, that since this was Murder in all the Rioters, that Court could not proceed to hear the Cause, but that the proper Way was by Indictment at the Assises. *Hob.* 138. *Sir Steph. Proctor* versus *Darnbrook.*

4. A joint Information was exhibited against two Justices, upon the Statute 13 H. 4. for not inquiring into a Riot; one was found guilty and the other acquitted; it was moved in Arrest of Judgment, that there ought to have been several Informations, because their Offences are several; besides, no Judgment could be given against him who was found guilty, because the other was acquitted; but adjudged, that the Execution may be several, and that 'tis not material, tho' one be acquitted. *Style* 245. *Maine* versus *Serjeant.*

For Robbery.

1. **I**NDICTMENT for a Robbery *in quadam via Regia pedestri*, leading from such a Place to such a Place; the Party was convicted, and before Judgment prayed his Clergy and had it, because the Indictment was not for a Robbery *in alia via Regia*, for in such Case Clergy is taken away by the Statute, but not *in quadam via Regia pedestri.* *Moor* 5.

2. One *Pudsey* was indicted for a Robbery; and upon Not guilty pleaded, the Evidence was, that *Pudsey* and one more met two Persons in the Highway, where they endeavoured to rob them, and for that Purpose drew their Swords; thereupon one of them ran away, and *Pudsey* pursued him, the other ran another Way, and his Companion followed, and robbed him out of the Sight or Hearing of *Pudsey*; and it was held that *Pudsey* was a Principal, and he was hanged. 1 *And* 116.

3. The Defendant was indicted for feloniously Taking a Purse from the Person of the Prosecutor; the Case was thus: The Defendant being on Horse-back, desired the Prosecutor to open a Gap that he might ride thro', and the Prosecutor going up a Bank to open the Gap, the Defendant rode up to him, and put one Hand on the Prosecutor's Shoulder and the other in his Pocket, and took out the Purse, which the Prosecutor perceiving, and in his Hand, he demanded the Purse, but the other refused to deliver it; the Defendant was convicted, but had his Clergy, because the Purse was not taken with any Force or Violence, so as to put the Prosecutor in any Fear. 2 *Roll. Rep.* 154. *Human's Case.*

(C c)

For Slandorous Words.

1. **T**HE Defendant was indicted for Speaking slanderous Words of the Queen, but the Indictment did not set forth *unde scandalum in regno inter Dominum Regnam & magnates & populum suum oriri poterit*, and concluded *contra formam diversorum Statutorum*; the Question was, what Judgment should be given by Law, for he was not punishable by the Statute 1 & 2 *Mariae*, because three Months were past, nor by the Statutes 2 & 12 R. 2. for those extend only to Words spoken of the Nobility; therefore it was adjudged, that he should be punished by the Statute *III.* 1. cap. 4 which was by Fine and Imprisonment at the Queen's Pleasure. *Mich.* 5 *Mar.* *Dyer* 155.

2. Information by the Attorney General *ore tenus*, for Speaking scandalous Words of the *Earl of Northampton*, who was Lord Privy Seal and Warden of the *Cinque Ports*, (*viz.*) *That more Jesuits came into England since he was Warden of the Cinque Ports than before; That he had wrote a Book against Garnet*, but did secretly write to Cardinal *Bellarmino*, intimating, that he did it *ad placendum Regi, & ad captandum populum*, and required him to answer it; resolved by all the Judges, that the Publishing false Rumours concerning the King or the Nobility, was punishable either at the Common Law, or in the Star-Chamber, upon an Information *ore tenus*; and that if one hear such false Rumours, 'tis not lawful to relate them to others. 12 *Rep.* 132. *Earl of Northampton's Case.*

3. Error to reverse a Judgment given at the Sessions at *Hicks's Hall*, upon an Indictment for slanderous Words spoken of the *Lord Fairfax*; the Error assigned was, (*viz.*) *Juratores jurati electi, &c. ad veritatem dicunt* instead of *dicend'*, the Judgment was reversed, and the Clerk of the Peace fined 40 l. *Style* 244. *Williams's Case*.

4. Indictment for Speaking slanderous Words of the *Queen-Mother of France*; the Defendant was convicted, and had Judgment to be committed for a Year without Bail; upon a Writ of Error brought, the Errors assigned were, that this was no Offence, either against the Common or Statute Law, that the Words were not laid to be spoken *contra pacem*, and that the Proceedings were against Law, being indicted and tried in one Day; adjudged, that Justices of Oyer and Terminer cannot try an Indictment the same Day it is found, nor Justices of Peace at the same Sessions in which 'tis preferred, but that there ought to be fifteen Days between the Indictment and the Trial. *Style* 28. *The King versus Place*.

5. Indictment in *Hull* for these Words, (*viz.*) *Whenever a Burgeſs of Hull comes to put on his Gown, Satan enters into him*; it was objected, that the Words were not indictable, but it was held they were a Scandal to the Government; afterwards it was quashed, because it concluded *in malum exemplum inhabitantium, &c.* when it should be *quamplurimorum ſubditorum Domini Regis in tali caſu delinquentium*. 1 *Mod.* 35. *The King versus Baker*.

6. At a Sessions held in the Borough of *Hatfield*, the Defendant was indicted for Speaking these Words, (*viz.*) *The Mayor and Aldermen of Hatfield are a Pack of as great Villains as any rob on the Highway*; after a Verdict for the King, it was objected, that the Indictment was ill, for it being at a Sessions in a particular Borough, it ought to set forth by what Authority it was held, either by Prescription or Charter; besides, these are Words of Heat and Passion, for which the Defendant ought not to be indicted, but to be bound to his Good Behaviour. 5 *Mod.* 203. *The King versus Cranfeild*.

* *Style*
250.

7. Indictment for these Words spoken of the *Mayor of Salisbury*: *ſ. You Mr. Mayor, I do not care a Far for you; you Mr. * Mayor, are a Rogue and a Rascal*; it was insisted, that these Words were indictable, because a Mayor is an Officer of the Government, and the Words are a Disparagement to the Government; which is very true, if a Mayor had been put into the Office by the Queen, but he is elective every Year; the Defendant might have been bound to his Good Behaviour with Sureties, or be committed, but cannot be indicted, unless it had set forth, that he was in Execution of his Office, or a Justice of Peace; and yet if these Words had been put into Writing, it would have been a Libel, and punishable by Indictment or Action. *Mod. Cases* 124. *The Queen versus Langley*.

(D d)

For using Trades, not being Apprentices. Indictments for Treason, see Title Treason.

1. Information in *Bury*, upon the Statute 5 *El.* c. 4. for using a Trade, not being an Apprentice to it for seven Years; there being a Verdict for the Plaintiff, and a Writ of Error brought, the Error assigned was, that Informations upon Penal Statutes ought to be brought in one of the Courts at *Westminster*, and not elsewhere, unless 'tis otherwise provided by some Statute; and so it was adjudged. *Cro. Eliz.* 737. *Barnaby versus Goodale*.

2. Information for using the Trade of a *Brewer* brought in the King's Bench; after a Verdict against the Defendant, it was moved in Arrest of Judgment, that a Brewer is not a Trade within the Statute, and that if it was, the Information ought to be brought in the Sessions of the County where the Offence was committed, for so it is provided by the Statute 31 *Eliz.* cap. 5. but adjudged, that a Brewer is a Trade expressly within the Statute, and that the Act 31 *Eliz.* doth not exclude the Courts at *Westminster*, because there are not any negative Words in it for that Purpose. *Mich.* 4 *Jac.* *Shoyle versus Tailor*.

3. In the Case of the King and *Miller*, a Judgment was reversed upon a Writ of Error, because the Information for using a Trade was brought in *London*, and not in the King's Courts in *Westminster*; and the Reason was, because there the Attorney General is to acknowledge or deny, &c. 2 *Cro.* 578. *The King versus Miller*.

4. An Alien was indicted for using a Trade, upon the Statute 22 *H.* 8. cap. 13. but the Indictment was quashed, because it was not set forth, that he was *natus extra Angliam*. *Style* 256. *Horman versus Jacobs*.

5. Indictment upon the Statute 5 *Eliz.* for using the Trade of a Draper, not being Apprentice, &c. it was quashed, because he set forth, that he used the Trade, &c. in the Year 1653, and did not say, *In the Year of our Lord 1653*. *Style* 448. *Pasch.* 1655.

6. Indictment for using the Trade of a Barber, not being Apprentice to it for seven Years *contra formam Statuti*, quashed by the Opinion of three Judges, *contra Holt Ch. Just.* because not laid *contra pacem*, for every Breach of a Law is against the Peace, and ought to be so laid. *Mod. Cases* 128. *The Queen versus Lane*.

(E c)

Watercourse, for Stopping.

1. **I**ndictment for Stopping a Water-course, (*viz.*) *Quod quadam pars aquæ* was stopped by the Defendant; adjudged this was too incertain, it ought to have been *Quadam pars terræ aqua cooperta*, or *Magna pars aquæ*, the Indictment was quashed. 2 Cro. 324. *The King* versus *Sorrell*.

2. *Sir Edw. Winter* and others, were indicted for erecting a Wear over the River *Wye*, by which the Subjects were hindered in passing with their Boats, and the Offence was laid *Anno* 42 *Eliz.* with a Continuance *ad nocumentum* of the Subjects of King *James*; and in the Verdict the Defendants were found guilty; and the Jury concluded, that the said Wear was erected and continued *contra pacem Domini Regis nunc*; adjudged ill, because the Beginning of the Offence, (*viz.*) the erecting the Wear was, *contra pacem nuper Domina Regina*. *Hill.* 20 *Jac.* *Telv.* 67. *Sir Edw. Winter's* Case.

3. Indictment before *Commissioners of Sewers* for a Nuisance in the Highway, by opening the Water in a River near his Mill, by which it overflowed the Banks and annoyed the Way; the Indictment was quashed, because *Commissioners of Sewers* have no Authority to meddle with such Nuisances in Highways, but only with Passages by Water. *Style* 60. *The King* versus *Hide*.

4. Indictment for Stopping a Water-course, and did not conclude *ad commune nocumentum*, but *ad grave damnum*, this was a private Trespass, and the Court agreed a Man might be indicted for such a Trespass, but then he must make out a Title to himself in the Indictment, which the Plaintiff had not done in this Case, therefore it was quashed. *Style* 314. *Hill.* 1651.

(F f)

Pleas to Indictments, good, and not good.

1. **T**HE Defendant being indicted for Murder before the Coroner, pleaded the Stat. 14 *H.* 4. *cap.* 9. that none should be impanelled, but by the Sheriff, &c. and that the Jurors should be *probi & legales homines*, but that one of the Jury nominated himself, and was not returned by the Sheriff, and that two more were outlawed in Debt, and averred the Outlawies were in Force; adjudged, that this Statute extends as well to Indictments taken before Coroners as before Justices of the Peace, and likewise to Persons outlawed in personal Actions; for such a Man is not *probus homo*, thereupon the Defendant was arraigned upon a new Indictment, and he pleaded *Auterfoits acquit* upon an Indictment before the Coroner; adjudged no good Plea. *Cro. Car.* 135 and 187. *Sir William Withipool's* Case.

(G g)

Westminster-Hall, striking in it.

1. **I**ndictment against the Defendant for *Drawing his Sword in Westminster-Hall*, the Courts then Sitting, and he resisting the Sheriff in making an Arrest; this was done upon the Stairs of the Court of Requests, and not within the View of the Courts; he was found guilty, and because it was done in the *Hall*, tho' not in the Sight of the Courts, he was fined 1000 *l.* and ordered to perpetual Imprisonment. *Carne's* Case. *Owen* 120.

2. *Sir William Waller* was indicted for an Assault and Battery on *Sir Tho. Rewell* in the Palace-*Cro. Car.* Yard at *Westminster*, near the *Hall*, the Courts being then Sitting, and that he endeavoured to strike the said *Sir Thomas*, in Contempt of the King and the Courts aforesaid, &c. upon Not guilty pleaded, he was found guilty; the Sentence was not, that his Hand should be cut off, because the Fact was not done in the Sight of the Courts; but he was fined 1000 *l.* and to be committed till he paid it, and to be of the Good Behaviour afterwards. *W. Jones* 341. *Sir William Waller's* Case.

3. The Defendant was indicted for Striking one in *Westminster-Hall*, near the Side-Bar of the *1 Lev;* *C. B.* sitting the Court; he was bailed Body for Body, but in no Sum, because if found guilty his Hand must be cut off; he was afterwards tried and convicted, but was pardoned. *Sid.* 211. *The King* versus *Bocknam*. ^{106.}

4. *Collins* gave *Man* the lie in *Westminster-Hall*, sitting the Courts, for which he was bound to his Good Behaviour; and it being proved, that *Man* gave him some Provocation at the same Time, he was also bound to his Good Behaviour. *1 Lev.* 107. *Collins* versus *Man*.

(H h) 302

(H h)

For Witchcraft.

1. **E**Xception to an Indictment for Witchcraft, for that it was, the Defendant *præticavit Artes diabolicas*, which is too general; it ought to have expressed what Arts; but adjudged, that the Employing wicked Spirits to any Purpose whatsoever, is Felony within the Statute. *Style 116. The King versus Camell.*

Noy 88.
Latch
156.

2. Dr. Lamb was indicted and tried at *Worcester*, for that he on such a Day, and at such a Place *felonice exercuit quasdam malas, diabolicas & execrabiles artes, vocat'* Witchcrafts, Inchantments, Charms and Sorceries (which are the very Words in the Statute) in and upon the Lord *Windsor*, *ea intentione* to weaken and consume the Body and *virilitatem* of the said Lord *Windsor*, and that *vigore & prætectu* of the aforesaid devilish Art, the said Lord *Windsor* *postea scil't* on the Day and Place aforesaid, and at divers other Days and Times *tam antea quam postea, fuit tabidus & consumptus in corpore & virilitate sua, contra formam Statuti, &c.* he was found guilty; but the Judges of Assize thinking the Evidence not sufficient to convict him, the Doctor was brought to the Bar by *Habeas Corpus*; and it was objected against this Indictment, that it was for exercising *quasdam malas Artes, Anglice* Witchcraft, &c. which is too general, for *mala Ars* doth not signify Witchcraft, the proper Word is *Sortilegium, veneficium & incantatio*, for Witchcraft, Sorcery and Inchantment; 'tis true, these Words come after the *Anglice*, but an Indictment must be in *Latin*, and where there are proper *Latin* Words, those must be expressed; and where there are not, then the Words that come nearest to it must be expressed with an *Anglice, &c.* and for this Reason the Indictment was quashed; there was another Exception, (*viz.*) that the Indictment set forth, that he exercised these Aits on the Lord *Windsor, ea intentione* to weaken him, and a Man's *Intention* could not be known; but this was held to be immaterial, because the *Intention* may be found by the Overt-Act. *W. Jones 144. Dr. Lamb's Case.*

(I i)

Quashed upon Exceptions and Writs of Error, and not quashed.

* Dyer
285.

1. Indictment, for that the Defendant *felonice cepit bona & catalla cujusdem * ignoti, &c.* this was held good, because the Goods might be stole in one County and brought into another, and so the proper Owner not known. *Dyer 99.*

2. The Defendant was indicted in the County of the City of *Norwich*, for that he feloniously did steal a certain Piece of Linen Cloth of *Anthony Nixon, &c.* to such a Value, &c. but did not set forth *de bonis & catallis* of the aforesaid *Anthony Nixon*, for which Reason this Indictment was held ill, for it ought to be certain in every Thing; and here it may be intended, that the Linen-cloth was delivered or pawned to another at the Time when it was taken. *Cro. Eliz. 489. Long's Case.*

3. Two were indicted, for that *felonice ducis centenas casti cepit & asportavit*; this was held ill, because the Word *Centenas* is incertain what Weight was intended, whether *Ounces, Pounds, &c.* and because *Two* were indicted, and the Verbs *cepit & asportavit* are in the singular Number. *Cro. Eliz. 754. Lane's Case.*

4. The Caption was *ad generalem Sessionem Pacis*, without *Domini Regis*, and for that Reason it was the better Opinion, that it was ill; but that the Caption might be amended in the same Term in which the Return is made, but not after. *Sid. 175. The King versus Love. Sid. 247. S P. 422. N. P. See Vent. 344.*

5. Indictment for the Using the Trade of a *Woollendraper, &c.* the Exceptions were *existit præstant* instead of *præsentat'*, it was quashed. *Sid. 175. The King versus True.*

6. Indictment for keeping *Nine-Pins* at *Excester*, the Exceptions were as to the Caption: *ss. Ad generalem sessionem pacis Com' Civitat' prædictæ ten' apud Guildhall in Guildhall, &c.* and so doth not say *pro Com'*; but adjudged, that was supplied by the Words *Ad sessionem pacis Com' Civitatis.* *Sid. 247. The King versus Warren.*

7. Indictment for a *Libel*; it was moved to quash it, for that the Caption was *25 February*, and the *Certiorari* to remove it was of the *Michaelmas-Term* precedent, so that the *Certiorari* was before the Indictment; the Court said this Indictment was not removed; if so, then there could not be a Proceeding on it any where; for the Clerk of the Peace had entered *Mittitur in Banco*, so that the Sessions could not proceed. *Sid. 317. The King versus Buck.*

1 Vent. 39.
Sid. 247,
422.

8. The Caption was at the General Sessions of the Peace in *London*, and it was quashed, because it was not said *Domini Regis.* *1 Lev. 175. The King versus Dudeney.*

9. Indictment for Taking out of his Pond *Carp-Fishes*; it was objected, that he did not say what Numbers, as in *Playter's Case*; this would have been ill in an Action, and 'tis so in an Indictment, which ought to be more certain: But adjudged, that in Actions Damages are to be recovered, but in Indictments the Party is to be fined, according to the Circumstances of the Fact, be it one Fish, or more. *1 Lev. 203. The King versus Werwamy.*

10. Error of a Judgment in an Indictment, which was, that the Defendant *scienter* did receive and harbour *Felons*; it was objected, that this was too general; it should have been, that he, knowing them to be Robbers, received them, for he may know the Men, and not that they were Robbers; besides, it ought to be *felonice* he did receive them; but adjudged, that * *Scienter* is sufficient, and that 'tis a Common Nuisance to harbour Felons. 2 *Lev.* 208. *The King* versus *Thompson*.

* This was denied per Holt Ch. Just. in Crosse.

Hill 13 Will. in the Case of *King* versus

11. Indictment upon the Statute 5 *Eliz. cap.* 2. for exercising a Trade in a Village, not being Apprentice, &c. quashed for want of these Words, *ad tunc & ibidem onerati & jurati*. 1 *Mod.* 26. *The King* versus *Turnith*.

12. It was *Justiciarii ad pacem conservand' assign'*, and not *ad pacem Domini Regis*; it was likewise in *Com' tenu'*, and not *pro Com'*; and for these Reasons it was quashed. 1 *Vent.* 39. *Sid.* 422. *S. C.* 1 *Lev.* 175. *S. C.*

13. It was *compertum fuit per Sacramentum duodecim proborum & legalium hominum*, omitting the Words *ad tunc, &c. jurat' & onerat'*; quashed. 1 *Vent.* 60.

14. The Defendant was indicted, for not performing an Order of Justices to provide for a Bastard-Child; it was moved to quash it, because it did not conclude *contra pacem*; but adjudged well enough, it being only for a Nonfeasance. 1 *Vent.* 108.

15. Indictment for not performing an Order of two Justices concerning a Poor Rate; moved to quash it upon the same Exception; but held well, because it was not for a Misfeasance, but a Nonfeasance. 1 *Vent.* 111.

16. Indictment for a Forcible Entry quashed, because it was, that the Party was seized and possessed; and so it was uncertain which. 1 *Vent.* 108.

17. Indictment for Manslaughter never quashed upon Motion; the Party was ordered to plead it. 1 *Vent.* 110. *John Petrus's Case*.

18. Error to reverse a Judgment in an Indictment, for that the *Venire facias* was *præceptum fuit Vicecomiti*, in the *Preterperfect Tense*, which looks like a History, it should be *præceptum est*, in the *present Tense*; and for this Reason the Judgment was reversed. 1 *Vent.* 170. *The King* versus *Alway*. 2 *Sind.* 393. *S. C.* 1 *Mod.* 81. *S. C.*

19. Error to reverse a Judgment against several Quakers, who were indicted upon the Statute 3 *Jac.* for refusing to take the Oath of Allegiance tendered to them in Sessions; one appeared, and the Entry against him was *Nil dicit, &c. Ideo remansit* (in the *præterperfect Tense*) *Dominus Rex* versus *eum indefens'*; the rest pleaded, and were convicted, and upon Error brought, the Error assigned was, that *Ideo remansit, &c.* is not good, it should be *remanet*; and so it was adjudged as to him; then as to the rest, it was objected against the *Venire*, by which the Sheriff is commanded to return twelve good and lawful Men, *qui nec Dominum Regem*, nor either of the Defendants *aliqua affinitate attingunt*, which is wrong, because in the King's Cases his Kindred may be returned, and if returned, 'tis no Challenge to the Favour; and this was held a good Exception. 1 *Vent.* 171. *The King* versus *Green*.

20. The Defendant was indicted, for that he being of the Jury for such a Year of the Wardmote Inquest, did not attend; he pleaded a Grant by which the Company of Cooks were exempted; and upon a Demurrer to the Plea, it was objected against the Indictment, for that it was for not serving of the Wardmote for such a Year, when no Man is to be of a Jury for a Year; besides, it sets forth, that the Defendant was elected a Juryman, and doth not say he ought to hold the Office to which he was elected; it was quashed. 3 *Mod.* 167. *The King* versus *Sellors*.

21. The Defendant was convicted of Manslaughter, and the Record being removed by *Certiorari* into *B. R.* he pleaded his Pardon, and had Judgment *Quod eat inde sine die*; now, tho' he was out of Court by that Judgment, yet the Dean and Chapter of Westminster having seized his Goods, he moved to quash the Indictment, for that it was, *By the Oath of 12 honest and lawful Men sworn and charged, presentat' existit modo & forma sequen', Middx. ff. Juratores pro Domino Rege presentant*; now this may be the Presentment of another Jury, for 'tis very incoherent to say, that it was presented by the Oaths of 12 Men, that the Jury did present; so that the *modo & forma*, and what follows, should be left out; and it should be *presentat' existit quod, &c.* besides the Indictment was, that Griffith and two others, did make an Assault on the deceased, and that *quidam Johannes in nubibus* did wound him with a Gun; now 'tis uncertain who did wound him, and what Gun was shot off; and for these Reasons the Indictment was quashed. 3 *Mod.* 201. *The King* versus *Griffith*.

22. Indictment for selling Low Wines in a Cellar, contrary to the Statute 3 & 4 *Will.* 3. without giving Notice to the Excisemen; moved to quash it, because it was returned in *English*; the Court doubted. 5 *Mod.* 12. *The King* versus *Lammas*.

23. A Miller was indicted, for taking excessive Toll; it was moved to quash it, because it was not said *jurat' nor onerat'*, nor the Jurors named; but it was held to be against the Course of the Court to quash Indictments for Extortion or Oppressions. 5 *Mod.* 13. *The King* versus *Wadsworth*.

24. The Defendant was indicted, for that he being qualified to be a Constable, was *debito modo electus* to serve that Office at *Ipsingron*, and that he had Notice of it, but did not take the Oath to execute the same; quashed, for that it did not set forth, that he was chosen by one who had

had sufficient Authority, nor that he was summoned before a Justice of Peace to take the Oath. 5 *Mod.* 96. *The King versus Harpur.*

Mod. Ca. 239. S. P. Rixa for Rixatrix. 25. A Woman was convicted upon an Indictment for a *Common Scold*, but the Indictment was quashed on a Motion in Arrest of Judgment; for that it was *Communis calumniatrix*, which is not *Latin* for a Scold, it should have been *Rixatrix*. *Mod. Cases* 11. *The Queen versus Foxley.*

Antea (B) 3. 26. Indictment for a *Battery*, &c. it was objected against the Caption, for that it was presented by the Jury *electi, triarii, jurati & onerati ad inquirendum pro Domina Regina, Et corpore Com'*; that instead of the *Copulative Et*, it should have been *pro Corpore Com'*; it was agreed, that *pro* had been better, but that & was sensible enough. *Mod. Cases* 180. *The Queen versus Cotesworth.*

Pl. 31. S. P. 27. Indictment for using a Trade not being an Apprentice to it, &c. the Caption was *Juratores super Sacramentum suum presentant existit*; quashed, for 'tis Nonsense; but one cannot move to quash an Indictment for a Fault in the Caption in the same Term that it comes in. *Mod. Cases*, 220. *The Queen versus Franklyn.*

28. Indictment against the Defendant (being a Printer) for a second Offence in printing a seditious Book, contrary to the Statute 14 *Car. 2. cap. 33.* he was found guilty, and the Sentence was, that he shall be disabled from exercising the Art of a Printer, and pay a *Fine of 20 l. and stand in the Pillory*; and upon a Writ of Error brought, the Error assigned was in the Judgment, for that the Statute appoints a Fine and Imprisonment, or other Corporal Punishment, in the *Disjunctive*, so that he shall not be fined and stand in the Pillory likewise; the Judgment was reversed. 1 *Vent.* 316. *The King versus Marlow.*

29. Information against the Defendant, for that he discoursing of the late Rebellion, and of those Persons who were executed for High Treason at *Charing-Cross*, he spoke these Words, *Gubernatio nostra consistebat de tribus Statibus, & si eveniret rebellio in Regno, nisi foret contra tres status non est rebellio*; he was found guilty; it was objected in Arrest of Judgment, that to put the Words in *Latin* when they were spoken in *English*, and without an *Anglice*, was not to be allowed; for the true Translation might either mitigate or extenuate the Sense; but the Court held, that the antient Precedents expressed the Words in *Latin* pursuant to the Statute *Ed. 3.* which requires, that all legal Proceedings shall be in *Latin*; and it hath been always allowed to put Words more agreeable to the Phrase of the Law, than to *Tully's* Orations; the Court set a Fine of 1000 *l.* upon him, and awarded, that he should recant the Words in such Form as they should direct, and to find Sureties for his Good Behaviour for seven Years; afterwards he produced a Writ of Error, returnable in Parliament, the Lords being then sitting, the Court allowed the Writ, but took Time to consider whether they should admit him to Bail. 1 *Vent.* 324, 327. *Harrington's Case.*

30. Error to reverse a Judgment in an Indictment at Sessions, for writing a scandalous Letter to one *Mellish*, concerning a Woman whom he intended to marry; the Errors assigned were, that it was a private Letter, and so not punishable by Indictment; or if it was, then not before Justices in their Sessions; but adjudged indictable at the Sessions, because it tends to the Breach of the Peace. 1 *Lev.* 139. *The King versus Summers.*

Pl. 27. S. P. 31. Indictment for exercising the Trade of a Goldsmith, not being Apprentice to it for seven Years; quashed, because it was *presentant existit*, instead of *presentarum*. 1 *Salk.* 370. *The King versus Franklyn.*

32. Indictment for Words spoken to the Intent to prejudice the Market of *Barnstable*, and to hinder the Town of *Toll*, (viz.) *I have got Judgment against the Town, that we shall not pay for standing, and they are Fools who pay*; quashed, and the Recorder ought to be fined. 1 *Salk.* 370. *The King versus Harwood.*

33. Indictment, reciting *quod cum* an Order was made, that the Parishioners, &c. should receive a *Bastard-Child*, they in Contempt did refuse to receive it; quashed, because the Charge was not positive, but only by Way of Recital. 1 *Salk.* 371. *The King versus Whitehead.*

4 *Mod.*
345.

34. Indictment, &c. *per Juratores presentant existit*, that the Defendant did erect a Cottage, & ulterius presentant, that he continued it *contra formam Statuti*; he was found guilty; but upon a Writ of Error the Judgment was reversed, because the Continuing the Cottage was a new Indictment, distinct from the first; and if so, then there is no *Nominative Case* to agree with the *Verb Presentant*; besides, the Continuing the Cottage is no Offence at Common Law, and the *contra formam Statuti* necessarily refers to the Continuing. 1 *Salk.* 371. *The King versus Trobridge.*

35. The Caption of an Indictment was *presentant existit quod separalia indictamenta* to this Schedule annexed, *sunt Billæ veræ*; quashed, because they are not Indictments till found, for till then they are only Bills. 1 *Salk.* 376. *The King versus Brown.*

36. Indictment removed by *Certiorari* and a Recognizance taken, which was afterwards forfeited, for not carrying down the Record to be tried at the next Assizes; and ruled, that after the Forfeiture of the Recognizance, no Motion shall be made to quash the Indictment, nor shall any Exceptions be taken to the *Certiorari*, or Return thereof. 1 *Salk.* 380.

Appeal.
(B) 12.
Mo. Ca.
219.

37. If there are two Indictments against *W. R.* for the same Fact, (viz.) one found by the Coroner's Inquest, and the other by the Grand Jury, and *W. R.* is acquitted on the one; yet he must be tried on the other, to which he may plead the former Acquittal; but the safest Course is to try him on both Indictments at once. 1 *Salk.* 382. *The Queen versus Cullisford.*

38. Indictment, for that the Defendant, with others, at the Parish of *St. Giles in the Fields* riotously assembled, *quoddam cubiculum* of *S. S.* in the Mansion-house of *David James*, *fregit & intravit*, and thirty Yards of Stuff *cepit & asportavit*; upon the Evidence it appeared, that the Chamber was in the Dwelling-House of *David Jamson*, and not of *James*; adjudged, that this did not maintain the Indictment, for all being put together as one entire Fact, under one Description, the Whole must be proved. 1 *Salk.* 385. *The Queen versus Cranage.*

39. The Defendant was indicted, for that he came to *W. R.* pretending that he was sent by *T. F.* to receive of him 20 *l.* and did receive it accordingly, whereas in Truth he was not sent by *T. F.* adjudged, that tho' this was a *Cheat*, yet it was not indictable, unless the Defendant had come with *False Tokens*; he may bring an Action, but 'tis not indictable for one Man to make a Fool of another; *Bainham* was indicted, for that *W. R.* borrowed 5 *l.* of him, and pawned Gold Rings to secure the Re-payment, and that at the Day the Borrower tendered the Money, but the Defendant refused to deliver the Rings; quashed. 1 *Salk.* 479. *The King versus Jones.*

(K k)

For Misdemeanors.

1. **T**HE Defendant was indicted, for that he being possessed of a Lease of a House in *London* 3 *Aprilis* 7 *Car.* the said House feloniously, voluntarily and maliciously did set on Fire, *ea intentione*, the same Mansion-house, and several other adjoining Houses, to burn and consume by Fire; adjudged this was not *Felony*, because it was an *Intention* only, without actually burning the Houses, for 'tis not *Felony* to burn an House of which he is in Possession; it must be *ades aliena* which is set on Fire; for 'tis that which makes it *Felony*; the Defendant was fined 500 *l.* and imprisoned during the King's Pleasure. *Cro. Car.* 274. *Holme's Case.*

2. The Defendant was indicted at Common Law for a Misdemeanor, and it was for shewing himself naked in a Balcony in *Covent-Garden*, and for speaking lewd Words, and acting indecent Postures there; the Indictment was read in Court, and in order to make a Publick Example, it was ordered to be tried at Bar; but the Defendant confessed the Indictment, and submitted to a Fine, which was 2000 Marks, and to be imprisoned a Week without Bail, and to be of the Good Behaviour for three Years. *Sid.* 168. *The King versus Sir Cha. Sydley.*

3. Indictment against two Defendants, one for Challenging, and the other for carrying the Challenge to the Party challenged, and knowing the Matter; they were both found guilty, and each of them fined 100 *l.* and to be committed for a Month without Bail, and to make a publick Recantation, and to be of the Good Behaviour for 7 Years. *Sid.* 186. *The King versus Darcy & al.* 5 *Mod.* 207. *S. P.*

4. *Bacon of Grays-Inn* was indicted for a Misdemeanor, intending to kill *Sir Harbottle Grimston*, Master of the Rolls; for that he discoursing with *W. R.* offered him 100 *l.* to kill the said Master; it was objected after a Verdict, by which the Defendant was found guilty, that this is a Matter not indictable, because it was only an *Intention*; but he was fined 1000 Marks, and committed three Months without Bail, and to be of the Good Behaviour during Life, and to acknowledge his Fault in the Court of Chancery. *Sid.* 230. *The King versus Bacon.* Lev. 146.

5. The Steward of *Windfor-Court*, and the Surveyor of the Castle, were committed to the Lord Mordant, who was Lieutenant of *Windfor-Castle*; and upon an *Habeas Corpus* brought, he returned, that they were committed by the immediate Warrant of the King, for refusing to deliver certain Rooms in the Timber-Yard, when the King commanded it; upon this Return they were discharged; for tho' 'tis a great Misdemeanor, yet it being a Quarrel between the King's Servants concerning their Rights, 'tis no Offence against the Publick, the Party grieved may file an Information in the Exchequer. *Sid.* 278. *The King versus Taylor.*

6. The Defendant was indicted, for selling Ale in Black Pots not sealed, *contra pacem*, omitting *contra formam Statuti*; for which Reason a Motion was made to quash it, for that the Statute Law directs the Sealing of Measures; but adjudged, that Measures were at Common Law, tho' the Statutes direct the Manner of ascertaining them. *Sid.* 409. *The King versus Burgoine.*

7. The Defendants being present with *Sir John Friend* and *Sir William Perkyne* at the Place of Execution, upon an Attainder for High Treason, and tho' they shewed no Signs of Repentance, yet they all three laid their Hands on *Sir John Friend*, and Cook pronounced the Absolution; and they likewise all three laid their Hands on *Sir Wm. Parkyns*, and Collier pronounced the Absolution, for which they were indicted for a Misdemeanor and found guilty; but the Jury made a Special Conclusion, whether three laying on their Hands, and but one pronouncing the Absolution, made them all guilty of the Whole. 5 *Mod.* 363. *The King versus Collier, Cook and Saut.*

8. The Defendant was indicted at Common Law, and not on the Statute of *Winton*, for that he being an Inhabitant in the Town of *Derby* on the 19th of *June*, &c. was summoned to watch with one *Booth* a Constable, and did obstinately, contemptuously and maliciously make Default; the Exceptions to quash it were, It sets forth, that the Defendant was an Inhabitant, &c. on the 19th of *June*, but doth not alledge, that he continued so to be; it doth not set forth, that he had Notice given to watch within the Parish, and that he did not watch with one *Booth* a Constable;

stable; which may be true, and yet he may watch with another Constable; it should set forth, that he did not watch at all; the Court would not quash it, but ordered the Defendant to demur to it. 5 Mod 393. *The King versus Stainford*.

9. The Defendant was indicted, for that he *falso & per Conspirationem* to cheat *W. R.* of his Money, prevailed on him to lay the Wager upon a Foot-Race, and afterwards got the Party to run booty; this being a Cheat, the Court would not quash it upon Motion; afterwards the Defendant would not plead till he was served with a peremptory Rule, and then his Plea would not be received without Bail to try it the same Term; whereas if he had pleaded freely, he need not try it till the next Term. *Mod. Cases* 41. *The Queen versus Orbell*.

Inducement.

(A)

1. **I**N Assault, &c. the Defendant pleaded, that the Plaintiff's Wife was presented at the Leet for a Common Scold; whereupon the Steward made a Warrant to the Defendant (being Constable) to punish her according to Law; that he the said Constable, and two more, went to the Plaintiff's House to execute the Warrant, and that the Wife assaulted them; whereupon the Constable commanded them to take her, who in Obedience to his Command *mol-liter manus imposuere*, &c. and upon a Demurrer to this Plea, it was objected, that the Defendants did not set forth on what Day the Leet was held, nor that the Plaintiff's House was within the Jurisdiction of the Leet, neither did they shew the Steward's Warrant; but adjudged, that all this was only Inducement to the Justification, the Substance whereof was the Presentment at the Leet, and the Command of the Constable. *Moor* 847. *Curteis's Case*.

2. In a *Quare Impedit*, the Plaintiff set forth, that *Queen Eliz.* was seised in Fee of the Advowson, &c. and that the Church being void, she presented *Pindar*, who was instituted; that afterwards she granted the Advowson to *Sir Christopher Hutton*, who granted it to *Sir Walter Sands*, under whom the Plaintiff claimed; the Defendant *Bostock* confessed the Presentation to *Pindar*, but that the Church was then full of another Incumbent, and that before the Grant of *Sir Walter Sands* to the Plaintiff, he granted the Advowson to *Serjeant Moor*, under whom the Defendant claimed, and traversed, that the Church was void when *Pindar* was instituted; upon which they were at Issue; it was objected, that the Plaintiff could never recover upon this Pleading; because the Defendant had made a good Title to himself from the Grantee of *Sir Walter Sands*, before his Grant to the Plaintiff; which destroyed his Title, and to which he made no Answer; which is very true, if the Defendant had relied upon it; but he made it only as an Inducement to his Traverse; and in such Case the Plaintiff could not take a Traverse upon a Traverse, and therefore he must maintain what the Defendant had traversed. *Cro. Car.* 173. *Pembroke Earl versus Bostock*. *Postea Quare Impedit*. (C) 5. S. C. *Dyer* 365. S. P.

3. Case, &c. the Plaintiff made a Title under four Coparceners, and prescribed in them for Right of Common in *Hartshorne*, as appurtenant to his Messuage there; and that the Defendant put in his Cattle, which eat the Pasture, and made a Warren in the Common, and Cony-Burrows, and hunted the Plaintiff's Cattle with Dogs, by Reason whereof he could not enjoy his Common *in tam amplo & beneficiali modo*, as before, &c. The Defendant as to the Hunting, pleaded Not guilty, and as to the rest he pleaded in Bar, that he was seised in Fee of the Manor of *Hartshorne*, of which the said Common was Parcel; and that he in his own Right, and the other Defendant, as his Servant, put the said Cattle into the Common, *prout ei bene licuit*; and (without relying upon this Justification) he prescribed to have a Free Warren within the said Manor, and so justified the putting in Conies and making Cony-burrows; and averred, that the Plaintiff had sufficient Common; the Plaintiff rejoined, and maintained his Declaration, and traversed the Sufficiency of Common, and the Defendant's Prescription to a Free Warren; and upon Demurrer to this Rejoinder the Plaintiff had Judgment, tho' it was objected against him, that he ought not to have traversed that Prescription, but should have answered the Defendant's Title in the Bar, (viz.) that he was seised of the Manor of *Hartshorne*; for if that was true, he had avoided the Title of the Plaintiff; this was admitted to be a good Objection, if the Defendants had relied on their Justification under that Title, as they ought to have done, by saying, *Et hoc parati sunt verificare, unde quoad* the putting in the Cattle *petunt judicium*, &c. but they did not rely on that Justification, for they made it only as an Inducement to the Prescription for a Free Warren, and thereby had given the Plaintiff an Advantage to traverse that Prescription. *Lurw. Rep.* 101. *Hassard versus Cantrell*.

4. In Assault, &c. the Plaintiff declared, that the Defendant struck his (the Plaintiff's) Horse with a Switch which he held in his Hand, on which the Plaintiff rode, by Reason whereof the Horse threw him and broke his Thigh; upon Not guilty pleaded, the Plaintiff had a Verdict in C. B. and upon a Writ of Error in B. R. it was objected, that there was a Variance between the Writ and Declaration, for in the Writ there was no Mention of Striking the Horse with a Switch: *Sed per Curiam*, that is only an Inducement to the Action, and to shew by what Means the Plaintiff was thrown down and broke his Thigh. *W. Jones* 444.

Induction.

Sec *Presentation*. (C) 9.

(A)

1. **T**HIS makes the Parson complete Incumbent, and if the Archdeacon should refuse to induct after an Institution, the Parson may bring an Action on the Case against him. *Godbolt* 23.

2. The Patron presented, and the Bishop refused his Clerk; thereupon he complained to the Archbishop, who sent a Monition to the Bishop to receive the Clerk by such a Day, or to appear and shew Cause why he refused; but he did neither; then the Archbishop granted *Institution*, upon which he was *inducted*; then the Bishop and one who was presented by the King, sued in the Delegates, supposing this Institution by the Archbishop was void, and by Consequence the Induction must be so too; but a Prohibition was granted, because the Church being full by *Induction*, which is a temporal Act, it cannot be avoided but by a *Quare Impedit*. *Hob.* 15. *Sir Timothy Hutton's Case*. Institution. (A) 8. S. C.

3. In a *Quare Impedit* against the Bishop of *Peterborough* and *Robert Dunn*, the Statute 21 H. 8. *Dyer* 130. of Pluralities, was pleaded to make a Title to the Avoidance, and the Taking a second Benefice with Cure; and Issue was taken upon the Induction to the second Benefice; so that 'tis not the Admission and Institution, but the Induction to the second Benefice, which makes the first void. *Moor* 12. *Agar versus Bishop of Peterborough*. 1 And. 15.

4. A Bishop sued in the Court of Audience, to repeal an Institution after an Induction had by the Clerk, and thereupon a Prohibition was granted, because an Institution is not examinable in the Spiritual Court after Induction, but then a *Quare Impedit* lies. *Moor* 860. *Rowth versus Bishop of Chester*.

5. In a Prohibition, the Plaintiff declared, that Pleas of Advowsons belonged to the Common Law and not to the Spiritual Court, and that he was instituted to the Church of C. and that the Defendant libelled in the Spiritual Court against him, that he was instituted to the said Church, and inducted before the Plaintiff, and had obtained a Super-institution upon him, and that the Spiritual Court proceeded, tho' this Plea was there pleaded, and tho' Induction belonged to the Common Law; the Defendant now pleaded, that he did not prosecute *contra prohibitionem*, and *pro consultatione habenda*, he demurred; and adjudged, that a Consultation should go; for tho' by the Declaration it appears the Plaintiff was instituted, yet it doth not appear that he was inducted, and so the Matter stands only upon the Super-institution, which is triable in the Spiritual Court; but afterwards, it being made appear to the Court that the Plaintiff was inducted, the Consultation was stayed, that he might declare *de novo* upon his Institution and Induction. 2 Lev. 125. *Monday versus Purton*.

6. In a Special Verdict in Ejectment, the Case was, a Clergy-man was admitted and instituted into a Benefice in the Diocese of *Glocester sede vacante*, and a Mandate was made by the Archbishop, who's Guardian of the Spiritualities to the Archdeacon to induct him; the Archdeacon appointed certain Ministers to do it, but before it was executed, a new Bishop of *Glocester* was consecrated, and then he was inducted; the Question was, whether the Archdeacon inducts by his own Authority or derivative from the Bishop, for by the later this Induction is not good; and adjudged, that it was not good: It was compared to a Letter of Attorney to make Livery, which cannot be done after the Death of him who made it; but this Judgment was reversed in the Exchequer-Chamber, for admitting the Archdeacon's Authority is derivative from the Bishop, yet the Archbishop hath a concurrent Jurisdiction with the Bishop throughout his Diocese as to Admissions, Institutions and making Mandates, &c. and his Jurisdiction is taken away by the Statute 23 H. 8. cap. 9. only as to Proceedings in the Bishop's Court. 1 Vent. 309. *Robinson versus Woolley* 319. S. C. 2 Lev. 199. Jones 78.

(B)

What Acts are void before Induction.

If. A Prebendary after Institution and before Induction to the Prebend, granted an Annuity out of it, which was confirmed by the Bishop, Dean and Chapter, on the same Day that he was inducted; adjudged, that this Grant, notwithstanding the Confirmation, was void, because it was made before Induction. *Plow. Com. 526. Hare versus Bickley. Dyer 221. S. P.*

Infant.

How he is favoured in Law, and not; and what Acts he may do, and good, when Executor, &c. (A)	Where they shall be charged for Necessaries, and where not. (E)
Where the Acts of another and his own Acts shall bind him, and where not. (B)	Of Fines and Recoveries levied and suffered by them, and of Statutes entered into by them. (F)
Of Deeds, Grants and Devises made to them. (C)	Of Inspection by the Court. (G)
Of Promises, Deeds, Grants and Devises made by them. (D)	How they must sue. (H)
	How they must be sued. (I)
	Of Infants <i>in Ventre sa mere</i> . (K)

(A)

How he is favoured in Law, and not; and what Acts he may do, and good, when he is Executor. See *Joint Executor*. (D) 7. *Limitation*. (A) 22, 30.

1. **I**nfants both Male and Female have seven Ages by Law assigned to them for several Purposes:

ff. The Male at twelve Years is to take the Oath of Allegiance in the Court-Leet; at fourteen Years to consent to a Marriage, and to chuse a Guardian in Socage, that being accounted his Age of Discretion, and under that Age he is in Ward to his Guardian; at fifteen the Lord is to have Aid to make his Son a Knight; at twenty-one he is to be out of Ward to his Guardian in Knights Service, and then he is of full Age to alien his Lands.

2. Then as to the Woman at seven Years, the Lord is to have Aid to marry her; at twelve Years she may consent to a Marriage; until fourteen Years she is to be in Ward, and if she attain that Age in the Life-time of her Ancestor, she is to be out of Ward; at sixteen Years the Lord may tender her a Marriage; at twenty-one Years she may alien her Lands. 6 *Rep.* 70. in the *Lord Darcy's Case*, and 9 *Rep.* 72. in *Dr. Hufsey's Case*.

3. Where a Judgment was given against him in a *Formedon in Reverter*, it was reversed upon a Writ of Error brought by him, and Infancy assigned for Error, which was tried by * *Inspection* of the Court. *Dyer* 104. *Anderson versus Ward*. * 9 *Rep.* 31.

4. He shall be favoured in the Law in all Things which are for his Benefit, and not prejudiced in any Thing to his Disadvantage, and therefore in all real Actions founded on a Right descended to him, the Parol shall demur till he is of Age. *Dyer* 137. *Basset's Case*, and 133. *S. P.*

5. If Judgment be against him by Default, he shall have a Writ of Error to reverse it; but if it be upon Default after Appearance, 'tis otherwise. *Dyer* 104.

6. Tenant in Tail levied a Fine to a Stranger, he in Remainder in Fee died, leaving his Heir an Infant, and then Tenant in Tail died without Issue, by Reason whereof the Title to have a *Formedon* in Remainder accrewed to the Infant, who suffered five Years to pass without bringing his Writ; but he shall have five Years after his full Age, by Virtue of the Statute 4 *H.* 7. of Fines. *Dyer* 133.

1 And.
10.

7. Debt against three Heirs in Gavelkind, upon a Bond of their Ancestor, one of them was an Infant; they were all outlawed, and the Two of full Age procured a Pardon, and the Plaintiff brought

brought a *Scire facias* against them, in which he declared, that they *simul cum* the Infant, &c. adjudged, that the Parol shall not demur for his Nonage, because the Original against him was not void, but voidable only by Error. *Trin. 7 Eliz. Dyer 239. Auger's Case. Moor 74. S. C. by the Name of Hawtry versus Auger.*

8. In a Writ of Dower, the Tenant vouched the Heir of the Husband, who was then an Infant, and in Ward to the King, and so prayed in Aid of the King, and the Aid was granted; and afterwards there came a *Procedendo in loquela, sed non ad iudicium Rege inconsulto*, and the Court was in Doubt how to proceed; but upon Consideration they gave Judgment, that the Demandant should recover against the Tenants, and they over in Value against the Heir, but with a *Cessat executio, &c.* *Mich. 8 Eliz. Dyer 256. Michael's Case.*

9. But if he is Plaintiff in such Actions, the Parol shall not demur, because it may be to his Prejudice, that the Possession should be kept from him till he is of Age; but where only a meer Right descends to him, there the Parol shall demur. *6 Rep. 3. Markall's Case.*

10. In a *Cessavit per Biennium*, altho' the Infant hath the Tenancy by Descent, he shall have his Age, because the Law presumes he doth not know what Arrears to tender before Judgment, and if he doth not make a true Tender, he shall lose his Land. *9 Rep. 84. Cooney's Case.*

11. If there are two Jointenants Infants, and one of them, whilst under Age, makes a Feoffment of his Moiety, and dieth, it shall not survive to the other, for by the Feoffment the Jointure is severed. *8 Rep. 44. Whittingham's Case.*

12. An Infant shall not be amerced, neither shall he find Pledges; therefore in such Case the Entry is *in misericordia, sed pardonatur quia infans.* *8 Rep. 58. Beecher's Case. Cro. Car. 296. Smith versus Smith. S. P.*

13. If Tenant in Tail make a voidable Lease for Years, and die, leaving his Heir an Infant, and in Ward, the Lord shall avoid this Lease; but if the Infant himself maketh a Feoffment, the Lord shall not avoid it by Escheat, but the Guardian shall, because he doth it in Right of the Infant. *7 Rep. 7. Earl of Bedford's Case.*

14. If Tenant in a Real Action voucheth an Infant, or if Tenant for Life prayeth in Aid of B. B. in Reversion, who is an Infant, and that the Parol may demur, if the Demandant replieth that he is of full Age; this shall not be tried by a Jury, but a Writ shall issue to the Sheriff, commanding him, that on such a Day *Venire faciat B. B. ut per inspectum Corporis sui constare poterit Justiciariis nostris, si prae B. B. sit plena aetatis necne.* *9 Rep. 31, in the Case of the Abbot of Strata Marcella.*

15. If an Infant being a Feme Covert levieth a Fine, with a Grant and Render to her self in Tail, or for Life, and the Husband dieth, she shall not take Advantage of her Infancy, and have a Writ of Error to reverse the Fine, because she is Tenant of the Land, and she cannot have a Writ of Error against her self, so that she is without Remedy; the Case is the same of any other Infant. *Hill. 40 Eliz. Owen 33.*

16. Where an Infant is made Executor, he may lawfully sell the Goods of the Testator, and such Sale shall be good, because he is bound to pay the Debts of his Testator, and by this Means he may be enabled to do it; and he who assists him in such Sale, shall not be accounted an *Executor de son Tort* by intermeddling with the Goods, but shall be as his Servant; so likewise if the Goods are sold by any other Person, with the Consent and by the Appointment of an *Infant Executor*, 'tis good, where such Sale is not to his Prejudice; and if sold at an under Value, 'tis likewise good, and shall bind him notwithstanding his Nonage. *Cro. Eliz. 254. Clerke versus Hopkins. 3 Leon. 143. Manning's Case. S. P. 4 Leon. 210. S. C. Keilw. 51. S. C.*

17. An Infant was a Shop-keeper and bought Wares to sell in his Shop; adjudged, that he shall not be bound by this Bargain, because he cannot contract for any Thing but for Necessaries. *2 Cro. 494. Whittingham versus Hill.*

18. Feoffment, on Condition that if he or his Heirs, &c. paid 100 l. before such a Day, that he might re-enter; the Feoffor died, and the Land descended to his Heir within Age; the Mother tendered the Money, and adjudged good, if the Heir was within the Age of fourteen Years, and there being no Age mentioned, it shall be intended for his Benefit, that he was within that Age. *Owen 137. Watkyns versus Astwick. Moor 222. S. C. Cro. Eliz. 132. S. C. Postea Tender. (B) 5. S. C. Leon. 34. S. C.*

19. Judgment against him, & *quod capiatur*, it was reversed by Error for that Reason. *1 Bulst. 162. Daly versus Holbrook.*

20. An Infant was Tenant in Tail of Gavelkind Lands, where the Custom was, that at the Age of fifteen Years, he might make a *Feoffment of his Lands* and bind himself, and accordingly he made a Feoffment of his entailed Lands; adjudged, that this was not any Discontinuance to bind him, for it was not good by the Custom, because that shall never enable him to do a Wrong either to himself or to another, and therefore it shall be intended that this Feoffment was made of Lands of which he was seised in Fee. *2 Cro. 80. Vaughan versus Lloyd.*

21. In *Affise of Novel Disseisin*, the Tenant pleaded a Recovery in another Affise, in Bar to the Action now brought; the Demandant replied, that he was then an Infant and not Tertenant of the Land, but that W. R. was Tertenant; and upon Demurrer to this Replication, it was the better Opinion, that a Recovery is not so sacred, but that it may be falsified in Point of Recovery of the Thing it self, between the same Parties; and this being in the Case of an Infant, the Court

are of his Counsel; he cannot have Error or Attaint, and therefore he may falsify the Recovery. *Hill. 15 Jac. 2 Cro. 264. Holford versus Platt.*

22. An Extent issued against the Land of *W. R.* but before the Return of the Writ *W. R.* died, his Heir within Age and in Ward to the King; it was moved, that the Cognisee of the Statute could not have the Land, because the King was now in Possession by Virtue of the Wardship of the Infant, and so the Land was in another Plight than when the Extent was taken out, but the Court would not allow it. *Mich. 2 Jac. Yelv. 55. Molineux versus Rigg.*

23. In a Writ of Partition brought against an Infant upon the Statute, adjudged, that he should not have his Age. *Mich. 14 Jac. Hob. 179. Poyns versus Gibbons.*

24. The Demandant, who was an Infant, brought a *Scire facias* against the Tenant, to shew Cause why he should not have Execution of Lands, the Remainder whereof were entailed on his Ancestor by Fine, &c. the Tenant pleaded, that the Demandant was within Age, and prayed, that the Parol might demur until he was of full Age; the better Opinion was, that it shall not, and in no Case but where the Land it self is in Demand; but here the Ancestor was never in Possession, neither is any Land demanded by this *Sci. fa.* of which the Ancestor was seised, but 'tis only to have Execution of a Fine. *Moor 35. Lord Sands versus Bray.*

25. Such an Infant may likewise give Releases or make new Acquittances for any Thing relating to the Executorship, but then such Releases must be where a true and real Satisfaction is made for the Thing released, otherwise they are void, because the Law will not allow that he should have any Prejudice by his own Folly whilst under Age; and certainly 'tis a very foolish Act for an Infant to give a Release without any Consideration; and so it was adjudged *Anno 21 Eliz.* 'tis true, Mr. *Plowden* argued against the Judgment; but the Chief Justice *Wray* told him, that he had consulted all the Judges, who were all agreed, that the Judgment was well given. *Moor 146. Russel's Case. 5 Rep. 27. S. C. * 1 And. 117. S. C. Cro. Eliz. 671. Knott versus Barlow. S. P. See Postea (D) 2.*

* By the
Name of
Russel v.
Platt.

26. Tenant in fee made a Lease for Years, rendring Rent, and afterwards entered into a Statute for the Payment of Money; and upon an Extent taken out, the Sheriff returned, that the Cognisor was dead, and that he had extended the said Rent; but the Heir of the Cognisor being at that Time an Infant, brought an *Audita querela*, and adjudged good. *Moor 37.*

27. In Dower against an Infant and two others, there was a Judgment and 200 *l.* Damages; the Demandant died, and her Executors brought a *Sci. fa.* against the Infant and the other two Defendants; the Court doubted, whether he should be privileged by Infancy, because in Dower he cannot have his Age; but he having brought a Writ of Error, and assigned for Error, that he had nothing in the Lands; this made the Doubt, whether he should be charged by the *Sci. fa.* *Moor 342. Williams's Case.*

2 Cro.
494.

28. Adjudged, that where an Infant Shop-keeper buys Goods to sell again, he shall not be charged in an Action of Debt upon the Contract for such Goods, because by Law he is not to be charged, but for necessary Food and Raiment, and 'tis not necessary for an Infant to keep Shop. *2 Roll. Rep. 45. Hill versus Whittingham.*

29. Infancy was pleaded by an Apprentice to an Action of Covenant brought against him for departing his Service; and it was adjudged a good Plea, for no Covenant or Obligation of an Infant for his Apprenticeship shall bind him. *Cro. Car. 129. Gilbert versus Fletcher. Hutt. 63. S. C. Winch 63. Flemming versus Pitman. S. P.*

30. He may be bound in a Bond to submit to an Award, and such Bond is good, for otherwise he would be in a worse Condition than a Man at full Age, who may save Charges by an Award, whereas an Infant would be bound to stand to the Hazard of the Law. *Latch 207. Stone versus Knight 111. Yates versus Rudstone.*

31. Error of a Judgment in *C. B.* in a *Scire facias* against three Executors, for that one of them was an Infant; adjudged, that a *Scire facias* lies against him, and because he did not appear to it, the Judgment was well given. *1 Vent. 190. Cultilian versus Pratt.*

32. *Assumpsit*, &c. for that the Defendant promised the Plaintiff, (who was at that Time an Infant) that if he would permit the Defendant to enjoy such Lands till he (the Infant) came of Age, (he having then a Title to the Reversion after the Death of *W. R.*) that he would then give him what it was worth: The Plaintiff averred, that *W. R.* was dead, and that he did permit the Defendant to enjoy the Land, and that it was worth so much; after a Verdict for the Plaintiff, it was insisted in Arrest of Judgment, that a Promise to pay so much as it was worth, was very uncertain; besides, this Act of the Infant was void, because he had only a reversionary Interest at the Time of the Contract made; but adjudged, that tho' this Agreement did not bind the Infant, yet it being for his Benefit, 'tis not void, but voidable by his Entry; 'tis true, the Defendant could have no Remedy against him if he had enter'd, but since he had not, 'tis reasonable the Defendant should pay the Rent. *2 Sid. 109. Davis versus Mannington.*

33. *Assumpsit* against the Defendant, who pleaded *Non Assumpsit*, and at the Trial gave Infancy in Evidence at the Time of the Promise; and this was held good, and the Plaintiff was nonsuit. *2 Lev. 144. Seafon versus Gilbert.*

(B)

Where the Acts of another, and his own Act shall bind him, and where not.

1. **W**Here an *Infant* hath a Tenancy by Descent, he may be distrained for the Rent, and shall not take the Benefit of his *Infancy*. 9 Rep. 84. *Coney's Case*.
2. But in a *Cessavit per Biennium*, tho' he hath the Tenancy by Descent, he shall have his Age; for the Law presumes, that he doth not know what Arrears to tender before Judgment, and if he make a wrong Tender, he forfeits his Land. *Ibidem*.
3. *Infant* being a Feme Covert levied a Fine, with a Grant and Render to her self in Tail, or for Life, and the Husband dieth, she shall not take Advantage of her Nonage, and by Writ of Error reverse the Fine, because she is Tenant of the Land, and she cannot have a Writ of Error against her self. *Owen* 33.
4. If the Cattle of an *Infant* stray, and are proclaimed according to Law, and not claimed within a Year and a Day, he shall be bound. 5 Rep. 108. in *Sir H. Constable's Case*.
5. If he holds Lands of a Manor by Fealty and Rent, and the Lord makes a Feoffment of the Manor to another, to whom the *Infant* attorns, 'tis good, and shall bind him to pay and perform the Services, because he might be compelled in a *per quæ servitia*; but he may avoid any Prejudice thereby at his full Age. 9 Rep. 84. *Conie's Case*.
6. An *Infant* was Bail, and Judgment was had against the Principal, who did not surrender himself in Discharge of his Bail; thereupon a *Sci. fa.* was brought against the *Infant*, and Judgment against him; it was then moved, that he might have an *Audita querela*, for he was still under Age, and probably there might be no Error in the Judgment against the Principal, and the Bail being still an *Infant*, could not plead his *Infancy* to the *Scire facias*; the Court allowed an *Audita querela de bene esse*. *Telv.* 155. *Markham versus Turner*.
7. Where an *Infant* presents to a Church, the Presentation is good; and so a Grant made by an *Infant* to a Copyhold is good, because the Grantee is in by the Custom, which is binding to the *Infant*. *Noy* 41. *Rench versus Martin*.
8. An *Infant* Copyholder in Fee made a Lease for Years of his Copyhold, without License, and at his full Age accepted the Rent; adjudged, that this Lease was no Disseisin to the Lord, but stood good against the *Infant*. *Latch.* 199. *Ashfield versus Ashfield*.
9. Adjudged, that where an *Infant* makes a Contract with another to give him so much Money to teach him to read and to write, this shall bind him. *March* *Clare versus Darrell*.
10. The Testator having two Sons, devised his Lands to his youngest Son in Tail, and died, his eldest Son having Issue a Son at the Time of the Death of the Testator; afterwards the youngest Son aliened those Lands to another in Fee, with Warranty, and died without Issue, the Son of his elder Brother being an *Infant*; it was adjudged, that this collateral Warranty shall bind the *Infant* without Assets, notwithstanding the Statute *W. 2.* *M. 2.* *Evan's Case*. Denied to be Law. *Vaugh.* 382.
11. Lease for Years made to an *Infant*, rendring Rent, which being in Arrear, the *Infant* became of full Age, and still continued to hold the Land; adjudged, that he shall be chargeable with the Arrears incurred during his *Infancy*. 2 Cro. 320. *Kettle versus Elliott*.

Godb.
120. S. C.
2 Bulst.
69. S. C.

(C)

Of Deeds, Grants and Debises made to them, and by them.

1. **I**nfancy was pleaded to an Action of Debt for Arrears of Rent upon a Lease made to an *Infant*, and it was held a good Plea, because a Lease made to an *Infant* is voidable at his Election; for if 'tis for his Benefit, he may accept it, if 'tis not, he may make it void by refusing the Land before the Day of Payment of the Rent incurs; but if the Rent is not more than the Land is worth by the Year, and if the Defendant comes of Age before the Rent-Day, then he is liable. 2 Cro. 310. *Kelsey's Case*. 1 Brownl. 120. S. C. 2 Bulst. 69. *Kirton versus Elliott*. S. P.
2. A Lease made to an *Infant* is voidable only at his Election, and not void of it self; for if 'tis for his Benefit, it shall not be void; but because it was not shewed, that the Rent was of greater Value than the Land, and because he was of full Age before the Rent was due, the Lease was held good. 2 Cro. 320. *Kelsey's Case*.
3. The Bishop of Rochester granted the Reversion of the Office of Register to an *Infant*, being then but eleven Years old, *habendum & exercendum per se vel sufficientem deputatum suum*; 310. it was objected, that the Grant was void, both in Respect of the Grantee himself, being under Age, and also in Respect of the Deputy, which he could not make; but adjudged the Grant was good, it being granted to be executed *per sufficientem deputatum*; and it being of an Office in Reversion, he may be capable himself at the Time when it falls. Cro. Car. 203, 279. *Young versus Stowell*, and 400. *Young versus Fowler*. March 41. S. C.

(E)

Where he shall be chargeable for Necessaries, and where not.

1. **A**N Action was brought against an *Infant* who attended the Earl of *Essex* in his Chamber, and it was for 40 *l.* for a satin Doublet and Hose, with Silver and Gold Lace, and a Velvet Coat and Hose to his own Use; he pleaded *Infancy*, and tho' he was sued by the Addition of Gentleman, yet the Court held, that these were not proper Cloths for a Gentleman, but above his Degree, and so the Action would not lie against him for Necessaries. *Goldf. 168. Mackerell versus Batchelour.*

2. An *Indebitatus Assumpsit* will lie against an *Infant* even at Common Law, for Necessaries; but if he enter into a Bond, tho' tis for Necessaries, tis voidable, that is, where the Bond is without a Penalty; but if tis with a Penalty, tis void. *Godb. 219. Rearsby versus Cuffier.*

3. The Plaintiff having paid several Sums for Meat, Drink, and other Necessaries for an *Infant*, he took a Bond of him in double the Sum, conditioned for the Payment of the Money by him laid out; adjudged, that for that the Bond is void; but if he had taken it only in the very Sum, it had been good. *Cro. Eliz. 92. Ailiffe versus Archdale. Moor 679. S.C.*

4. *Infancy* was pleaded in Bar to an Action for Money, for curing him of the *Falling Sickness*; the Court inclined, that the Plea was not good; for it was as necessary to cure him of this Disease, and to allow him Meat, Drink, &c. *1 Bulst. 39. Dale versus Copping.*

5. *Case, &c.* wherein the Plaintiff declared, that the Defendant put Cloth to him the said Plaintiff, being a Taylor, to make him a Suit of Cloths, and promised to pay him as much as he deserved, &c. the Defendant pleaded, that he was an *Infant* at the Time of the Promise, &c. it was adjudged for the Plaintiff, and that he need not aver, that it was for necessary Cloths, or convenient for the *Infant*, because the Promise was only for making the Cloths. *Noy 85. Dalwall versus Clare, cited.* W. Jones 146. Larch 156. S. C.

6. *Assumpsit* by an Executor, for that the Defendant, in Consideration the Testator would buy and pay for the said Defendant twenty-three Yards of Velvet and three Yards of Broad-Cloth, and make a Cloak for him, he promised the Testator to pay him so much Money as he should pay for the same; and also declared, that the Defendant was indebted to the Testator in 27 *l.* for a Doublet and a pair of Hose of Velvet, made for him, and that he had not paid the Money; the Defendant pleaded, that at the Time of the Promises, &c. he was within Age; and it was adjudged for him, because it did not appear by the Declaration, that the Cloak, Doublet and Hose were made for the Defendant himself; and if it had been averred, that they were made for him, and for his own Wearing, the Declaration had still been ill, because it was not averred, that these Things were necessary and convenient for him to wear, according to his Circumstances and Degree. *Hill. 17 Jac. 2 Cro. 560. Ive versus Chester. See Stone versus Withypool.* Poph. 151. Palm. 361. 2 Roll. Rep. 144.

7. An *Infant* who had a Family, bought Bread of a Baker, and upon an Account between them, promised to pay 10 *l.* and afterwards the Baker brought an *Assumpsit* against him; but adjudged it did not lie, because it was founded on an Account, and an *Infant* is not chargeable for Necessaries in Account, for no Contract binds him, but what concerns his Person. *2 Roll. Rep. 271. Tirrell's Case.*

8. In *Assumpsit* and *in simul computasset*, the Defendant pleaded *Infancy*; the Plaintiff replied, it was for Necessaries; and upon Demurrer, it was objected, that an Action on the Case would not lie, because Damages were to be recovered in that Action; it should have been an Action of Debt; but this Exception being disallowed, it was objected, that an Account would not lie, because an *Infant* might be mistaken in it; and for that Cause it was adjudged, that the Action did not lie. *Latch. 189. Wood versus Wetherell.* Palm. 528. S. C. by the Name of Pickering v. Gunning.

9. Debt on a single Bill; the Defendant pleads, that the Bill was made by him within Age; the Plaintiff replies, that it was for Victuals, Necessaries and Cloths suitable to his Quality; and upon Demurrer to this Replication, it was insisted, that this Bill was void as well as a Bond, and that it was not averred, that the Cloths were delivered to him for his own Use; which Exception was allowed in *Ives* and *Chester's Case*; but adjudged, that the Bill was good, it being for Necessaries, and without a Penalty; and that when the Things were delivered to him, and suitable to his Quality, it must be intended for his own Use; and that Exception was not allowed in *Ives* and *Chester's Case*, as reported by *Popham*, tho' *Croke* reports it was. *1 Lev. 86. Russell versus Lee.* W. Jones 182, S. C.

10. *Assumpsit* against an Executor, for 60 *l.* as well for Money lent, as laid out for the Use of the Testator; the Defendant pleaded, that his Testator was at that Time an *Infant*; the Plaintiff replied *Protestando*, that the Testator was not at that Time an *Infant*, and pleads, that he laid out Money for Lodging, Meat, Drink, &c. for him and his Family, and that it was laid out for Necessaries; and upon a Demurrer to this Replication, it was adjudged ill; for tho' it was good as to the Money laid out, yet it did not maintain his Declaration as to the Money lent. *5 Mod. 368. Ellis versus Ellis.*

(F)

Of Fines and Recoveries levied and suffered by them, and of Statutes entered into by them.

1. **T**enant in Tail levied a Fine, he in Remainder died, his Heir being an Infant; then Tenant in Tail died without Issue, so as the Title came to the *Infant*, and five Years incurred during his *Infancy*; adjudged, that the Statute 4 H. 7. did save his Right till five Years after he came of full Age, and then he may avoid the Fine. *Dyer* 133.

2. Husband and Wife levied a Fine of the Lands of the Wife, she being then but eighteen Years of Age, and soon after died; but the *Queen's Silver* being entered four Days before her Death, it was held a good Fine, and did bind the Heir. *Dyer* 220. *Carell's Case*. See *Tey's Case*.

3. An *Infant* levied a Fine, and afterwards brought a Writ of Error to reverse it, and assigned Nonage for Error, and brought a *Sci. fi.* against the Cognisee, and on two *Nihilis* returned, the Court proceeded, and by Witnesses and Inspection reversed the Fine. *Dyer* 201, 303. *Cheney's Case*.

4. *Tenant for Life*, Remainder in Fee to an *Infant*, joined in a Fine, which was reversed as to the *Infant*; yet the Cognisee shall have the Land during the Life of the *Tenant for Life*. *Englyb's Case*, in *Bredon's Case*. 1 *Rep.* 76.

5. A Common Recovery suffered by an *Infant*, who appeared by Guardian, shall not bind him. 10 *Rep.* 44. *Margery Portington's Case*. But now the Law is otherwise. See *pl.* 20.

6. An *Infant* levied a Fine, and declared the Uses thereof, this shall bind so long as the Fine doth remain in Force. 2 *Rep.* 131. in *Beckwith's Case*; but if he levy a Fine to the *King*, it shall bind him, and shall not be avoided for *Infancy*; and if he declare the Uses of such Fine by Deed, 'tis good. 10 *Rep.* 43.

7. Husband and Wife, *Tenant for Life*, Remainder in Fee to an *Infant*, they all Three joined in a Fine; and upon a Writ of Error brought by the *Infant* alone, he assigned *Infancy* for Error, and adjudged well, and the Fine was reversed as to him only, for the Error was not assigned in the Record, but out of it, in the Person of the *Infant*. 1 *Leon.* 317. *Pigot versus Harrington*. See Fine. (C) 8.

8. Husband and Wife levied a Fine of the Lands of the Wife, she being within Age, and afterwards they suffered a Common Recovery; the Husband died, the Widow married again, and her Husband and She brought a Writ of Error to reverse this Fine and Recovery; the Court reversed the Fine, but would advise on the Recovery, because it was had against them after Appearance, and not by Default. *Goldf.* 181. *Sir Henry Jones's Case*.

9. The Vendor being *Tenant in Tail*, the Remainder to B. in Fee, covenanted to make farther Assurance to the Vendee at any Time within seven Years, who died before any such Assurance, leaving his Heir an *Infant*; afterwards the *Infant* was made *Tenant* to the *Præcipe*, and the Vendor was vouched, and so a Recovery was had, which was intended for the Use of the *Infant* and his Heirs; and the Court being satisfied therein by the *Affidavit* of credible Witnesses; and there being a sufficient Guardian, the Recovery was allowed. *Leon.* 211.

10. Husband and Wife acknowledged a Fine before Commissioners by *Dedimus*, the Wife being within Age; and it was proved, that the Commissioners did know she was an *Infant*, for which they were fined; but the Fine it self was effectual. *Mich.* 25 *Eliz.* *Candish versus Worpley*.

11. Error to reverse a Fine levied by an *Infant*, and he assigned his *Infancy* for Error, and prayed he might be inspected, which was done on the Day of the Adjournment of the Term. 2 *Brownl.* 278. *Poyne's Case*. 2 *Cro.* 330. S. C. and held good. 1 *Bulst.* 206. *Batts versus Jennings, S. P.*

12. The Husband levied a Fine, and after his Death the Widow claiming Dower, brought a Writ of Error to reverse it; and upon a *Sci. fi.* against the Heir and Tertenant, he pleaded, that the Cognisor, his Father, died seised, and that the Lands descended to him as Heir, and that he is Tertenant, and under Age; and upon a Counter-plea to the Age, the *Infant* had his Age allowed. 2 *Cro.* 398. *Herbert versus Bingham*. *Moor* 847. But not in Dower.

13. A Common Recovery may be had against an *Infant*, being examined *sole & secrete*, and he may suffer a Recovery by Guardian in open Court. *Hob.* 169. *Blount's Case*. 2 *Bulst.* 235. 2 *Bulst.* 335. S. P. *Zouch versus Mitchell, S. P.* * *Holland versus Lee, S. P.* *Postea* *Infant.* (I) 5.

S. C.
* 1 *Roll.* *Rep.* 301.

14. An *Infant* who wanted only 9 Weeks to be of full Age, acknowledged a Fine before Commissioners, who by the Inspection could not tell whether he was of Age or not; adjudged, it was a Fault in them, but not punishable; the Fine was reversed. 2 *Bulst.* 320. *Requisb versus Requisb*.

15. Where a Fine is levied by an Infant, if 'tis not reversed during his Minority, it is unavoidable in Law, because his Age is triable only by Inspection; for if there should be any other Trial allowed, then after the Death of the Conusor many Years, it must be averred, that he was within Age at the Time of the Fine levied; and if so, no Man could be sure of his Inheritance, because Records might be avoided by Averments. 12 Rep. 122. *Anne Hungate's Case*. Moor 844. *Keckwith's Case*, *contra*.

16. The Testator being seised in Fee, devised his Lands to his Son in Tail, Remainder over, and appointed B. G. to be Guardian to his said Son, who was a very deformed Cripple, and an Idiot *a Nativitate*; the Son was taken away from his Guardian and kept privately till he acknowledged a Fine before one of the Judges of the Common Pleas, to the Use of the Conusor and his Heirs; upon a Trial at Bar in that Court against one *Mansfield*, who claimed under the Fine, the Idiot was brought into Court; the Chief Justice, upon Sight of him, caused a Juror to be withdrawn by the Consent of the Parties, but yet the Fine stood good. 12 Rep. 123. *Mansfield's Case*.

17. An Infant became bound in a Statute-Staple, and was taken in Execution at the Suit of the Cognissee; thereupon he (the Infant) brought an *Audita querela*, and the Writ was *quod attunc & adhuc infra atatem existit*; and it appeared to the Court at the Time of the Writ brought, that he was of full Age; adjudged, that this *Audita querela* would not lie after he was of full Age; 'tis like a Writ of Error to reverse a Fine, which must be brought during the Infancy. Moor 75. *Worley's Case*.

18. An Infant levied a Fine before the Chief Justices, the Cognisees would not have it engrossed till after he was of full Age; and he moved the Court, upon producing a Note of the Caption before the Chief Justice, that his Age might be examined, and that he might bring a Writ of Error, for before the next Term he would be of full Age, all which was granted. Moor 189.

19. *Nota*, &c. one *Hicks* knowing Mr. *Strangeways* was under Age, procured him to enter into a Recognizance to him the said *Hicks*, for so much Money, for Goods sold and delivered to him, for which the said *Hicks* was fined in the Star-Chamber in 100 l. and committed. Moor 555. *Strangeways versus Hicks*.

20. Error to reverse a Judgment in a Writ of Entry against an Infant, wherein he appeared *per Guardianum*, and vouched the common Vouchee, against whom the Judgment was given by Default; adjudged, this was no Error, for the Judgment was not given upon the Default of the Infant, but upon Departure of the Vouchee in spite of the Court; and they will not admit a Guardian, but such who will answer the Loss of the Infant, if he have any. Cro. Car. 307. *Newport Earl versus Sir H. Mildmay*. Hob. 196. Goldf. 181. *Sir Henry Jones's Case*. S. P. pl. 22.

21. The Mother was seised of an Advowson for Life, the Reversion in Fee to her; they both join in a Fine, and declare the Uses to the Mother and her Heirs for ever, if the Son did not pay 10 s. on such a Day, and if he did, then to the Mother for Life, and afterwards to his right Heirs; the Son died before the Day of Payment of the 10 s. came, wanting only one Month to be of full Age; adjudged, that this Declaration of the Uses of a Fine made by the Infant, was good, and bound him; and likewise, tho' he was an Infant, he was bound to perform this Condition. W. Jones 389. *Spring versus Caesar*.

22. An Infant suffered a Common Recovery, he cannot avoid it by Entry, but by Matter of Record, (*viz.*) by bringing a Writ of Error. Style 246. *Ailett versus Wutkins*.

23. Error to reverse a Common Recovery, and the Error assigned was, that the Person who suffered it was an Infant at the Time of the Recovery suffered, but did not say, that *he was yet within Age*, for in Truth he was not; it was agreed, that if an Infant appear by Guardian and suffer a Common Recovery, it shall not be reversed by Error, and that was my Lord *Newport's Case*, *antea pl. 9.* but if he appear by Attorney and suffer a Recovery, 'tis otherwise, for in such Case he may reverse it by Error when of full Age; because it may be tried by the Jury, whether he was an Infant when he made the Letter of Attorney, or not; but in the other Case it must be by * Inspection, which cannot be after full Age; now, in the principal Case, the Party being of full Age, that Trial fails, for it cannot be by Inspection, and therefore Infancy cannot be assigned for Error after full Age in a Common Recovery, no more than it can in a Fine, which is unavoidable. Sid. 321. *Raby versus Robinsen*. See *Postea* (1) pl. 5.

24. The Son married one *Judith Barrow*, an Heiress, being unde Age, and *Sir Herbert Parrott* the Father, and an ignorant Carpenter, took a Fine of her by *Dedimus*, &c. and the Uses thereof were declared to Mr. *Parrott*, the Husband, and to his Wife for their two Lives, Remainder to the Heirs of the Survivor; the Wife afterwards died without Issue, and under Age, and Mr. *Barrow*, the Heir at Law prayed Relief of C. B. it appeared upon Examination, that *Sir Herbert* did ask the young Woman whether she was willing to levy a Fine, and that he likewise asked both his Son and her, whether she was of Age, and they answered she was; and being privately examined as to her Consent, she replied, she was under no Restraint of her Husband, but was willing; but she was not privately examined concerning her Age; the Court agreed, that there was no Way to vacate the Fine; and three Judges held, that the Son should be fined, but not the Father, for the Son shall not be presumed to be ignorant of the Age of his Wife. 1 Mod. 246. *Barrow versus Parrott*.

25. The Husband prevailed with his Wife, an Heiress, and about twenty Years of Age, to join with him in a Fine, to the Use of himself and his Wife, and the Heirs of their two Bodies; this

1 Roll.
Rep. 113.

Winch
103. S. C.

Lev. 142.

* 3 Cro.
569.
Moor
460.

Fine was taken by *Dedimus* by the Father of the Husband and another; and at that Time she had Issue, but afterwards died without Issue; it being moved to discharge this Fine, and to set a Fine upon the Commissioners for taking a Fine of one under Age, the Court was of Opinion they could not meddle with the Fine, but if the Wife had been living they might have set it aside by inspecting her; and the Court was divided about fining the Commissioners, for two Judges held it might not appear to them upon their View, that she was under Age, she being twenty Years old. 2 Vent. 30. *Herbert Perrott's Case*. 1 Mod. 146. S. C.

26. In Ejectment tried at Bar, a Question did arise concerning an Infant, who was a Party to the Suit, whether an Answer which he had given by his Guardian to a Bill in Chancery, should now be read in Evidence against him, and adjudged that it should not. 2 Vent. 72.

27. A Common Recovery was suffered in the County Palatine of Lancaster by an Infant *per Guardianum*; and now being of Age, he brought a Writ of Error to reverse the Judgment in that Recovery; the Entry of the Admission by Guardian was *concessum est per Cur' hic quod Johannes Molineux sequatur pro Tho. Hesketh Ar', qui infra aetatem existit, ut guardianus pradiet' Tho. versus Tho. Lee & Alexandrum Rigly in placito terræ*; and in the Recovery it self, at the End of the Court, the Entry is thus, *viz.* And the aforesaid *Tho. Hesketh*, who is under Age, by *John Molineux*, who is admitted by the Court *ad sequend'* for the same *Thomas*, as his Guardian in the said Plea, *in propria persona sua venit, &c.* it was insisted, that it was Error to admit a Guardian *ad sequend'* for an Infant, where he is Defendant, as in this Case he was; for he was Tenant in this Action, and the now Defendant was then Demandant; so that there being no Suit for the Infant to prosecute, but only to defend himself against the Demand of another, the Admission of the Guardian ought to have been *ad defendendum*: Besides, the Entry is, that the Guardian was admitted *ad sequend'* for the Infant *in propria persona sua venit*, which is plainly erroneous; for tho' the Guardian was admitted for him, yet he appeared *in propria persona sua*; but adjudged, that the Admission of a Guardian *ad sequend'* for an Infant Defendant is good; for 'tis to follow or to take upon him the Defence of his Cause, and 'tis a Word which may be indifferently applied, as well where an Infant is Defendant as where he is Plaintiff; and as to the other Objection, that the Guardian was admitted *ad sequend'* for the Infant *in propria persona sua venit*, that Clause shall be thus construed, that the Infant came by his Guardian, which Guardian was *in propria persona sua*, so that these Words shall rather be apply'd to the Guardian than to the Infant; so the Judgment was affirmed. 2 Saund. 95. *Hesketh versus Lee & al'*. See *Simpson and Jackson's Case*.

28. *Sir John St. Aubin* being about nineteen Years of Age, and his Sister, who was next in Remainder, having married his Footman, *Sir John* petitioned the King for Leave to suffer a Common Recovery, who referred it to the Judges of the Common Pleas; and many Precedents were shewn of Recoveries suffered by Infants upon *Privy Seals*; but the Judges held this Matter had been carried too far, and therefore they disallowed it. 2 Salk. 567. *Sir John St. Aubin's Case* See *Hob. 196. Cro. Car. 309.*

(G)

Of Inspection by the Court. See (F) pl. 23.

1. THE Inspection of an Infant was taken on an Effoin-Day, and Judgment given on the same Day, and held good. 2 Cro. 230. *Poynt's Case*. 1 Bulst. 35. *Walter's Case*. S. P.

2. An Infant having entered into a Recognisance, brought an *Audita querela* in the Common Pleas, and upon Inspection was adjudged within Age; and thereupon a *Scire facias* was awarded against the Conussee, and upon one *Nihil* returned, Judgment was given, that the Recognisance should be vacated; thereupon the Cognissee brought a Writ of Error in the King's Bench, and assigned for Error, that he was never warned, and that without Warning the Recognisance ought not to be vacated, for there should be two *Nihils* returned, or a *Scire feci*; but one *Nihil* returned was no Warning, for which Reason the Judgment was reversed; and now the Infant being of full Age, brought another *Audita querela* in B. R. and shewed all this Matter, and that the first Judgment was reversed only for Error in the Proceedings, and not for the Principal Matter in Law; but adjudged, that the *Audita querela* did not lie, because the Reversal of the Judgment was general, and not for any particular Cause mentioned; and the Inspection by the Judges of the Common Pleas, is not binding to the Court of King's Bench; and that now he could not be inspected, because he was of full Age. Yelv. 88. *Randall versus Wales*. Cro. Eliz. 208. *Clavill versus Mallaroy*. S. P.

3. An Infant confessed Judgment in an Action of Debt brought against him, and during his Nonage he brought an *Audita querela*; and adjudged it did not lie upon a Judgment confessed in an Action of Debt in B. R. tho' it would lie upon a Statute or a Recognisance; but the Party ought to bring a Writ of Error in the Exchequer-Chamber by Virtue of the Statute 27 Eliz. Moor 460. *Randall's Case*.

4. An Infant was inspected, when there was no Action depending, and a Guardian assigned, and afterwards the Court was moved for a new Inspection, and that the Guardian might be discharged, there being now an Action to be brought, which was granted. Style 456.

5. Husband and Wife levied a Fine of the Lands of the Wife, an Infant; she was brought into Court to be inspected, and upon a *Sci. fa.* to the Tertenants, they pleaded she was of full Age at the Time of the Fine levied, and Issue being joined upon it, the Plaintiff had a Verdict, (*viz.*) that she was under Age, notwithstanding which she was inspected; and adjudged, upon Inspection, to be within Age. *Style 474. Vidian versus Fletcher.*

6. Error to reverse a Fine for Infancy; upon a Motion, the Party was brought into Court and inspected, and the Inspection was recorded; and there was a Copy of the Register-Book sworn to be a true Copy, and several Affidavits of her Age. *1 Vent. 69. Cousin's Case.*

(H).

How they must sue. See *Falſe Judgment.* (A) 4.

1. **T**HE Error assigned in the Exchequer-Chamber to reverse a Judgment in *B. R.* was, that the Plaintiff was an Infant, and was admitted *per R. B. Guardianum suum ad hoc per Cur' Specialiter admissum*, which was only a Recital, and no Record made of the said Admittance in *B. R.* as 'tis in *C. B.* but the Error was disallowed. *4 Rep. 53. Rawlins's Case.* See *Yelv. 58.*

2. The Case of *Row and Long* before-mentioned proves, that an Infant himself cannot sue by Attorney; but where he is made an Executor he may then sue by Attorney, because he brings the Action in Right of another; 'tis true, it was otherwise adjudged in the Case of *Bantholmeu versus Dighton.* *Cro. Eliz. 424.* but in the very next Year that Case was denied to be Law. *Cro. Eliz. 541. Bade versus Stokes,* and *569. Sedborough versus Rant. S. P.*

3. Error in the Exchequer Chamber of a Judgment in *B. R.* in Ejectment, (*viz.*) that the Plaintiff being an Infant, sued *per * Attornatum*, and this was held Error in Fact. *2 Cro. 5. Row* * *1 Roll. Rep. 380. Westcot v. Cattle.*

4. The Plaintiff sued *per proximum amicum*, and pending the Action, he came of Age and still continued the Suit and recovered; and this was assigned for Error, (*viz.*) that after he came of Age, he ought to have sued by Attorney, &c. adjudged not assignable for Error, and if the Defendant would take Advantage of it, he should have pleaded it; but now 'tis too late, it being after Judgment. *1 Bulst. 24, 171. Stone versus March. 2 Cro. 580. S. C.*

5. A Guardian and *Prochein Amy* are distinct, tho' they may either of them be admitted for the Plaintiff, for the *Prochein Amy* was never before the Statute *W. 1. cap. 47.* he was appointed in Case of Necessity, where an Infant was to sue his Guardian, or where the Guardian would not sue for him, for which Reason he may be admitted to sue by *Prochein Amy*, where he is to demand or gain any Thing. See *Postea.* (I) *Simpson versus Jackson. 2 Cro. 640.*

6. An Infant sued by Attorney, and afterwards became Nonſuit, and Costs were given against him according to the Statute *4 Jac.* and upon a Motion to mitigate the Costs, because he sued by Attorney, it was denied, because after a Nonſuit and Costs given, the Parties have no Day in Court; and if the Infant should bring a Writ of Error, he cannot have a Benefit of it, after a Nonſuit. *Hill. 9 Jac. 1 Bulst. 199. Hamlen versus Hamlen.*

7. If the Admission is to sue *per Guardianum*, when it be *per proximum Amicum*, 'tis well enough, for there are many Precedents both Ways. *Cro. Car. 86. Young versus Young. Hutt. 92. S. C.*

Palm. 518. Hutt. 92. Het. 52.

Litt. 60. W. Jones 177.

8. The Plaintiff being an Infant, may sue *per guardianum*, or *per proximum Amicum*, but if he is sued, it must be *per guardianum.* *Cro. Car. 115. Goodwin versus Sir R. Moor.*

9. There were two Executors, and one of them an Infant, they both joined in an Action, which they brought *per Attornatum*; it was objected, that they could not sue by Attorney, because an Infant may not make a Warrant of Attorney; for the Law presumes that he is not able to instruct one; but it was adjudged, that since one of the Executors was of full Age, they might both sue * *per Attornatum*, for both represent the Person of the Testator, and sue in the Right of another; and it seems unreasonable, that one of them should sue *per Attornatum* and the other by his Guardian; but *Twisden* was of another Opinion, (*viz.*) that an Infant Executor cannot sue *per Attornatum*, because he cannot make a Warrant of Attorney, and if he should be nonſuit, he must be in *mise-recordia*, which an Infant ought not to be. *Foxwist versus Tremaine. Saund. 207, 212. See Hatton versus Maskall. S. P.*

*1 Mod. 47. 296. 1 Lev. 299. Sid. 448. 1 Vent. 102. Raym. 198. * 1 Roll. Rep. 380. Westcot v. Cattle.*

10. There were four Executors, and two of them were under Age; the Question was, whether they shall all sue by Attorney; if they might, then if the Attorney should plead any Thing to their Prejudice, they cannot have an Action against him, which they may against a Guardian; *adjournatur.* *1 Vent. 40. 1 Lev. 299. S. P. 2 Saund. 212. S. P. See Foxwist versus Tremaine.*

11. Infant brought an *Assumpsit per Guardianum*, for that the Defendant entered into his Close and cut his Grass, and that in Consideration he (the Infant) would permit the Defendant to make it into Hay, and to carry it away, he promised to pay six Pounds; upon Demurrer to this Declaration, it was insisted, that here was no Consideration for this Promise, because the Infant was not bound

1 Mod. 25. Sid. 41.

bound by his *Permission* as aforesaid, but might have sued the Defendant notwithstanding it; but yet the Plaintiff had Judgment. 1 *Vent.* 51. *Smith versus Bowen.*

Sid. 446. 12. Error to reverse a Common Recovery had against an Infant, the Error assigned was the Admission of the Guardian, for it was *concessum est per Curiam quod I. M. Ar' sequatur pro T. H. Ar' ut Guardian*, when it should not be *sequatur*, but *ad comparandum & defendendum*; besides, *quod sequatur ut Guardianus* is only similitudinary; but adjudged, that *quod sequatur* is proper enough, for 'tis no more than to follow the Cause, and *sequatur ut Guardianus* is likewise proper, for *ut* sometimes signifies an Identity, as *seisins, &c. ut de feodo*, and Conuſance is made by such an one *ut Balliuis*. 1 *Vent.* 73. *Heskett versus Lee*. See 2 *Cro.* 641.

T. Jones 170. 13. In Dower *unde nihil habet*, the Demandant had Judgment in the Grand Sessions in *Brecknock*; and now the Tenant brought a Writ of Error, and assigned for Error, that he was an *Infant* at the Time of the Judgment given, (*viz.*) at the Age of fourteen, and no more, and that he appeared by *Attorney*, whereas he ought to have appeared by *Guardian*; and Issue being taken upon the Infancy, and laid to be at *Abergavenny in Com. Monmouth*, the Trial was had at *Monmouth*, and found for the Plaintiff in the Writ of Error; and it was moved in Arrest, that the Trial ought to have been in *Brecknockshire* where the Land lies; but adjudged, that Infancy, or not, may be tried in the County where the Party dwelleth, and not where the Writ of Dower was brought, because 'tis collateral to that Action. *Raym.* 456. *Morgan versus Vaughan*. See 1 *Bulst.* 129, and 1 *Brownl.* 150. *Ord versus Moreton*. *S. P. Yelv.* 212. *S. C.*

14. *Scire facias* against an Executor, upon a Judgment had against his Testator; the Defendant pleaded in Abatement, that there was another Executor living, and not named in the Writ; the Plaintiff replied, that the Executor was an Infant under the Age of seventeen Years, and so not capable to take upon him the Executorship; and upon Demurrer it was adjudged, that the Action was well brought by the Executor alone, who was of full Age, without joining the Infant-Executor, and this Judgment was affirmed in the Exchequer-Chamber. *Mich.* 15 *Car.* 2. *Rot.* 703. *B. R. Hutton versus Miskew*. See Joint-Executor. (D) 7.

15. The Case was, the Defendant covenanted to teach the Plaintiff (who was an Infant) to sing and to dance, and also to find her Meat, Drink, Washing and Lodging; and the Infant covenanted to serve the Defendant for so many Years; and in an Action of Covenant brought, the Breach assigned was, that the Defendant did not find the Plaintiff in Meat, Drink, &c. there was a Judgment by Default; and it was moved, that this Action would not lie by an Infant, because this Covenant being reciprocal, it would bind on the Part of the Infant, and therefore ought not to bind on the Part of the Defendant; but adjudged, that it shall bind the Defendant, she being of full Age, tho' it did not bind the Infant. *Sid.* 446. *Faruham versus Atkins*.

16. *Assumpsit, &c.* for Money lent and Money laid out to the Use of the Defendant's Wife *dum sola*; upon *Non Assumpsit* pleaded, it was adjudged, that the Defendant might give in Evidence the Infancy of his Wife at the Time of the Promise; that this Promise is merely void; but a Bond given by an Infant is only voidable, because 'tis a more deliberate Act; adjudged likewise, that where Money is lent to an Infant, who employs it in buying Necessaries, yet he is not liable, because the Foundation of the Contract is the Lending, for after that Time there could be no Contract raised to bind the Infant. 1 *Salk.* 279. *Darby versus Boucher*.

(I)

How they must be sued.

2 Roll. Rep. 257. Palm. 295. 1. ERROR of a Judgment in Ejectment, wherein the Father appeared by Attorney, and his Son being an Infant, appeared by the same Attorney as *proximum amicum*, admitted by the Court *ad prosequendum*, and for these Causes the Judgment was reversed, (*viz.*) where an Infant is Defendant, he always ought to be sued *per guardianum*, admitted by the Court not *ad prosequendum*, as in this Case, but *ad defendendum*. 2 *Cro.* 641. *Simpson versus Jackson*. See *Dyer* 104. *S. P.*

2. Error of a Judgment against three Defendants, one of them being an Infant, and all appearing by Attorney, when the Infant should have appeared by Guardian, &c. and this being Error, and it being a joint Judgment, it was reversed as to all the Defendants, and not as to the Infant alone. *Style* 400. *Bocking versus Simonds*. 2 *Cro.* 303. *King versus Marleborough*. *S. P. Allen* 74. *Oates versus Aylett*. *S. P.*

3. Error of a Judgment had against an Infant Executor, (*viz.*) that he appeared *per Attornatum* when it should be *per Guardianum*; it was insisted, that he being sued as Executor to one who was of full Age, and so representing his Person, he might make an Attorney; but adjudged, that he could not, because by a false Plea he may be charged *de bonis propriis*. 2 *Cro.* 441. *Cotton versus Westcot*. *Poph.* 130. *S. C.* 1 *Roll. Rep.* 380. *S. C.* reported by the Name of *Prescot* and *Cotton*. See *Antea* (H) pl. 9.

4. In Replevin against *Moile*, an Infant, he appeared in two Terms *per Attornatum*, and in the Third *per guardianum*, and for this Reason the Judgment was reversed; 'tis true, he may appear *per guardianum*; and if pending the Suit he comes of Age, he may then plead *per Attornatum*. *Moor* 665. *Ewre versus Moile*.

5. Error to reverse a Common Recovery, suffered by Husband and Wife, of the Lands of the Wife, they both appearing *per Attornatum*, and the Wife being an Infant; and this was held Error, for an Infant cannot make an Attorney; and tho' it was objected, that the Husband being of full Age, might make an Attorney for himself and his Wife, it was adjudged, that he could do no Act of himself to bar the Inheritance of the Wife, but that she ought to appear by her Guardian. *Bridg. 69. Holland versus Jackson. See antea (F) pl. 23. 5 Mod. 209. Stokes versus Olliver. S. P.*

6. Judgment was had against the Defendant and another, who was an Infant, and he brought a Writ of Error, and assigned for Error, that he was an Infant at the Time of the the Action brought, and that he appeared by Attorney, when it should be *per Guardianum*, or *Prochein Amy*; the Defendant in Error pleaded, that there was no Warrant of Attorney filed by the Defendant in the Action; the Plaintiff in Error *allegando*, that there was a Warrant of Attorney, shewed the Error as before; and then the Defendant pleaded in *nullo est Erratum*, and the Judgment was reversed; but instead of pleading, that there was no Warrant of Attorney, it had been the better way for the Defendant in Error to have demurred; for if there was no Warrant of Attorney, then the Infant did not appear at all. *March 24. Lewis versus Jones.*

7. Error, &c. to reverse a Judgment; the Error assigned was, that the Action was brought against three Defendants, one of them being an Infant, and all appearing by Attorney; whereas he within Age ought to have appeared by his Guardian; so that this being a joint Judgment against three, and it being erroneous against one, it must of Consequence be so to the rest; and it was adjudged accordingly. *Style 400. Bocking versus Simons, and 318, Weld versus Rumney, S. P. 1 Lev. 294. Grell & al' versus Richards, S. P.*

8. Error to reverse a Judgment in C. B. in Debt against an Heir; and the Error assigned was, that the Defendant being an Infant, appeared *per Guardianum*, and did not say *per Curiam*, &c. *specialiter admissum*, according to *Rawlin's Case*; 'tis true, where he appears by Attorney instead of his Guardian, this is helped by the Statute 21 *Jac. cap. 13.* but where he appears *per Guardianum*, if in the C. B. there must be an Admission entered on the Roll; but the Plaintiff had Judgment. *Sid. 173. Swift versus Nott.*

9. In Debt upon a single Bill, the Defendant pleaded Infancy; the Plaintiff replied, that the Money was due for Necessaries, (*viz.*) 10 *l.* for Cloths, and 15 *l.* *pro & erga* his necessary Support at the University; the Defendant rejoined, that the Money was lent him to spend at his Will and Pleasure, and traversed, that it was lent for Necessaries, upon which they were at Issue, and the Plaintiff had a Verdict and Judgment in C. B. and upon a Writ of Error in B. R. the Judgment was reversed, because that which was put in Issue is only, whether the Money was lent, and not whether it was laid out for Necessaries; for it may be borrowed for Necessaries, and laid out at a Tavern; a Feme Covert may buy Necessaries, but she cannot borrow Money for that Purpose so as to charge her Husband; so 'tis in the Case of an Infant, he may buy, but cannot borrow Money to buy Necessaries; for the Law will not Trust him with Money, but at the Peril of the Lender, who must lay it out for him, or see that 'tis laid out, and then 'tis his Providing Necessaries for him. *1 Salk. 386. Earl versus Peel.*

(K)

Of Infants in ventre sa mere.

1. **Y**ET Anno 15 & 16 Eliz. it was held, that a Devise to such an Infant was not good, because he is not capable of taking an Estate. *Dyer 303. See pl. 8.*

2. It was a Question, whether a Surrender of a Copyhold to such an Infant after his Birth, was good or not good; it was adjudged, that if it had been by any other Conveyance, it hath been void; and so likewise by this. *Cro. Eliz. Clamp's Case.*

3. A Thing which is not in *Esse*, but in apparent Expectancy, is regarded in Law, and therefore an Infant in his Mother's Womb shall be vouched; and if an Usurpation be upon him, he shall be relieved against it at the next Turn after his Birth. *Hob. 240. Stanhope versus Bishop of Lincoln.*

4. And this agrees with many former Resolutions in the like Case; as for Instance, Lands were devised to two Men, and to the Child of T. P. in *Ventre sa mere*; this was held a good Devise, but it may be a Question, whether they were Jointenants or Tenants in Common. *Moor 177.*

5. So where the Testator being possessed of a Term for Years, devised the same to his Daughters, he having two born at that Time, and another after his Death; adjudged, that all three have a Title to the Term. *Moor 220. Stanley versus Baker.*

6. 'Tis true, my Lord Coke and Doaderidge were of a contrary Opinion, (*viz.*) that where there is a Devise to an Infant in ventre sa mere, and then the Testator dies, and the Child is not born till after the Death of the Testator, that in such Case the Devise is void, tho' by the Civil Law Conception is accounted for Birth, when it relates to the Benefit of an Infant. *1 Roll. Rep. 110. Simpson versus South.*

7. Now because of these different Opinions, it still remained a Question, whether a Devise to an Infant in *Ventre sa mere*, was good, or not; for Anno 19 Car. this Matter was debated again, and

and two Judges were of Opinion, that the Devise must be *in rerum natura at the Time when the Will takes Effect*, and that is at the Death of the Testator; otherwise the Devise is void as to that Person; but *Mr. Siderfin*, who reports the Case, tells us, that the Court was clearly of Opinion, that a Devise to an *Infant*, when it shall be born, is good; but this doth not agree with the Reason before-mentioned; for if the Testator dies before the Child is born, then 'tis plain, that 'tis not *in rerum natura* when the Will takes Effect; 'tis true, two other Judges, (*viz.*) *Twisden* and *Keeling*, were of Opinion, that a Devise to an *Infant in Ventre sa mere* was good, and they affirmed, that the Lord Chief Justices *Hale* and *Hide* were of the same Opinion; therefore, because the Court was now divided, it was adjourned into the Exchequer-Chamber; but before any Judgment was given, the Parties agreed. *Sid.* 135. *Snow* versus *Cutler*. *Raym.* 162. *S. C.* 1 *Lev.* 135. *S. C.*

8. As to that Case *in Dyer*, where 'tis held, that a Devise to an *Infant in Ventre sa mere* is not good, my Lord Chief Justice *Hale* caused the Roll to be searched, and upon Perusal of it, he tells us, that it doth not warrant the Judgment as reported by *Dyer*, and therefore it was adjudged by the Court, that such a Devise is good. 1 *Lev.* 135.

Inferior Courts.

(A)

1. Judgment was obtained in *B. R.* and an Action of Debt was brought upon that Judgment in an Inferior Court against the Bail; and after a Summons and *Nihil* returned, the Defendant was taken upon a *Capias* and rescued; and an Action on the Case was brought in the *same Court* against the Person who rescued him; and upon a Motion a Prohibition was granted, for that the Original Foundation of this Action commenced in this Court. 1 *Roll. Rep.* 54.

2. *Assumpsit*, the Consideration must be laid within the Jurisdiction of the Inferior Court. *Sid.* 105.

3. If a Foreign Plea be tendered on Oath and refused, a Prohibition lies, or a Bill of Exceptions may be made, and Errors assigned thereon. 1 *Vent.* 181. *Coxe's Case*.

4. An Action on the Case lies for suing one in an Inferior Court, where the Cause of Action arises out of its Jurisdiction; but it must be brought against the Plaintiff in the Action, and not against the Officer. 1 *Vent.* 369. *Hodson* versus *Coke*.

5. *Assumpsit* in *Windsor-Court* for Meat, Drink, &c. at *Maidenhead infra jurisdictionem*, &c. Upon *Non Assumpsit* pleaded, the Evidence was of Meat, Drink and a Promise at *Henly*, which was out of the Jurisdiction; the Defendant demurred on the Evidence, but the Steward refused, and the Plaintiff had a Verdict and Judgment, and now moved for a Prohibition, but it was denied, because after Judgment. 2 *Lev.* 230. *Jackson* versus *Neale*.

6. In *Assumpsit*, &c. the Defendant pleaded two Attachments of Money in *London (viz.)* of one Part of it for himself, and the Rest for a Stranger, and both due on Bond; the Plaintiff replied, that both the Bonds on which the Attachments were made, were executed *extra Jurisdictionem*, &c. the Defendant rejoined, that the Bond made to him was executed *infra Jurisdictionem*; and upon a Demurrer to this Rejoinder, the Plaintiff had Judgment, because where they give Judgment of a Thing *extra Jurisdictionem*, 'tis absolutely void, and Advantage may be taken thereof, by Pleading, without a Writ of Error; besides the Rejoinder answers only Part of the Replication. 3 *Lev.* 23. *Frumpton* versus *Pettis*.

7. Debt upon a Bond against an Executor, who pleaded, that in *Curia Domini Regis de Recordo* tent' 4 Novemb. Anno Regni Domini Regis nunc 34 apud *Guildhald' Civitat' Norwic'* coram A. & B. *Vicecom' ejusdem Civitatis*, one *Lilly* brought an Action of Debt on a Bond against him for 500 *l.* and recovered, and so pleaded *plene administravit præterquam*, &c. and upon Demurrer to this Plea it was adjudged ill, because the Defendant did not shew by what Authority this Court was held, either by Prescription, Grant, or otherwise, according to *Turner's Case*. 8 *Rep.* 3 *Lev.* 142. *Jones* versus *Moldrin*.

8. *Assumpsit*, &c. in *London* for the Pasture of an Horse in *Essex*; the Defendant pleaded in Bar a former Action brought in the Sheriffs Court in *London*, for the same Pasture, and that he had Judgment in that Action; the Plaintiff replied, that the Cause of Action did arise *in Essex extra Jurisdictionem*; and upon a Demurrer, it was adjudged, that the Plea was ill; for if the Cause of Action did arise out of the Jurisdiction, &c. then the Judgment is void. 2 *Lev.* 234. *Mico* versus *Morris*.

9. In *Trespas*, &c. the Defendant justified by Process out of an Inferior Court, setting forth, that a Plaint was levied, &c. *in placito transgressionis*, to which the Defendant appeared, and there-

thereupon *taliter processum fuit*, that Judgment was given against the now Plaintiff, upon which he was taken, &c. the Plaintiff replied, that the Cause of Action did not arise *infra Jurisdictionem Curie*, &c. the Defendant rejoined, that the Plaintiff is estopped to say so; for the Declaration below did alledge the Cause of the Action to arise *infra Jurisdictionem*; to which the Defendant (but now Plaintiff) pleaded, and Judgment was given against him; and upon a Demurrer to this Rejoinder, it was held, that he who sues in an Inferior Court, is bound at his Peril to take Notice of the Limits of its Jurisdiction; and that if the Party after a Verdict below, prays a Prohibition, and alledges, that the Court had no Jurisdiction, a Prohibition shall be granted; but two Judges were of Opinion, that since the Plaintiff had replied, that the Cause of Action did not arise within the Jurisdiction; and the Defendant having rejoined, that the Declaration below did alledge it to be done *infra Jurisdictionem*, and admitted there so to be; the Plaintiff by his Demurrer hath confessed it, and therefore shall not now take Advantage of it, but is concluded by his former Admittance. 2 Mod. 195. *Higginson versus Mason*.

10. In a Prohibition to the Sheriffs Court of London, the Plaintiff suggested, that he was sued there in an Action on the Case, and sets forth the Proceedings at Large, and that there was a Verdict against him, and averred, that the Contract upon which he was sued, was *revera* made in *Middlesex extra Jurisdictionem*; and upon a Demurrer to this Prohibition, it was argued, that it ought to be granted, tho' after a Verdict, because the Admittance of the Jurisdiction below cannot give a Jurisdiction where originally they had none: *S.d. per Curiam*, where it appears in the Declaration it self, that the Cause of Action did not arise *infra Jurisdictionem*, or if the Subject Matter in the Declaration is not proper for the Judgment or Determination of an Inferior Court; or if the Defendant intended to plead to the Jurisdiction, and is prevented by some Artifice, as by not accepting, or by over-ruling his Plea; in such Cases a Prohibition may be granted at any Time; but after the Defendant hath admitted the Jurisdiction by pleading to the Action, and especially, if a Verdict and Judgment pass against him, this Court will not examine whether the Cause of Action did arise within the Jurisdiction, or not; for 'tis now too late for that Purpose; therefore a Prohibition was denied. 2 Mod. 270. *Mendike versus Stint*.

11. Upon a Motion for an Attachment against a Steward of an Inferior Court, for discharging a Jury before they gave their Verdict; it was held, that the Steward might from Time to Time adjourn the Court till they were agreed, and that they ought to be kept without Meat, Drink, Fire or Candle in the mean Time; that all Misdemeanors in *Judicial Officers* of Inferior Courts are Contempts to the Courts of King's Bench, and therefore Attachments are granted against Stewards of those Courts. 1 Salk. 201.

12. Judgment in the Town-Court of Bristol, and Costs taxed, and a *Scire facias* issued against the Bail, and a Year afterwards the Court set aside the Judgment, and granted a new Trial; and for this Cause an Attachment was granted against the Steward. 1 Salk. 201. *The Queen versus Hill*.

13. Case, &c. against a Serjeant at Mace, for the Escape of a Person in Custody by Process out of the Sheriffs Court of London, in an Action of Debt upon a Bond; upon Not guilty pleaded, it appeared, that the Bond was made out of the Jurisdiction of the Court, and so the Proceedings were *coram non iudice*, and void, and the Serjeant a Trespasser; adjudged, that where an Inferior Jurisdiction is confined to Persons, as the *Marshalsea* was to those of the King's Household, if it appear by the Declaration, that the Person who sues is qualified to sue, tho' in Truth he is not; yet if the Defendant doth not plead to the Jurisdiction, he shall never take Advantage of it afterwards; but if 'tis not averred in the Declaration, that the Cause of Action arises within the Jurisdiction, then all the Proceedings are void; so where they are confined to Place (*viz.*) to all Contracts arising within such a District, tho' it did really arise out of it, yet the Inferior Court may award Process, and the Officer may execute it, unless it appears to him that it did arise out of the Jurisdiction; as if in this Bond it had appeared to be dated at York, for he is not bound to enquire where it did arise; but where a Defendant pleads to the Merits of the Cause, and not to the Jurisdiction of the Court, he shall never afterwards take any Advantage of the Want of Jurisdiction; for by the Averment in the Declaration, and his admitting it by his Plea, he is estopped to say, that the Matter did arise out of the Jurisdiction; and 'tis impossible the Court should know where a transitory Matter arises, unless the Defendant acquaints them with it. 1 Salk. 201. *Lucking versus Denning*. See 2 Bulst. 64. Hob. 267. March 117. 2 Mod. 196. 30. 1 Lev. 95. Lutr. 935, 1560.

14. The Censors of the College of Physicians in London, have Power by their Charter to punish Persons practising Physick within seven Miles, by Fine and Imprisonment *pro mala praxi*, and accordingly they condemned the Defendant for administering *insalubres pillulas & noxia medicamenta*, and fined and committed him; the Question was, whether a *Certiorari* lay on this Conviction; adjudged, that where Power is given to bear, examine and punish, 'tis a judicial Power; and if the Power is to fine and imprison, the Persons in whom 'tis reposed, act as Judges, and 'tis a Court of Record. 1 Salk. 200. *Groenvelt v. Burwell*. See 8 Rep. 38, 60. See Stat. IV. 2. cap. 11.

15. Where a Jury in an Inferior Court will not agree on their Verdict, they may be kept without Meat, Drink, Fire or Candle, and the Stewards may adjourn the Court from Time to Time till they agree. Pasch. 1 Annæ Farr. 1.

Informations.

On Penal Statutes. (A)

[For several other Offences. (B)

(A)

On Penal Statutes.

1. **W**HERE an Offence is made by a Statute, which was not so at Common Law, and a Penalty is inflicted, to be recovered in any of the Courts of Record, it must be in one of the Courts at *Westminster-Hall*, and cannot be recovered at the Assises. *Mich. 7 Eliz. Dyer 236.*

2. Information in the Court of Exchequer, against the Defendant, a Merchant Stranger, upon the Statute 18 *H. 6. cap. 6.* concerning the Gaging Vessels of Wine, setting forth, that the Defendant had sold to *B. G.* so many Vessels of Wine, and none of them did contain 126 Gallons, as they ought, and that he had not abated in the Price, &c. according to the *Want of Measure*, by Reason whereof he had forfeited to the Queen the Value of the Wine so defective, &c. it was objected, that it was not set forth, in *how many Vessels*, nor ** how much Wine in each* it was held ill. 2 *Leon. 38. Martin van Herbert's Case.*

* It doth not appear whether this was after a Verdict, or upon a Demurrer.

3. Information upon the Statute of Usury, depending four Terms; after Issue joined, the Defendant moved the Court of Common Pleas, that he might bring it on by Proviso, before Commissioners in the County where the Information was laid, as the Course is in the Exchequer; the Court doubted it, because the Queen is *quodam modo* a Party to the Suit: *Serjeant Fleetwood* informed the Court, that the Course was so; but *Mr. Nelson, the Chief Promotary*, said he never saw any such Precedent; and the old Books are. that it cannot be granted without the Consent of the Attorney General. 2 *Leon. 110. Knevetts versus Taylor.*

4. Information upon the Statute 27 *Eliz. cap. 7.* brought by the Party grieved, one Moiety being to the Queen, and the other to himself; the Plaintiff was Nonsuit; adjudged, that he shall not pay Costs by the Statute 18 *Eliz.* because that Statute is to redress Disorders in Common Informers, and the Action given to the Party grieved is not a *Popular Action*. 2 *Leon. 116. Doghead's Case.*

5. Information brought in *London*, upon the Statute 13 *Eliz. cap. 5.* for justifying *apud London* a fraudulent Gift of Goods made by *B. G.* to him, to defraud the Plaintiff of his Debt; the Defendant pleaded, that *B. G.* gave him the said Goods at *Coventry bona fide*, and justified the Gift there, and traversed the Justifying at *London*; adjudged an ill Plea; for tho' the Statute 31 *Eliz.* restrains Common Informers to bring their Action in any other County than where the Offence was done, yet the Party grieved, as in this Case, might inform in what County he would. *Cro. Eliz. 645. Allen versus Steer.*

6. Information upon the Statute 5 *Ed. 6. cap. 7.* for buying Wools contrary to the Statute; the Defendant pleaded to all, except fifty Stone of Wool, Not guilty, and as to that he pleaded an *Information depending* against him in *C. B.* at the Suit of *B. G.* and averred, it was for the same Offence, *unde petit Judicium*, &c. and upon Demurrer, it was objected, that the Plea was not good, because it was not set forth, that any *Process* issued upon the Information; and if there was no *Process*, then the Information was *not depending*; but adjudged, that as soon as the Information is filed, 'tis *depending*; and therefore the Plea is good. *Cro. Eliz. 261. The King versus Harris.*

7. Judgment in the Court of Piepowders at *R.* upon an *Information* upon the Statute of *buying Leather*; the Defendant was in Execution, and being brought up by *Habeas Corpus*, it was objected, that the Judgment was *coram non Judice*; for tho' the Court of Piepowders is the King's Court, yet they have not Authority to hold Pleas upon Penal Statutes; and so it was adjudged; but the Judgment was voidable by Writ of Error. *Cro. Eliz. 532. Wilkinson versus Neithersall.*

8. Information upon the Statute of Usury, *tam quam*, &c. the Attorney General entered a *Nolle prosequi*, which was pleaded in Bar against the Informer; but adjudged no good Plea to bar him, for he might still proceed; and so he may, if the Queen be Nonsuit. 1 *Leon. 119. Shetton versus Taylor.* 11 *Rep. 56. In Dr. Foster's Case.*

9. But where the Attorney General prosecuted a *Pramunire* against the Dean of *Christ-Church, Oxon*, and others, for the Queen and *B. G.* for that they procured him to be sued before Commissioners there, in an Action of Trespass, according to the Ecclesiastical Law, and proceeded in the Suit after he pleaded his Freehold, and so to the Jurisdiction of the Court, and afterwards the Attorney General entered a *Nolle prosequi*; in such Case *B. G.* who was the Party grieved could not go on, because the principal Matter was the *Pramunire*, the Conviction, &c. and putting the Party out of the Queen's Protection; and the Damages of the Party grieved are but accessary; so that the Principal being released, the Damages are gone. 1 *Leon.* 292. *The King versus Dean of Christ-Church in Oxford.* 3 *Leon.* 139. S. C. reported by the Name of *Parvett versus Dr. Matthew.*

10. Information in the Lord Mayor's Court in *London*, upon the Statute 5 *Eliz.* for 40 s. per Month, for using a Trade, not being Apprentice for seven Years; after a Verdict for the Informer, a Writ of Error was brought, and the Error assigned was, that the Information being on a Penal Law, ought to be prosecuted in the King's Courts at *Westminster*, where the Attorney General may acknowledge or deny the Fact; besides, the Judgment was, that the Defendant be in *miserecordia*, when it should be *quod capiatur*; and for these Errors the Judgment was reversed. *Trin.* 17 *Jac.* 2 *Cro.* 538. *Miller and the King.*

11. An Information was exhibited against the Defendant upon a Penal Statute, and before Judgment the Informer died; adjudged, that the Attorney General might proceed for the Queen's Moiety, for neither the Death or Release of the Party shall bar her of it. *Moor* 541.

12. Error to reverse a Judgment given in the Common Pleas, upon an Information for selling Wine without a License; the Error assigned was, because it was brought in the Common Pleas, and the Fact was done in *Lambeth*; adjudged, that the Statute 21 *Jac.* gives no Jurisdiction to the Justices in Cases where they had none before. *Style* 542. *Buckstone versus Sherlock.*

13. Information upon the Statute 1 *Jac. cap.* 22. for that the Defendant being a Currier, bought two Hides of tanned Leather, &c. and sold them again unwrought, &c. it was found by the Jury, that the Defendant bought the Hides, and curried them with Oil and Tallow, and shaved and died them, and so sold them unwrought into Wares; adjudged, this was an Offence within the Statute 21 *Jac.* and 'tis against the Meaning of the Statute 6 *Ed. 6. cap.* 15. *Cro. Car.* 425. *Lodge versus Holliwell.*

14. Error to reverse a Judgment in *Coventry*, upon an Information for using the Trade of an *Ironmonger*, not being Apprentice; it was assigned for Error, that by the Statute 21 *Jac.* every common Informer shall be sworn before his Information shall be received, which this Informer was not; besides, the Statute gives one Moiety of the Forfeiture to the King, and the other to Informer, except in corporate Towns; and this being done in a corporate Town, the Informer cannot have a Moiety, because it must go to the Corporation; but adjudged, that as to the first Error assigned, that the Informer was not sworn, the Judgment shall not be reversed for that Reason, because 'tis only a Direction to the Officers of the Court not to receive the Information, unless the Informer is sworn; and as for the other Objection, the King's Moiety shall go to the Corporation, and the Informer shall have his Moiety still. *Cro. Car.* 230. *Trin.* 9 *Car.*

15. Information in *B. R.* upon the Statute 23 *H. 8. cap.* 4. for selling Beer at another Price than appointed in that Statute; upon Not guilty pleaded, there was a Verdict against the Defendant, who moved in Arrest of Judgment, that the Information ought not to be brought in *B. R.* because by the Statute 21 *Jac. cap.* 4. 'tis enacted, that Informations shall be brought before the Justices of Peace, for such Matters whereof they have Power to enquire, and *not in the Courts at Westminster*; but adjudged, that this Information is well brought * in *B. R.* because the Statute upon which 'tis brought, gives the Forfeiture to be recovered in Courts where no Protection, Escoin, or Wager of Law are allowable, which Words extend only to the Courts at *Westminster*, tho' not named, for no inferior Court can allow an Escoin, &c. besides, the Statute 21 *Jac.* doth not introduce a new Law to enable Justices of Peace to determine Informations, where they had no Power so to do before; but it appoints, that where an Information may be brought before them, or in the Courts at *Westminster*, at the Election of the Prosecutor, there it shall be brought in the County where the Offence was committed, and this is for the Ease of the Subject. *Cro. Car.* 79. *Farrington versus Keymer.* *Cro. Eliz.* 112. *Cro. Car.* 146.

16. Resolved by *B. R.* that the Statute 21 *Jac.* of Penal Laws is to be expounded thus, (*viz.*) where Liberty is given to sue for the Penalty by Information, Debt or Plaint, in any Court of Record, that must be intended in any Court at *Westminster*; and therefore on such Statutes the Information may be brought in *Westminster*; and 'tis not restrained by the Statute 21 *Jac.* 2. where any Penal Law gives Power to the Justices of Assize, Oyer or Terminer, or Justices of Peace, to hear and determine an Offence against any Statute, this must be by Way of Indictment, unless Bill, Plaint, or Information is specially named. (3.) And if those Words are specially named, and yet the Offender is indicted, it may be removed in *B. R.* and there tried; or after the Defendant hath pleaded, it may be sent to be tried at the Assizes. (4.) That an Information in *Middlesex*, upon a Penal Law, may be tried in *B. R.* tho' the Justices of Peace have Power to determine it. *W. Jones* 193. Resolution on 21 *Jac.* concerning Penal Laws.

W. Jones
463.

* Hardr.
103. S. P.

(B)

For several other Offences.

1. **A**N Information hath not only somewhat in it of an Indictment, (*viz.*) to alledge the Offence in particular, but hath also something in Nature of an Action as to demand what is due; therefore if the Informer make no Demand, or if he doth demand what appears not to be his due, in such Case the Information is ill; as for Instance, an Information against an Inn-keeper for selling Flesh in a Time prohibited, *unde petit advisamentum Curiae*, and that the Defendant *forisfaciat* 5 *l.* for every Offence, *unde ipse petit medietatem*, this was held insufficient. *Hob. 242. Pre versus Westly.*

2. An Information was brought against the *Mayor and Commonalty of London*, for not suppressing an unlawful Assembly in the City, made there in *June, 4 Car.* in the Day-time, when *Dr. Lamb* was killed in the Riot, nor any of the Offenders taken, &c. The Defendants confessed the Offence, & *posuerunt se in gratiam Curiae*, they were fined 1500 Marks, for this is an Offence at Common Law; the like Information was brought *Anno 21 H. 6.* against the City of *Norwich*, where one *Gladman* took upon himself the Title of King, and with a Crown of Paper on his Head went to the Priory there in a riotous Manner, and for this their Liberties were seized. *Cro. Car. 183. Mayor and Commonalty of London's Case.*

3. Information brought before the Judges of Assise at *Oxford*, against a Taylor, for taking an unreasonable Sum of Money with an Apprentice; after a Judgment for the Prosecutor, a Writ of Error was brought, and the Error assigned was, that it did not appear by which of their Commissions the Justices of Assise did determine this Offence; for they have not Power by all their Commissions to determine Offences of this Nature; and if they had such Power, as they are Justices of *Oyer and Terminer*, this should have appeared in the Information; besides, in this Case there was a Fault in the Entering the Judgment, for it is not said, *It was considered by the Court*, but only that *it was considered*, for which Cause the Judgment was reversed. *Style 430. Richardson's Case.*

Vent. 49.

4. Information against *Paris* and others, for a Cheat, in obtaining a Judgment of a Woman, who was afterwards married to *Mr. Lee*, upon which his Lands were extended: The Case upon the Evidence at the Trial was thus: *ff.* The Defendant being a Shop-keeper in *London*, and acquainted with this young Woman (who was well born, but had little or no Portion) undertook to provide a Husband for her, and for that Purpose he told *Mr. Lee*, that she had 4000 *l.* Portion; and likewise told her that *Mr. Lee* had a better Estate than in Truth he had; and on the Day before Marriage the Defendant got her to a Tavern, where he told her it might be necessary for her to seal some Writings, for her better Provision, in Case *Mr. Lee* should be unkind when he should find that she had no Portion; and thereupon he gave her 100 *l.* and took a Judgment, with a Release of Errors for a greater Sum, and all this was done in the Presence of Witnesses; but soon after he went into the next Room with her, and took the 100 *l.* from her; and upon the Evidence of all this Matter, but chiefly of the Woman herself, the Defendant was found guilty, and fined and committed, and the Judgment was set aside. *Sid. 431. The King versus Paris.*

5. Information for a Libel in Writing a Book, which he entituled, *A Paraphrase upon the New Testament*, in which the Crime laid to his Charge was, that he intending to bring the Protestant Religion into Contempt, and also the Bishops, (*Innuendo* the Bishops of *England*) did publish the Libel, in which was contained such Words, &c. The Defendant was convicted; and it being insisted in Arrest of Judgment, that the *Innuendo* would not support this Charge, it was over-ruled, for by the Word *Bishops* no other could be intended, but the *English Bishops*; he was fined 500 *l.* and ordered to give Security for his Good Behaviour for seven Years. *3 Mod. 69. Mr. Baxter's Case.*

6. Information against the Defendant, upon the Statute 2 *Ed. 3.* for going armed in Affray of the Peace, setting forth, that the Defendant did walk about the Streets in *Bristol* armed with a Gun, and that he went to *St. Michael's Church* in Time of Divine Service, with a Gun, to terrify the King's Subjects *contra formam Statuti*; the Punishment is a Forfeiture of the Armour and Imprisonment. *3 Mod. 117. Sir John Knight's Case.*

7. Information in the Crown-Office against seventy poor Men, setting forth, that *Mr. Prynn* was Lord of the Manor of *H.* and that the Defendants did meet together in a riotous Manner, and pulled down certain Fences, &c. one of the Defendants demurred to this Information, and it was argued for him, that an Information would not lie for this Riot, but a * *Presentment or Indictment* in the County where the Fact was committed; that Informations began in the Reign of *H. 7.* when *Empson* and *Dudley* procured an † Act of Parliament to enable Justices of the Peace, upon Informations for the King, to hear and determine all Contempts and Offences, except for Treason, Murder and Felony; but *Anno 1 H. 8. cap. 6.* this Act was repealed, as being oppressive to the Subject, and *Empson* and *Dudley* were hanged: By the Petition of Right, *Anno 3 Car. 1.* no Man is to be tried but by *legal Process*; but that Parliament being dissolved, and none called again in thirteen Years, in that long Interval Informations came in again, and the first was 5 *Car. 1.* against my Lord *Hollis* and *Elliot*, and others, in the Court of Star-Chamber, and many other were prosecuted

* 1 And. 156.

† 4 Inst. 41. † 11 H. 7. cap. 3. in Rastal's Statutes.

cuted in that Court; which being a Grievance, as soon as a new Parliament was called, *Anno* 1640, that Court was abolished, and the Parliament enacted, that no Court of that Nature should ever again be set up in *England*; there were no more Informations in all that Reign; but when *Car. 2. was restored*, then Informations began to revive, and were afterwards as oppressive as they had been in former Reigns; as for Instance, upon an Information against *Sir Sam. Bernardiston*, for Writing only a merry Letter to a Friend he was fined 10000*l.* and so was another for drinking to the pious Memory of *Stephen Colledge*; and there are other Hardships in Informations; for if the Defendant come into Court upon his Recognisance, he must plead *insolvent*, and if he is acquitted, he shall have no Costs against the King; to which it was answered, that there are Precedents of Informations as antient as Indictments; that the Crime of *Empson and Dudley* was for compounding and not for exhibiting Informations; that the Statute for enabling Justices of Peace to take Informations, except for *Life or Limb*, implies, that they did lie in other Cases; that the Reason why the Court of Star-Chamber was taken away, was, because there was nothing punishable there, but what might be done in the King's Court at Common Law; true it is, that an Information was exhibited against the Lord *Hollis* and others, for Assaulting the Speaker in his Chair, and for speaking seditious Words in the House of Commons; and that there was a Judgment against him, which was reversed, not because the Prosecution was upon an Information, but because *B. R.* had intermeddled in Parliamentary Affairs; there were many Informations in *B. R.* in the Lord Chief Justice *Hale's* Time, who never complained that they were illegal, but of the Abuse of them; 'tis true, the old Statutes do enact, that Proceedings shall be by *Presentment* or Indictment; but an Information by the Attorney General is no more than a *Presentment*; adjudged, that Informations were at Common Law, and that a Crime committed at *York* cannot be punished in *B. R.* by Indictment, because it cannot be removed out of the proper County, therefore it must be punishable here by Information. 5 *Mod.* 459. *Mr. Pryn's Case*.

8. Information against the Defendant for refusing to take upon him the Office of Sheriff of *Norwich*: The Defendant pleaded the Statute 13 *Car. 2. cap. 1.* that he had not qualified himself by Taking the Sacrament, according to the Usage of the Church of *England*, within a Year after his Election; the Attorney General replied, that he ought to have done it by Law; the Defendant rejoined, and set forth the Act of Toleration, and that he was a Protestant Dissenter and exempted by that Statute; and upon Demurrer to this Rejoinder, it was adjudged, that this was a Departure from the Plea, for it should have been pleaded at first; that *B. R.* cannot take Notice of the Toleration-Act, unless pleaded, because 'tis a private Statute; that by the Statutes of *Ed. 6.* and *Q. Eliz.* all Persons are bound to observe the Discipline of the Church which hath been established Time out of Mind; and that the Law took no Notice of Dissenters till this Act of Toleration; besides, it doth not extend to all Dissenters, but only to such as take and subscribe the Declaration at Quarter-Sessions; that the Design of the Statute 13 *Car. 2.* was not to exempt a Man from serving in an Office to which he was obliged before, but to qualify him to execute it; that the King hath an Interest in every Subject, and a Right to his Service, and he cannot be exempt from the Office of a Sheriff, but by Act of Parliament or Letters Patents; and lastly, no Man shall take Advantage of his own * Disability, where 'tis in his Power to remove it. 1 *Salk.* *King versus Larwood.* See *Moor* 111. 9 *Rep.* 46. *Sav.* 43. 2 *Vent.* 247. 4 *Mod.* 269.

* See Sir John Read's Case.

9. Motion to file an Information in the Nature of a *Quo Warranto*, against the Mayor and Aldermen of *Hertford*, to shew by what Authority they admitted Foreigners to be Freemen of their Corporation, which was an Encroachment upon the Freemen; this being a Question of Right, and no other Way to try it, an Information was granted, in which the first Process is a *Subpœna* and then a *Distringas*; and Process being moved accordingly, the Court was moved to set it aside, because no Recognisance was given, (*viz.*) By the Statute 4 & 5 *Will. 3. cap. 18.* 'tis enacted, that the Clerk of the Crown-Office shall not, without express Order in open Court, receive or file any Information for *Trespasses, Batteries, and other Misdemeanors, or issue any Process thereon, before he shall have taken a Recognisance from the Informer, in the Penalty of 10*l.* to the Person prosecuted, with the Place of his Abode, Title, or Profession, to prosecute with Effect, &c.* now it was insisted, that by *Trespasses, Batteries and other Misdemeanors*, the Statute did intend frivolous Wrangling about Matters of an inferior Nature, and not Informations to try a Right; but adjudged, that the Usurpation to admit Foreigners was a Misdemeanor, and the Information might be as vexatious as in *Trespasses* or *Batteries*; that this is a remedial Law, and shall be construed accordingly; so the Process was set aside, but the Information stood. 1 *Salk.* 376. *The King versus Mayor of Hertford.*

Informers.

(A)

Of common Informers.

1. **K**NEVETT exhibited an Information against the *London Butchers*, upon a Penal Statute, and at the Trial the Verdict was found against him; whereupon the Defendants severally moved for their Costs; upon the Statute 18 *Eliz. cap. 5.* it was insisted for him, that the Act was made against common Informers, which he was not, because this was the first Information that ever he was concerned in, and the Statute was made to redress Disorders in common Informers, as appears by the Preamble: *Sed per Curiam*, tho' the Preamble mentions common Informers, yet the Body of the Act is against every Informer upon a Penal Law; and where any Statute gives an Action to him who will sue the Person, in such Case Suing shall be reputed a common Informer; but where a Moiety, or any Part is given to the Party grieved, he shall not be taken to be a common Informer; and in this Case *Knevett* paid Costs. 1 *And. 116. Knevett's Case.*

2. Information upon the Statute 21 *H. 8. cap. 13.* against two Parsons, (*viz.*) against one for Non-residence, and against the other for Taking a Farm; one of them pleaded Sickness, and that by Advice of Physicians he removed into a better Air; the other pleaded, that he took the Farm for the Maintenance of himself and Family; these were both good Pleas, and the Informer not Proceeding, but having brought this Information only for Vexation, and to make the Defendants compound with him, they exhibited another Information against him upon the Statute 18 *Eliz. cap. 5.* and moved the Court, that because the Informer was a mean Person, he might give Bail to answer the Costs, but it was denied. 2 *Bulst. 18. Martin's Case.*

Innuendo.

(A)

1. **C**ASE, &c. for slandering the Plaintiff's Title, in which he declared, that he was seized of the Manor of *Upton Grey*, and that the Defendant said, he (the Plaintiff) had no Title to *Upton*, innuendo *Upton Grey*; after a Verdict for the Plaintiff, it was objected, that Words spoken of *Upton* generally, can never be intended to be spoken of *Upton Grey*, and cannot be helped by the *Innuendo*; but adjudged, that it shall explain what *Upton* was meant. *Cro. Eliz. 419. Marein versus Maynard.*

2. The Plaintiff declared, that he was produced as a Witness in such a Cause, and that the Defendant said, that he was disproved at the Assises, by the Oath of *Mr. K.* *Innuendo*, that he was disproved in his Oath taken at the Assises; Judgment for the Defendant, because the *Innuendo* will not supply such a Suggestion. *Moor 407. Brown versus Brinckley.*

Inns and Inn-keepers.

(A)

1. **B**Y the Statute 4 & 5 Will. 3. cap. 13. Par. 18. 'tis enacted, that Constables, Tything-men, &c. and other Chief Magistrates, may quarter and billet Officers and Soldiers in Inns, Livery Stables, Ale-Houses, Victualling-Houses, Houses selling Brandy, Strong-Waters, Cyder and Metheglin by Retail, to be drunk in their Houses, but in no private Houses. An Action of Trespass was brought against the Defendant, being a Constable, for quartering a Dragoon upon the Plaintiff; and upon Not guilty pleaded, a Special Verdict was found, that the Plaintiff kept a House at Epsom, and let Lodgings to such Persons who came thither for the Air and drinking the Waters; that he dressed Meat for his Lodgers at 4 d. the Joint, and sold them small Beer at 2 d. per Mugg, and also found them Stable-room and Hay for their Horses, at such a Rate; and that the Defendant being a Constable quartered a Dragoon on him; the Question was, Whether this was an Inn, or not; those who argued for the Defendant, insisted, that it being a Common and Publick House, kept for Gain, 'tis within the equitable Construction of the Act; but adjudged, that it was not, because to quarter Soldiers upon a Man against his Will, is contrary to the Petition of Right, 3 Car. 1. and therefore this Statute shall not be extended to Equity; 'tis not within the Words of the Statute, for 'tis not an Inn, because there Men are entertained at Access, but here upon a Contract; and an Inn-keeper is indictable if he refuse a Guest, but the Plaintiff is not, if he refuse a Lodger; 'tis not a Livery Palm-Stable, for there is Accomodation for Horses only, but here for Horse and the Owner; 'tis not an Ale-house, for they sell to all publickly, &c. 1 Salk. 389. *Parkhurst versus Foster.*

2. Replevin for a Horse; the Defendant avowed, and justified the Taking, for that he kept an Inn, and the Plaintiff being a Traveller, left his Horse there, and it was kept so long, till the Keeping came to so much, and that he detained the Horse till Payment, &c. and upon Demurrer to this Plea, it was adjudged, that since Inn-keepers are bound to receive Guests, they might detain their Goods till Payment; that the Plaintiff was a Guest, by leaving his Horse there, tho' he never came himself, (which Holt Chief Justice doubted) because the Horse must be fed, by which the Inn-keeper hath Gain; but if it had been a Trunk, it had been otherwise. 1 Salk. 2 Cro. 388. *Yorke versus Grindstone*

Moor 471.
Poph. 178.
188.
Noy 46.
Latch 126.

Inquest of Office.

(A)

1. **O**NE who was seised of an Advowson in Gross, which he held in Chief of the Crown, aliened the same by Fine, without License of the Queen, the Church became void, and the Conusee presented; the Queen, without any Office found, brought a *Quare Impedit* against the Bishop of London and the Presentee; adjudged, that this Alienation being by Matter of Record, a *Scire facias* will lie before Office found; but if it had been by Deed only, without a Fine, then without Office found of the Alienation, the Queen could not be entitled to the Presentation, because an Alienation by Deed is only Matter in fact, upon which a *Scire facias* will not lie. *Trin. 30 Eliz. The Queen versus Bishop of London and Scott.* 3 Leon. 195.

2. Covenant to stand seised to Uses; Proviso, that if the Covenantor by himself, or any other, during his natural Life, tender a Gold Ring to the Covenantee, to the Intent to make the Uses void, that then they shall be void; the Covenantor was afterwards attainted of Treason, and outlawed upon it; the Queen made a Lease of the Lands for forty Years, the Attainder was confirmed by Act of Parliament, and enacted, that the same shall not extend to make any Lease void made by the Queen after the Treason; the Queen reciting the Proviso, and the Benefit thereof given to her by the Statute, authorised W. R. to make the Tender, &c. who did according to the Proviso, and the Covenantor refused to accept the Ring; this being certified into the

Ex-

Exchequer, it was adjudged, that the Tender and Certificate was good *without Office found*, and if the Party is grieved thereby, he may traverse it; for the Inquest of Office is only a Record to satisfy the Queen of her Title. 7 Rep. *Englefield's Case*. Tender. (A) 10. S. C.

3. The King made a Lease for Years, rendring Rent; provided, that if it be behind, and not paid on the Days on which 'tis limited to be paid, that the Lease shall cease; adjudged, that upon Default of Payment this Lease is determined without any Office found. Trin. 36 Eliz. Poph. 53. *Finch versus Rosely*.

4. Adjudged, that where an Office is found against the King, and a *Melius Inquirendum* is awarded, and upon that *Melius*, &c. 'tis found for the King, tho' the Writ may be void for Repugnancy, or otherwise, yet a new *Melius Inquirendum* shall be awarded; but if upon the first *Melius* it had been found against the King, in such Case he could not have a New *Melius*, &c. for then there would be no End of such Writs; and if an Office be found for the King, the Party grieved may traverse it, and if the Traverse is found against him, there is an End of that Cause, and if found for him, it shall conclude the King; but after Office found against the King, no *Melius Inquirendum* shall be awarded, without View of some Record, or other pregnant Matter in his Behalf; and this is for avoiding the Vexation of the Subject. 8 Rep. 169. *Paris Stoughton's Case*. 8 Jac. Lea 26. *Gardner's Case*. S. P.

5. It was found by Inquisition, that *Rushton* was possessed of Lands for a Term *quorundum Annorum*; this was held void for the Incertainty, and that the particular Term it self ought to be found. 2 Leon. 147. *Rushton's Case*.

6. An Office was found by Virtue of a *Mandamus* before the Escheator of L. in the County of C. after the Death of W. R. that he died seised of certain Wood-lands, *sed de quo vel de quibus, vel per quæ servitia, &c. ignorant*; afterwards a *Melius Inquirendum* was awarded, reciting the Time and Place where the former Inquest was taken, and the *Ignoramus* of the Tenure, but omitted to say *coram Escheatore*, and then the Writ proceeded, that the Lands, or some of them, were held *by Knights Service or Chief*, or otherwise: *Ideo tibi præcipimus* to inquire, whether the said Lands, or any of them, be so holden, &c. It was objected against this Writ, that it was naught, because *coram Escheatore* was left out, and because where there was an *Ignoramus* of the Tenure in the former Inquest; it ought to be left at Large in the *Melius Inquirendum*, and not be restrained to the King's Tenure; as to the first Objection, it was held, the Writ was good, tho' *coram Escheatore* was omitted; for it recites the *Mandamus, virtute ejus* the Inquest was taken at such a Place, which must be before the Escheator; but it was held to be ill for the Objection, for the Tenure ought not to be restrained in the Writ, but left at Large. Trin. 12 Jac. Hob. 73. *Curtice's Case*.

7. Upon the like Inquisition, after the Death of *Edward, Earl of Rutland*, it was found, that he was seised in Fee of and in the Reversion or Remainder of the Manor of *Eckering*, &c. and this was held void, because it was so *incertain*, that no Man could tell which to traverse, either the Reversion or Remainder. Moor 723. *Earl of Rutland's Case*.

8. There is no such Nicety required in an Inquisition, as in Pleading; because an Inquisition is only to inform the Court, how, and in what Manner Process shall issue for the King, whose Title accrews by the Attainder, and not by the Inquisition; and yet in the Cases both of the King and a common Person, Inquisitions have been held void for the Incertainty; as for Instance, upon an Inquisition after a *diem clausit extremum*, it was found, that King Ed. 2. granted the Manor of *Skipton in Craven* to the Lord *Clifford*, and the Heirs of his Body, and the Reversion being in the King, the Jury found, that King H. 6. by a *sufficient Conveyance*, granted it to another; it was objected, that this Inquisition was void for the Incertainty; because neither the Quality of the Conveyance was found, nor the Time or Place where it was made; the Court doubted, whether this Objection should be allowed in the Case of the King, because it would be mischievous, he should be devided of an Inheritance by such an incertain Office, for it could not be traversed; but they held it a proper Objection, if it had been in the Case of a Common Person. Lane 39. *Earl of Cumberland's Case*.

9. Upon the like Inquisition, it was found, that one *Golfey* at the Time of his Death was seised in Fee of a Messuage and Lands, situate *in vel prope Dorchester*; this was adjudged void for the Incertainty, and not to be helped by a *Melius Inquirendum*, because the Words *in vel prope* are so very incertain, that neither the County or Town can be intended out of which the Visue should come, if the Fact should be traversed. Ley 24.

10. Upon the like Inquisition, it was found, that one *Barber* died seised in Fee *de duobus messuagiis sive Tenementis* in W. and of forty Acres of Meadow, in the Tenure of R. C. but did not say, in what Parish, Town or County; for which Reason, and also because of the Word *Tenementum*, which is *nomen collectivum*, this was held void for Incertainty. Ley 43. *Barber's Case*. 13 Rep. S. C.

11. Upon the like Inquisition, it was found, that *Isabell Fortescue* had no Lands but those in a Schedule to the Inquisition annexed, in which Schedule several Lands were named; but that the Jury did not find, that she died seised of them; and this was held void for the Incertainty. Lane 91. *Isabel Fortescue's Case*.

12. In the same Book it was found by Inquisition, that *Sir Thomas Gresham* was seised of *diverse* Messuages in London; and upon Demurrer, this was held void; because the Word *Diverse* is so general, that it cannot particularly be answered. Lane 100.

13. Inquisition taken upon an Outlary found, that the Person outlawed was seised in Fee of a Messuage, and of several *Pieces and Parcels of Lands* in *H.* in the Occupation of *T. H.* and found the Value, and that he was also seised in Fee of *two Murples* in *S.* by particular Names, and their Value, and in whose Occupation: *Corey* and others appeared as Tertenants, and demurred; and it was objected, that this Inquisition was incertain, because 'tis not found how much of these Pieces was Arable, and how much Pasture; as in *Replevin pro centum ovibus, vervecibus & matricibus*, without shewing how many of each, is naught; and an Inquisition ought to be as * certain as a Declaration or Indictment. Then as to the *Murples*, 'tis not found *how many Acres*; neither is there any Tertenant found; for 'tis only in the Occupation of such; but adjudged well, because the several Values are found; it had been otherwise, if the Value of the Whole had been entirely found, and that the finding an Occupier is a good Tertenant. *Hudr. 59. Protector versus Corey.*

* 5 Rep.
120. B.
Plow.
Com. 204.

14. Inquisition taken upon an Outlary of one *Wythens* in Debt, at the Suit of of *Wm. Grove*; the Jury found, that at the Time of the Outlary and Inquisition, *Wythens* was seised in Fee of a Messuage, with the Apputenances, in *Grove*, in the Parish of *Wantage*, and of five Acres of arable Land, twenty Acres of Meadow, &c. in *Grove* aforesaid, now or late in the Occupation of *Edw. Dawson*, of the clear yearly Value of 30 *l.* &c. about two Years after *Richard Buckridge* came in as Tertenant of a Messuage, &c. and of a Parcel of Ground called *Bull-Acre*, and of a Close called *But-close*, and of a Cottage or Tenement adjoining to *But-close*, containing an Acre and half, Part of the Premises, and pleads, that *Wythens* was indebted to him in 600 *l.* for which he brought an Action, and had Judgment by Default in *C. B.* at *Westminster* in the County of *Middlesex*; upon which he brought an *Elegit*, and the Sheriff returned an Inquisition by him taken at *Abington*, and delivered him a Moiety of a Messuage, and of *Bull-acre*, &c. to the Value of 10 *l.* and avers the Land which he set forth in his Plea, to be Parcel of the Lands set forth in the Inquisition, and prays, that the Protector's Hands may be amoved; to this Plea the Attorney General demurred, and *Buckridge* joined in Demurrer; it was objected, that the Plea was ill, because the Defendant had not shewed the Quantity or Quality of the Lands, but had only described them by particular Names; but adjudged, that was a sufficient Certainty, because it appeared to the Court, that the Lands in the Inquisition and in the Plea, are one and the same; 'tis true, an Ejectment *de uno messuagio five tenemento*, is ill; but this Plea *de uno Cottagio five tenemento* is not so, because the Defendant avers it to be Parcel of the Premises, &c. then it was objected against the Plea, that it doth not appear but that the Defendant might be satisfied of his Debt by Perception of the Profits; for which Reason he ought to aver, that he was not satisfied; but adjudged, that there needs no such Averment, because it appears on Record, that the Extent was on the 12th of *October* 1652, for 602 *l.* Debt and Costs; and that the Lands extended were of the yearly Value of 10 *l.* and that they had been in Extent but two Years at the Time of the Plea pleaded, which was in *Michaelmas-Term* 1654; so that it was impossible for the Debt to be satisfied by the Perception of the yearly Profits. *Hudr. 75. Attorney General versus Buckridge.*

15. Inquisition upon an Outlary found, that the Person outlawed was seised in Fee *de sex clausis prati & pastura*; it was objected, that it was void for Incertainty; but adjudged, that this is not an Office of Entituling, but of Information; and therefore a precise Certainty is not required in it. *Hudr. 191. Wilford versus Graves.*

16. Inquisition taken upon an Attainder in Treason, by which it was found, that the Person attainted was seised of Lands *infra manerium, Villam five parochiam de Catterick*; this was said to be void for the Incertainty. 2 *Lutw. 996. The King versus Hungerford.*

17. *Manlove* the Warden of the Fleet suffered many voluntary Escapes, which being found by Inquisition, the King granted the Office to *Layton*; but the Lord Chancellor refused to seal the Grant, because in his Opinion it ought to be quashed; for there are two Sorts of Inquisitions, one to inform the King, the other to vest an Interest in him; the one need not be certain, but the other must; now in this Inquisition 'tis not found what Estate *Manlove* had in this Office; which Defect cannot be supplied by a *Melius Inquirendum*; 'tis true, where an Inquisition finds some Parts well, and nothing as to others, that may be supplied by a *Melius Inquirendum*; but not where there is any Defect in the Points which are found. 2 *Salk. 469. Layton versus Manlove.*

Inquisition. See Coroner and felo de se.

Inrollment.

See *Bargain and Sale*. (A) per totum.

(A)

1. **B** Argain and Sale of Lands in Exchange was made by the Duke of *Somerset* to King *Ed. 6.* the Deed was brought into the Court of Augmentations, and there put into a Chest, but not enrolled; afterwards, *Anno 19 Eliz.* it was moved, whether it could not be then enrolled, and thereby the Lands vest in the Queen as Heir or Purchaser; adjudged, that it could not vest any Interest in the Queen; but about forty Years afterwards this was denied to be Law; it was in Ejectment for a Farm in *C.* The Case upon the Evidence was, that *W. R.* was seised in Fee, and about *29 H. 8.* this Land was supposed to be conveyed to him in Fee, for the Inlargement of the Honour of *Hampton*; but there was no Deed, or any Matter of Record, to prove this Conveyance; but it was proved, that the King enjoyed it as long as he lived, and that it had been likewise enjoyed under several Leases made by *Ed. 6.* and Queen *Eliz.* and that she granted it to the *Earl of Lincoln*, *Anno 16* of her Reign, and that the *Earl* enjoyed it under that Title for a long Time; it was proved, that *W. R.* brought the Deed by which he conveyed it to *H. 8.* into the Court of Augmentations, but it could not be found, neither was it enrolled; yet this was adjudged a sufficient Record to entitle the King. *Hill. 19 Eliz. Dyer 355. Pasch. 15 Jac. Hutt. 1. Combs versus Inwood.*

2. Tenant in Fee-simple entered into a Recognisance of 200 *l.* and then bargained and sold all his Lands; the Recognisance was forfeited, and then the Conusee brought a *Scire facias* against the Bargainee, and had Judgment to have Execution; afterwards the Deed was enrolled; adjudged, that the Bargainee was not a sufficient Tenant against whom the *Scire facias* was brought, because he had nothing in the Land till the Inrollment. *Owen 69. Mallory versus Jennings. Owen 149. Hob. 184. Dimmock's Case. contra 2 Cro. 408. S. C. Owen 149. S. C. See Cro. Car. 217.*

3. Bargain and Sale of Lands, and before the Deed was enrolled, the Bargainor made Livery and Seisin to the Bargainee, and afterwards the Deed was enrolled; adjudged, that the Livery prevents the Operation of the Enrollment; for 'tis the more worthy Ceremony in the Law to pass Estates, and therefore shall be preferred. *1 Leon. 5. Stonely versus Bracebridge.*

4. A Recognisance was acknowledged before a Master in Chancery, and the Cognisee died before it was enrolled; adjudged, that his Executors may enroll it. *Godbolt 141. Halon's Case.*

5. Bargain and Sale of Land by Deed dated 11 *June*, on the very next Day Common was granted to the Bargainee for all commonable Cattle; the Deed was enrolled three Days afterwards; this was adjudged a good Grant of the Common, and that the Inrollment shall have Relation to it. *Godb. 270. Ludlow versus Stacie.*

6. Tenant for Life, Remainder to his Sister for Life, of two Parts, Remainder to her in Tail of a Third Part, Remainder over; she by Deed bargained and sold all her Part, &c. to her Brother; in this Case, amongst other Things, it was adjudged, that where the Bargainee, after the Sealing and Delivery of the Deed, and before the Inrollment, makes a Lease of the Lands, and afterwards the Deed is enrolled within the six Months, yet the Lease is void, and the Relation of the Inrollment shall not make it good. *Cro. Car. 110. Iseham versus Morris.*

7. A Deed may be enrolled before the Justices of the Peace of the County, &c. Some Counties, as particularly *Yorkshire*, is divided into several *Ridings*, and the Justices of Peace act distinctly in their respective *Ridings*; yet if a Deed be enrolled before the Justices of the West or East-Riding, 'tis sufficient, if the Lands lie in that Riding where the Deed was acknowledged. *Hob. 128. Perkin versus Perkin.*

8. Bargain and Sale of Lands by Deed dated 27 *February*, &c. the Bargainee by another Deed, dated the very next Day, reciting the first Deed made to him, bargained and sold the same Lands to *B. G.* in Fee; afterwards 5 *May*, the first Deed was enrolled; and after that, (*viz.*) 6 *August*, the second Deed was enrolled: *Anderfon, Ch. Just.* and another Judge, held, that the Lands did not pass by this second Deed, because 'tis against a Rule in Law, for a Man to convey what he hath not; and here the Bargainee had nothing in the Land till the Deed was enrolled, and therefore could pass nothing; but the other three Judges held, that the Land was well conveyed; for when the first Deed was enrolled, it being between Privies, it shall have Relation to the Sealing and Delivery of the Deed. *2 Cro. 52. Bellingham versus Alsop.*

9. In Debt, &c. the Plaintiff declared, that *W. R.* was seised, and by Indenture bargained and sold the Lands in Fee; which said Indenture was afterwards within six Months, &c. enrolled in due Form, according to the Form of the Statute; and upon a Demurrer to this Declaration, it was adjudged ill; because the Plaintiff did not shew in what Court it was enrolled, that the Court may know, whether it was duly enrolled, and that the Party against whom 'tis pleaded might know in what Place to search for it. *Mich. 9 Jac. 2 Cro. 291. Warley versus Purley.*

10. Tenant in Fee-simple made a Lease for Years, and afterwards bargained and sold the Lands to the Lessee and his Heirs, but in this Deed there were not these Words *Give and Grant*; adjudged, that nothing passes by this Deed, unless it was enrolled, for then, and not before, the Freehold passes. *Moor* 34.

11. In Ejectment, the Plaintiff gave in Evidence a Deed of Bargain and Sale enrolled in Chancery, and exemplified under the Great Seal, and at the Bottom of the Exemplification there was a *Memorandum*, that this Deed was enrolled, but did not say when, and thereupon the Plaintiff gave several Circumstances in Evidence, to prove that it was enrolled within six Months; but the Counsel for the Defendant offered to demur upon this Evidence, for that the Time of the Enrolment is made Parcel of the Record by the Statute 27 *H. 8.* and therefore ought to be tried by the Record, and not by any other Matter given in Evidence to the Jury; for if the Time is omitted out of the Record, tho' in Truth the Inrolment was within six Months, yet the Bargain and Sale is void: *Sed per Curiam*, 'tis not void, and that before the Year 16 *Eliz.* at which the Office of Enrolment was established, they never inserted the Time of the Enrolment in the Record, but that it was usual so to do ever since. 2 *Roll. Rep.* 119. *Worsley* versus *Filesker*.

12. A Deed may be enrolled without the Examination of the Party himself, for 'tis sufficient if Oath is made of the Execution of the Deed; if the Party *dies* before 'tis enrolled, yet it may be enrolled afterwards; if Two are Parties, and the Deed is acknowledged by one, yet the other is bound; if a Man lives in *New York*, and would pass Lands in *England*, 'tis usual to join a nominal Person with him in the Deed, who acknowledges it here, and it binds. 1 *Salk.* 389. *Tailor* versus *Jones*. Godb. 270. 3 Leon. 84.

13. The Rule in *B. R.* is, that all Deeds shall be acknowledged on the Plea-Side, and in open Court. 1 *Salk.* 389. *Lady Anderson's Case*.

Institution.

(A)

1. **I**nstitution is the Act of the Bishop, which he doth by these Words, (*viz.*) *Instituo te Rectorem, &c.* and then the Clerk hath *Beneficium*, and may celebrate Divine Service, administer the Sacraments; and the Church is full against all Persons but the King; but he is not complete Parson till Induction.

2. If a Clerk is inducted to one Benefice with Cure, &c. of the yearly Value of 8*l.* and accepts of another of the like Value, and is *instituted* to it, and afterwards hath a Dispensation, and is then inducted, this Dispensation, tho' before the Induction, yet coming after the Institution, is too late, because the Church was then full against all Persons but the King. 4 *Rep.* 79. *Digby's Case*.

3. As to the Spirituality, (*viz.*) *Cura Animarum*, the Presentee is compleat Parson by the Institution made by the Bishop. 4 *Rep.* 79. in *Digby's Case*.

4. By Institution he hath *jus ad Rem*, but not *jus in Re*, and therefore if he doth any Act to charge the Glebe or Tithes before Induction, such Act is void. *Dyer* 221. *Plowd.* 528. *Hure* versus *Bickley*. *S. P.*

5. If the King hath a Title to present by Lapse, and his Clerk is instituted, and dies before he is inducted, he may present again. *Giles's Case* cited in *Holt's Case*. 10 *Rep.* 132. *Dyer* 348. in *Weston's Case*.

6. By Institution the Church is full as to the Spiritualities, (*viz.*) to celebrate Divine Service and to administer the Sacraments; and 'tis a good Plea against a common Person, but not against the King. 33 *H. 6.* 24. 4 *Rep.* 79, in *Digby's Case*. *Poph.* 133. *Morgan* and *Glover* versus *Ronne*.

7. The King was Patron of a Church, but one who had no Title presented to it upon the Death of the Incumbent, and his Clerk was admitted and instituted; afterwards *B. B.* presented to it, and his Clerk was likewise admitted and instituted, then *R.* got a Presentation from the King, and he was admitted and instituted; adjudged, that by the Institution of the Clerk who was first presented by him who had no Title, the Church was full against all Persons but the King, and by Consequence the Presentation of the Clerk of *B. B.* must be void, because of the *Super-Institution* of the Clerk, tho' his Patron had no Title. *Poph.* 133. *Morgan* and *Glover* versus *Ronne*. *Hob.* 301. *S. C.*

8. *Sir Timothy Hutton* presented his Clerk to the Bishop of *Chester*, who refused him, whereupon he complained to the Archbishop of *York*, who sent a Monition to the Bishop to receive the Clerk, or to appear before him, &c. who did neither; then the Archbishop instituted him here in *London*, and by his Warrant the Clerk was inducted; afterwards the King presented, and his Presentee sued in the Delegates, supposing the Institution by the Archbishop was void, and by

Consequence the Induction, for that the Institution was made in *London* to a Benefice in *Cheshire*; but a Prohibition was granted, because the Induction is a temporal Act and triable at Common Law, and not to be avoided but by a Suit in a *Quare Impedit*. *Hob. 15. Sir Timothy Hutton's Case.* Induction. (A) 2. *S. C.*

Intention.

Where Construction shall be made according to the <i>Intention</i> of the Parties, and where not. (A)	In Wills, as to the Limitation of the Estate. (B)
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(A)

Where Construction shall be made according to the Intention of the Parties, and where not. See *Ways*. (A) 3.

1. **T**HE Cognisor having an House in *London*, acknowledged a Statute to the Chamberlain, and afterwards he acknowledged another to *B. G.* before the Recorder and Mayor of the Staple; and the last Conusee having taken out Execution, the Successor of the Chamberlain likewise sued out Execution by *Elegit*, and having assigned their several Interests to several Persons; an Action was brought; and the Jury found, that the Cognisor entered into the last Statute *coram Recordatore Cistat' London & R. B. majore Stapule*, but do not say *secundum formam Statuti*, nor *per scriptum suum obligatorium*, all which is required by the Stat. 33 *H. 8.* but the second Resolution in *Fulwood's Case* is, that the Jury having found a Recognisance before the Mayor, &c. it shall be intended to be *secundum formam Statuti*, for otherwise they cannot take any Record. 4 *Rep. 65. Fulwood's Case.*

2. A Man being seised in Fee, made a Lease for Life, rendring Rent, &c. and afterwards in Consideration of 50 *l.* he demised and granted the Reversion to another for ninety-nine Years, rendring Rent; adjudged, this was a Bargain and Sale, because their Intent was to pass it as such, tho' there were not apt Words to make it so. 1 *Rep. 94. Fox's Case.*

3. Debt on a Recognisance taken in *London*, setting forth, that the Lord Mayor had used to take Recognisances by Custom, of all Persons except Infants, &c. and upon any Day except Sundays, &c. and that the Recognisance was taken before the Mayor, &c. it was objected, that the Plaintiff did not aver, that the Defendant was not an Infant, or that the Day on which it was taken was none of the Days excepted; but adjudged, it shall be so intended, if the contrary is not shewn by the Defendant. *Cro. Eliz. 118. Chamberlaine versus Thorp.*

4. In Replevin, the Defendant avowed for an Amerciament in a Court-Leet, and made Title under *B. O.* who was seised of the Hundred in Fee, in which there was a Leet, and that he died seised, and it descended to *W. O.* his Cousin and Heir, &c. and upon Demurrer it was objected to the Avowry, for that the Defendant had not shewn, that *B. O.* died without Issue; for if he had, it could not descend to *W. O.* as Cousin and Heir; but adjudged, that it shall be intended he died without Issue. *Cro. Eliz. 245. Porter versus Grey.*

5. The Plaintiff declared, that whereas the Defendant was indebted to him in 10 *l.* he promised to pay the Money, if he would forbear him but one Week, and averred, that he did forbear him one Week, but did not say *one Week following*; but adjudged upon a Writ of Error brought, that it shall be so intended. *Cro. Eliz. 272. Tracy versus Brown.*

6. *Assumpsit*, &c. in Consideration the Plaintiff would marry the Daughter of the Defendant, *super se Assumpsit*, and did not say, the Defendant *super se Assumpsit*; and this was objected against the Declaration in Arrest of Judgment, but adjudged, it must necessarily be intended, that the Defendant promised, because the Plaintiff *queritur versus B. G.* where he was named. *Cro. Eliz. 913. Law versus Sanders.*

7. Debt against an Executor upon a Bond of his Testator, the Defendant pleaded *Non est factum suum*; it was objected against this Plea, that the Relative *suum* must relate to the Defendant, and 'tis not mentioned in the Declaration, that it was *his Bond*, so the Plea must be ill; but adjudged, that *suum* shall refer to what may be reasonably intended to make the Plea good, and that is to the Testator. *Latch 125. Booker's Case.*

8. If a Feoffment be made of an House, and 'tis delivered there, without any other Circumstances, the same doth not amount to a Livery of Seisin; but if he doth any Act by which the In-

tent of the Feoffor appeareth, that the Feoffee shall have Livery, that shall amount to a Livery and Seisin. *Leon. 207. Mills versus Shomball.*

9. *Assumpsit, &c.* in Consideration the Plaintiff had sold and delivered one Hundred Couple of Newfoundland Fish to the Defendant, and for his proper Use, and had shipped them, and agreed to export them from *Bristol* to *St. Lucar* in *Spain*, and to import from thence the Value of the Fish to *London* or *Bristol*, according to the Custom of Merchants, the Defendant promised to pay him one Hundred and twenty Pounds upon the Arrival of the Ship, &c. and alledged, that he had exported the Fish to *St. Lucar*, and had imported Goods from thence to the Value of the Fish to *London*, according to the Custom of Merchants, &c. after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that here was no Consideration, because he alledged the Fish were delivered to the Use of the Defendant, but doth not say to whom; then he alledged, that he agreed to export them from *Bristol*, but doth not say with whom the Agreement was made, and probably it may be with a Stranger, which doth not bind the Defendant; then he alledged, that he imported Goods to the Value of the Fish to *London*, but did not shew to whom the Property of those Goods did belong; but all these Exceptions were disallowed; for as to the first it shall be intended, that the Fish were sold and delivered to the Defendant himself, and that the Plaintiff imported the Goods of the Defendant; for he alledged, that it was *secundum usum mercatorum*, which implies both; and lastly, it shall be intended, that the Agreement was made with the Defendant; and if it had been made with a Stranger, to the Use of the Defendant, it had been the same Thing. *Cro. Eliz. 229. Hopkins versus Staples.*

10. Lease for Years, to commence the Day after Lady-day, *habendum from the Feast of the Annunciation*, by Virtue whereof he entered and enjoyed, &c. from the Annunciation; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration was not good, because the Defendant could not enter by Virtue of the Lease therein set forth, for that was to commence the Day after Lady-day, by which the Day it self was excluded, and the Entry and Possession was laid from Lady-day, so that must be before the Commencement of the Lease, and then the Defendant is a Disseisor; but adjudged, that he shall be intended to have the Possession by Agreement before the Lease. *Cro. Eliz. 905. Waller versus Campion.*

11. Devise to the Master and Wardens of the Mystery of Cordwainers, &c. and they were incorporated by the Name of Master, Wardens and Commonalty; adjudged, that the Devise was good, for it shall be intended, that the Testator had no Counsel to advise him; and they being usually known by that Name, it shall be farther intended, that he meant that Corporation and no other. *Cro. Eliz. 106. Foster versus Walter. Antea Misnolmer. (E) 6. S. C.*

12. Debt upon Bond against Husband and Wife, as Executrix of the Last Will of *W. R. &c.* of *London, Taylor*; the Defendants pleaded in Bar a Recovery against them in *B. R.* as Executrix of the Last Will of *W. R. &c.* of *London, Barber-Chirurgeon*, and did not aver, that the said *W. R. Taylor*, and *W. R. Barber-Chirurgeon*, were one and the same Person; and upon Demurrer to this Plea it was insisted for the Defendant, that if a Plea in Bar is good to a Common Intent, that is sufficient; and here it shall be intended, that they were the same Person; but adjudged, that the Plea was ill, for they shall not be intended the same Person, but rather the contrary; for common Intent is where one Thing or Person may be more strongly intended than another, and can never be intended, that a Barber and a Taylor can be the same Person, because their Trades are different. *Mich. 39 Eliz. Goldsb. 111.*

13. Debt upon a Retainer in such a Place, to embroider a Gown; it was objected against the Declaration, that the Plaintiff did not shew where he embroidered it; but adjudged, that it shall be intended where the Retainer was. *Cro. Eliz. 880.*

14. A Grant of a Rectory *una cum* the Glebe Lands and Tithes of *W.* 'tis true, the Tithe alone will not pass without a Deed, but it passeth by the Livery of the Rectory, and in such Manner, that tho' the Deed mentions the Tithes to pass, yet if Livery is not given by which the Lands pass, the Tithes will not pass by the Deed, because it was not the Intention of the Grantor, that the Lands and Tithes should pass severally, but the one *una cum* the other (*i. e.*) both together. *2 Brownl. 201. Knowles versus Mason.*

15. Covenant to repair a Mill *cum omnibus appertinentiis*, the Breach assigned was, in not repairing the Mill-Pool, but did not set forth where that Pool was; and this being objected in Arrest of Judgment, the Objection was disallowed, for he had set forth where the Mill was, and it shall be intended, that the Pool was there. *2 Roll. Rep. 144. Presley versus Humphries.*

16. Debt on a Bond, conditioned, that his Wife should make a Will, &c. the Defendant pleaded, that his Wife did not make a Will; the Jury found, that she made a Will, and that she was a Feme Covert at the Time of making it; adjudged, that tho' 'tis not properly a Will, she being a Feme Covert, yet 'tis a Will within the Intent of the Condition, and good. *Cro. Car. 159. Mariott versus Kinsman. Antea Baron and Feme. (D) 4. S. C.*

17. Debt on an Award Bond of *R. and B.* so as they made it before such a Day, &c. and if they did not agree, then to stand to the Umpirage of *N.* upon *nullum arbitrium* pleaded, &c. the Plaintiff replied an Award made by the Umpire; and the Plaintiff having a Verdict, it was moved, that the Award-Bond was uncertain, for it was, that if the Arbitrators did not agree, and did not set forth what they should agree on, but it shall be intended, that if they do not agree to make their Award, &c. *Cro. Cur. 163. Taverner versus Skingle.*

18. A Feoffment was made with Warranty, and in the Deed the Feoffor mentions *B. G.* to be his Son and Heir apparent; afterwards he makes a Feoffment to another, and an Ijectment being brought by the last Feoffee against *B. G.* as Heir of the Feoffor, upon whom the Warranty descended, the Jury found the said *B. G.* to be *unius filius* of the Feoffor by *E.* his Wife, but did not find that he was *his Heir*, and the Court would not intend it, for he may have other Sons by another Wife. *Cro. Car.* 391. *Gimlett versus Sands.*

19. A Fine was levied to the Conusor and his Wife for Life, then to the Use of the *Heirs Males of his Body*, and afterwards to the Use of the Plaintiff, who brought an Action of Waste against the Wife after the Death of the Cognisor, *ad exhereditatem* of him the said Plaintiff; and upon no Waste pleaded he had a Verdict and Judgment, upon which Error was brought; and the Error assigned was, that he had not well entitled himself to the Reversion, because he did not set forth, that the Cognisor was dead *without Issue Male of his Body*; but he having alledged, that the Wife entered and was seised for Life, Remainder to him, and that she committed Waste *in exhereditatem* of the Plaintiff, and the Jury having found it so, it shall be intended, that the Cognisor died *without Issue Male*, for it could not be to his Dis-inherison, if he had *Issue living*. *Cro. Car.* 277, 291. *Stonehouse Mil' versus Corbet Mil'.*

20. Writ of Error to reverse a Fine levied by Tenant in Tail; it was objected, that 'tis not alledged that the Cognisor was Tenant in Tail *at the Time* when the Fine was levied; but adjudged, that where *Seisin* of an Inheritance is once alledged, it shall be *intended* to continue till the contrary is shewed. *Jones* 181, 182.

21. Debt upon Bond dated in the Year 1648, before King *Charles* was beheaded; the Condition was, to pay so much Money for six Horses *when the King shall be restored to his Crown in Peace*; the Defendant pleaded, that King *Charles* the First was *never restored to his Crown in Peace*; and upon Demurrer to this Plea, two Judges were of Opinion that it was good, for Conditions of Bonds shall be taken according to the Intention of the Parties, and here they plainly intended King *Charles the First*; one Judge doubted, and the other held the Pleas ill, so the Plaintiff had no Judgment. *Sid.* 314. *Grinshall versus Archer.*

22. Covenant, &c. the Case was, that *T. A.* being seised in Fee of a Piece of Ground in *Westminster*, let it upon a Building Lease, and paying 100 *l. per Ann.* Rent, and afterwards granted the Reversion to *Sir Philip Meadows and his Heirs*; that *Sir Philip*, by *Lease and Release*, conveyed the Reversion to the Plaintiff and his Heirs; and upon Demurrer to this Declaration, it was objected, that the Plaintiff did not alledge, that *Sir Philip Meadows* was seised of the *Reversion at the Time of the Release executed*; but adjudged, that the *Reversion shall be intended* to continue in him, it being an Estate in Fee. 1 *Lutw. Rep.* 351. *Lamplugh versus Shiers.*

23. In Trespass, &c. for Taking three Bushels of Barley on the 16th Day of *November*, &c. The Defendant justified for *Toll in Wallingford Market*, of all Foreigners, &c. then sets forth, that *John Ferrars*, a Foreigner, brought five Quarters of Barley to *Wallingford*, to be sold there; and that he sold it to the Plaintiff *Kirby* (but did not say *there*) &c. and upon Demurrer it was objected, that there was no *Place* alledged where the Barley was sold; but adjudged, that the Defendant having alledged that the Barley was brought to *W.* to be sold *there*, and having justified the Taking the Toll on the 16th Day of *November*, it shall be intended that it was sold on that Day, and at that *Place*. 2 *Lutw. Rep.* 1498. *Kerby versus Whichelow.*

(B)

In Wills, as to the Limitation of the Estate. See *Exposition of Wills.* (A) per totum.

1. **T**HE Husband being seised in Fee, devised his Lands to his Wife for Life, Remainder to *T. P.* and the *Heirs Males of his Body*, and if he die without *Heirs of his Body*, (omitting the Word *Males*) Remainder over to another in Fee; adjudged, that this Condition did not alter the Estate-tail limited in the precedent Clause, because the Intention of the Testator did plainly appear, that *T. P.* should have an Estate-tail Male. *Mich.* 2 *Eliz.* *Dyer* 171.

2. A Woman had *one Son* by one Husband, and after his Death she married again and had another Son, and then her Husband devised his Lands to the Wife for Life, Remainder to *her next of Kin*; adjudged, that the youngest Son shall have the Lands, for it being incertain by these Words which Son shall have, they being equally of Kin to their Mother, it shall be construed that the Intention of the Testator was, that his own Son should have the Lands, and not that Son which his Wife had by her first Husband. See *Dyer* 333.

3. In all Conveyances, except *Last Wills*, the Law requires apt Words to pass away Estates, but in Wills the Intention of the Testator is sufficient; but that Intention must consist with the Law, and be collected out of his Words, as a Devise of *Years* to *W. R.* and *his Heirs*; adjudged, that he shall have the whole Term, for tho' he cannot take by the Word *Heirs*, according to the legal Construction thereof, yet it plainly appears that the Testator intended he should have what Estate he himself had in the Term, therefore the Whole shall pass. 2 *And.* 17.

4. The Testator being seised in Fee of several Manors and Lands, made a Feoffment thereof to the Use of himself for Life, Remainder to his *right Heirs*; and after the Statute of Wills, 32 *H.* 8.

he devised *All his said Manors and Lands* to his Wife for Life ; but that if he could not devise *all his Lands*, by Reason of the Statute, then he devised so much thereof to his Wife as he could by Law devise ; and that his Feoffees should stand seised of the said Manors and Lands after the Death of his Wife, to the Use of *M. M.* and others, *for Years, for the Payment of his Debts, and to raise Portions for his Daughters* ; and if the Law would not allow, that *M. M.* and others, should have *Interest*, then he devised, that his Son should have *all his said Manors and Lands*, and should pay his Debts, and raise so much Money for his Daughters Portions ; the Question was, whether this Devise to the Son in the later Part of the Will had not destroyed the Devise to *M. M.* adjudged, that the Will was good for two Parts in three, both to the Wife and *M. M.* and that by the Intent of the Will, the Son was to pay as much Money as *M. M.* was to have paid ; for it was not made in Favour of the Son, but it must be construed according to the Intention of the Testator. *Mich. 15 Eliz. 3 Leon. 28. Sir Peter Philpott's Case.*

5. 'Tis usual to transpose Words to make the Sentence agree with the Intention of the Testator ; as where he intended to devise his Lands to the *Heirs of W. R.* and instead thereof the Clerk writes to *W. R. and his Heirs*, this may be helped by an *Averment*, because the *Intent* of the Testator appeared to be so by the very Words of the Will, tho' something more was wrote than he intended ; but if the Devise is to the *Heirs of W. R.* and the Testator intended to give it to *W. R.* and his Heirs, there an *Averment* will not carry an Estate to *W. R.* because it cannot be collected out of the Words, that the Testator intended any Thing for him ; so that an *Averment* may be allowed to take away a Surplusage, but never to add to a defective Will ; therefore, where the *Intention* of the Testator cannot be collected out of the very Words of his Will, 'tis void ; as if he devised his Lands *to the Heirs Males of any of his Sons, or to his next of Kin* ; *Per Anderson in Godb. 131. and per Rolle in Style 240.*

6. Debt upon Articles of Agreement, reciting several Articles, &c. and for the due Performance of all the Agreements, *We bind our selves* (but did not say to whom) *in 200 l. to be forfeited upon due Proof of any Part of these Articles of either Side* ; the Action was brought for the 200 *l.* and the Breach assigned ; and upon a Demurrer to the Declaration, it was objected, that an Action of Debt would not lie upon these insensible Articles ; but adjudged, that it shall be *intended* the Parties were capable to oblige themselves, had done it accordingly, and under a Penalty to perform their mutual Agreements ; so that tho' the Articles are senseless, yet they shall be construed according to the Intent of the Parties to support the Deed. *1 Lutw. 436. Watts versus Pitt. Postea Proof. (A) 12. S. C. 3 Lev. 21. S. P.*

Interest. See Authority.

Interest. See Principal.

Interrogatories. See Ejectment.

Inventory.

(A)

1. **A**N Inventory is a true Description of the Goods and Chattels in Writing, together with the true Value thereof to be appraised by two indifferent Persons ; and this is required by the Statute 21 *H. 8. cap. 5.* by which 'tis enacted, *That the Executor or Administrator shall call to his Assistance, either two Creditors, or two of the next of Kin, or two Neighbours or Friends of the Deceased, and in their Presence to cause a true Inventory to be made of the Goods and Chattels, Wares and Merchandise, as well moveable as not moveable, and shall deliver the same on Oath unto the Ordinary, indented, of which one Part shall remain with him, and the other Part with the Executor or Administrator.*

2. The Intention of this Statute was for the Benefit of the Creditors and Legatees, that the Executor might not conceal any Part of the Personal Estate from them ; and as to the Valuation 'tis not conclusive, but the true Value as found by a Jury ; 'tis true, if they are undervalued the Creditors may take them as appraised ; and if overvalued, it shall not be prejudicial to the Executor.

3. Now tho' 'tis generally true, that all the Personal Estate of the deceased, of what Nature or Quality soever it be, ought to be put into the Inventory, and appraised ; yet the Goods to which the Husband is entitled, as Administrator to his Wife, are not, nor Goods given away
in

1 Roll.
Rep. 123.

in the Life-time of the Deceased, and actually in the Possession of the Person to whom they were given; as for Instance, an Administratrix exhibited an Inventory to the Ordinary, in which she put some Goods which the Intestate had given to a Younger Child, and which were then in his Possession; and he being sued in the Spiritual Court for those Deeds, he pleaded this Deed of Gift, and the Plea being rejected by that Court, he moved for a Prohibition, and had it. 3 Bulst. 355. *James versus James*. *Postea* Prohibition. (C) 2. S. C.

4. The Civil Law requires, that the Inventory be exhibited within three Months after the Death of the Person; but if 'tis done afterwards, 'tis good, for the Ordinary may dispense with the Time; and even, whether it shall be exhibited or not; as for Instance, *Thomas Boon* a Merchant in *Excester*, being possessed of a Personal Estate, the Value of 100,000 l. and upwards, which lay in several Places, and was put out upon several Securities, devised considerable Portions to his Daughters, and to *Christopher* his second Son, 2000 l. and no more, to be paid at three several Payments, and made *John* his eldest Son, Executor, and died; afterwards the said Executor proved the Will *per Testes*, and made Oath to bring in the Inventory as usual; but he not doing it at the Time appointed by the Judge of the Prerogative Court, his Brother *Christopher* cited him to bring in an Inventory; but the Judge did not think it necessary; because there were two Payments already made to *Christopher*; and his Brother *John*, the Executor, offered to pay the Third and Last; whereupon he appealed to the *Delegates*, where the Sentence of the Judge was confirmed; then he brought a *Commission of Review*, and insisted, that there might be another Will, and that he himself might be Executor in that Will, therefore an Inventory was necessary, for otherwise it might be prejudicial to him; besides, there might be Specialties taken in the Name of his Brother *John*, and no Trust declared; and that *John* might die Intestate, and then Administration *de bonis non*, &c. would of Right belong to *Christopher*; and lastly, that *John* is not only obliged by the Statute to exhibit an Inventory, but is sworn to do it; but adjudged, that not one of these Objections shall be presumed; and as for the Statute, it was made for the Benefit of Creditors as well as Legatees; and in this Case they were all paid by the Executor; so was *Christopher* too, or his Legacy tendered to be paid; and here were no Creditors complaining; therefore the Will being performed, and the Estate of the Testator consisting chiefly in Debts due to him upon Specialties, it might be prejudicial to those who owed the Money, to have their Debts discovered; especially where it was no Manner of Advantage so to do. *Raym.* 470. *Boon's Case*.

Joinder in Action.

Who shall join and be joined in Actions. (A)	Of Actions against two or more, jointly, and where one of them is acquitted or released. (C)
Who shall not join and be joined in Actions. (B)	Of joint and several Actions. (D)

(A)

Who shall join and be joined, and in what Actions. See postea (B) placito 8.

1. **T**WO were robbed of one joint Sum between them both, they may join in a Suit against the Hundred upon the Statute of *Winton*; but 'tis otherwise, if they were robbed of several Sums. *Pasch.* 22 *Eliz.* *Dyer* 370.

5 Leon.
194.

2. Two are Partners in Merchandise, one of them appoints a Factor; they may both have several Writs of Account against him, or they may join. *Mich.* 29 *Eliz.* *Godb.* 90. *Moor* 188. *Dawbeny versus Goor & al.* S. P.

3. Debt upon Bond, the Defendant pleaded a Release, which was in these Words, (*viz.*) the Obligee confesseth himself to be discharged of all Bonds, &c. and that he will deliver up all, except one, which is not yet forfeited, in which the Defendant, and two others, stand bound to the Plaintiff; and thereupon the Plaintiff in his Replication averred, that this was the Bond upon which the Action was brought; and upon Demurrer it was adjudged against him, because the Action was brought against the Defendant alone, when by the Plaintiff's own Confession, it appeared, that the Bond was made by him and two others, who ought to be joined in the Action. 9 *Rep.* 52. *Hickmot's Case*.

4. The

4. The Lessor being seised in Fee of one House, and being possessed of a Term for Years in another, made a Lease of both for ten Years, and the Lessee covenanted to repair, &c. afterwards he granted the Reversion in Fee to the Plaintiff, by one Deed, and the Reversion for Years by another Deed, and for not repairing, he brought an Action of Covenant against the Lessee; and upon Demurrer to the Declaration, the Plaintiff had Judgment; and upon Error brought, it was assigned for Error, that he having two Reversions, the one in Fee, and the other for Years, and that by several Deeds, he ought to have brought several Actions; but adjudged, that the Action was well brought. 2 Cro. 329. *Pyott versus Lady St. John*.

5. Two Lessees for Years, rendring Rent; one of them assigns his Interest to one of the Defendants, and the other made his Will, and appointed an Executor, and died; the Rent was behind after the Assignment made by one, and after the Death of the other Lessee, and an Action was brought against the Defendants in the *Debet & Detinet*; it was objected, that a joint Action would not lie against both, because the Contract was determined, and the Interest was divided; one by Assignment, and the other as Executor; but adjudged, that the Severance of the Land shall not make any Severance of the Action. 3 Bulst. 211. *Ipswich Bailiffs versus Martin and Parker*.

6. In Trespass, the Plaintiff declared, that the Defendant *simul cum B. G. clausum fregit*, &c. Upon Not guilty pleaded, it was found for the Plaintiff; but the Judgment was reversed upon a Writ of Error, because it appears upon the Plaintiff's own Shewing, that the Action ought to be brought against two; but if Trespass had been brought against one, who pleaded, that it was done by him, and by one *W. R.* whom the Plaintiff had released, and the Plaintiff traverseth the Release; in such Case, because the Matter doth not appear upon the Plaintiff's Shewing, but comes in on the Part of the Defendant, the Declaration is good. 1 Leon. 41. *Henly versus Broad*.

7. The Intestate, by a Bill under his Hand, did acknowledge, that he received 40*l.* to be between *A.* and *B.* and afterwards *A.* died, and his Executor brought an Action of Debt against the Administrator, and had Judgment; it was objected, that the 40*l.* being to be divided between two, they were Tenants in Common, and so the Plaintiff ought to have joined both in the Action; but adjudged, that these were several Debts, (*viz.*) 20*l.* to one, and 20*l.* to the other; and so the Action was well brought. *Yelv.* 23. *Whorewood versus Shaw*.

8. *Scire facias* on a Recognizance against three, who were bound in it jointly and severally; and upon Issue joined, it was found for the Plaintiff, and Execution awarded; but because *Erronice emanavit*, it was superfeded; and then the Conussee brought an Action of Debt upon the Judgment against one of them; adjudged it would not lie, because the Judgment was Joint against all three. *Pufch.* 26 *Eliz.* 2 *Leon.* 220.

9. Two Men are Partners, one of them sold Goods, which were in Partnership, and he alone brought the Action; adjudged, that it did not lie; for the Sale by one is the Sale of both, and the Action must be brought in both their Names. *Godb.* 244. *Lambert's Case*.

10. Lessee for ninety-nine Years, leased Part of the Lands for the whole Term, they are both sued in the Spiritual Court for Tithes; adjudged, that they may both join in a Prohibition, and that the Death of one of them shall not abate the Prohibition. *Owen* 13. *Bertue's Case*.

11. In Trespass, the Writ was against two, and one of them appeared, but the other was outlawed, and yet the Plaintiff declared only against him who appeared; and upon Not guilty pleaded, it was found against him; it was objected against the Declaration in Arrest of Judgment, that it was ill, because the Plaintiff ought to have declared against both, or against him who appeared *simul cum* the other, but adjudged good; and that if it was not so, yet it was helped by the Statute of *Jeofails*. *Mich* 31 *Eliz.* *Goldf.* 109.

12. Covenant with *W. R.* and two more by Name, to enter into a Bond to pay 10*l.* to *W. R.* who died before any Bond was given, and his Administrator brought an Action of Covenant against the Covenantor; but adjudged, that it was not well brought by him alone, because the Covenant was made jointly to three, and therefore the Action shall survive to the other two who were living; and tho' the Covenant was, to enter into a Bond, and doth not say, to whom; yet the Bond shall be given jointly to the three Covenantees; therefore, tho' the Money is to be paid to one of them, yet all must join in an Action of Debt on this Bond. 2 *Brownl.* 207. *Yates versus Rolls*.

13. Tenants in Common of a Reversion, after a Lease for Years, &c. the Lessee committed Waste; the Lease expired, and the Tenant in Common joined in an Action of Waste, and adjudged good, because now they are not to recover in the Realty, (*viz.*) *locum Vastatum*, but only Damages for the Waste done; but if the Lease had not been determined, they could not join in this Action: Coparceners may join in this Action, because they are but as one Heir; but Tenants in Common have several Titles. *Moor* 40. See (B) *pl.* 4.

14. The Testator devised 40*l.* to *A.* and *B.* two Infants, equally, and died, his Executor paid the Money to *W. R.* who gave a Receipt for it, to the Use of *A.* and *B.* the Infants, and afterwards he died; then one of the Infants died, and his Administrator brought an Action of Debt against the Executor of *W. R.* who had received the Money; and adjudged good, tho' the Infants were Tenants in Common of this 40*l.* yet each of them may sue for 20*l.* because it being of a Personal Thing, they need not join in the Action, as they ought to do in an Action for the Profits, issuing out of a Realty, of which they are Tenants in Common, as in

Trespafs, &c. *Moor* 667. *Shaw* versus *Norwood*. *Cro. Eliz.* 729. *S. C.* *Yelv.* 23. *S. C.* affirmed in Error.

15. In a Writ of False Judgment, to reverse a Judgment given in the Hundred-Court, the Defendant pleaded, that the Judgment was had there against the now Plaintiff *and oī. rī*, and therefore all ought to have joined in this Writ, as in Attaint or Error, all who are Privy to the Record, must join; but adjudged, that one alone, if he is a Tenant, and had Damage by the Judgment, he might have Restitution. *Moor* 854. *Philpott* versus *Ballard*.

16. Covenant to stand seised to the Use of himself and his Wife, for their Lives, for her Jointure, Remainder to his Son and Heir, excepting the Timber-Trees, saving that his Wife shall have the Loppings; the Covenantor died; the Widow married the Plaintiff; the Son cut down five Oaks, and the Husband and Wife brought the Action; it was objected, that he ought not to have joined his Wife in the Action, because he alone might have released the Damages; 'tis his Possession, and the Wrong was done to the Possession; but adjudged, that he being entitled to the Land in the Right of his Wife, the Action is well brought by both, and she shall have the Damages, if she survive. *Cro. Car.* 316. *Trigmiell* versus *Reeves*.

17. Judgment against three; one of them was taken in Execution, the rest being at large; they all three brought an *Audita querela*; and adjudged, that they might all join; for they being Parties to the Judgment, and liable to Execution, tho' it was never executed against the other two; yet for their Indemnity, they may well join with the other. *Cro. Car.* 320. *Corbett* versus *Bates*.

18. Judgment on a Demurrer, and a Writ of Error brought; and the Error assigned was, that the Record is, *ad respondendum Domino Regi & presidenti Collegii, &c. qui tam, &c.* whereas the Action ought to be brought by the President alone, without joining the King; but adjudged well enough. *Cro. Car.* 186. *Butler* versus *College of of Physicians*. 4 *Mar. Dyer* 159. *S. P.*

19. In Debt for Arrears of Rent; the Case was, the Plaintiff made a Lease for Years to the Defendant, and *T. S.* rendering Rent; *T. S.* assigned his Moiety to *Symonds*, and the Plaintiff brought his Action against him and the Lessee jointly, for the Rent, and had a Verdict; it was moved in Arrest of Judgment, that 'tis in the Election of the Lessor, to sue the Lessee *alone* for the whole Rent, or to have several Actions against the Lessee and Assignee, but they cannot be joined both in one Action; because the one is charged upon the Contract, which continues, notwithstanding the Assignment; and the other is charged by Reason of the Occupation of the Lands, and not upon the Contract; for there is none between him and the Lessor; so that these are Actions of several Natures; but adjudged, that the Action lies jointly against the Assignee and Lessee, because otherwise it would be in the Power of every Lessee to put the Lessor to two Actions to recover his Rent; 'tis true, he may bring one Action against both the Lessees, because the Reversion remains entire notwithstanding the Assignment of a Moiety by one. *Palin.* 283. *Waldron* versus *Vicars & al.*

3 Mod.
321.
2 Salk.
440.

20. Case against the Defendants, Proprietors of a Ship, wherein Goods are commonly carried for Hire, in which the Plaintiff declared, that he loaded Goods on board the said Ship, to be carried for Hire from *London* to *Topsham, &c.* and that the Defendants received them, *and undertook to carry them to Topsham*, but did so carelessly place and carry them, that tho' the Ship arrived at *Topsham*, the Goods were spoiled: Upon Not guilty pleaded, the Jury found, that the Ship had a *Master* placed in her by the Proprietors, and that ten other Persons, besides the Defendants, were Proprietors; that the Master had 60 *l. Wages* for every Voyage from *London* to *Topsham*; that the Goods were delivered to the *Master*, none of the Proprietors being present, and that the Contract was made with them, &c. that the Ship should arrive save at *Topsham*, but that the Goods were spoiled by Negligence; the Question was, whether the Proprietors were chargeable, there being no Contract made with them, or whether the Master ought to be charged in Respect of his Wages; as in the Case of *Morse* versus *Sluce*; and adjudged, that as the one is chargeable in Respect of Wages, so are the other, in Respect of the Freight; and this at the Election of the Plaintiff; but that the Action must be brought against all the Proprietors; for they are all chargeable, in Respect of their Joint Profit, which they receive by the Freight, and this in the Point of *Contract*, upon their Joint Undertaking to carry the Goods for Hire; and they are not chargeable as Trespassers, for then they might be charged alone. 3 *Lev.* 258. *Boson* versus *Sundford*.

21. The Case upon the Pleadings was, that there were several Joint Merchants; one of them died, and then his Executor, and the surviving Merchants, bring an Action of Trespafs against the Defendant, for taking their Goods in the Life-Time of the Testator. 2 *Lutw.* 1493. *Smyth* versus *Milward*.

22. Judgment in Debt on a Bond against Father and Son; and afterwards the Father alone brought a Writ of Error, and assigned for Error, that the Son was under Age: *Sed per Curiam*, the Son ought to be joined in the Writ of Error; which not being done, it was ordered, that the Writ should be * abated 3 *Mod.* 134. *Hacket* versus *Herne*.

* Roll.
Abr. 920.
placit. 32. contra.

3 Lev.
351.

23. The Plaintiff having the *fifth Part* of a Ship, brought an Action on the Case against the Defendant, for hindring the Ship to Sail by a Process out of the *Admiralty*, *per quod* he lost his Voyage *ad damnum, &c.* there being a Verdict and Judgment for the Plaintiff, and a Writ of Error

Error brought, it was objected, that this Action ought not to be brought by one Proprietor alone, who had only a fifth Part of the Ship, but that all Five were Joint-Owners, and therefore should have joined in this Action; but adjudged, if this had been pleaded in Abatement, as it might, the Declaration had been ill, but now it doth not appear but that the other Four may be dead, and if so, then the Action is well brought by the Survivor; and whether these were Jointenants or Tenants in Common, the Action survives; now, if Jointenancy had been pleaded in Abatement, then the Life of the Jointenants *not named* must have been averred, otherwise the Plea had been ill. 1 Salk. 31. *Child versus Sands*. See 1 Saund. 29. S. P.

24. In Covenant, the Plaintiff declared, that the Defendant and T. S. *demiserunt* to the Plaintiff for seven Years, by Virtue whereof he entered, &c. and that the Defendant entered upon him, and that neither the Defendant nor the said T. S. ought to have demised, but that at the Time of the Demise, one R. was seised in Fee; the Defendant pleaded, that T. S. *was seised* and had Power to demise, and *traversed*, that R. was seised, and likewise *traversed*, that the Defendant entered and kept the Plaintiff out; and upon Demurrer to this Plea it was adjudged, that this Action must be founded upon the Word *Demiserunt*, which is a Covenant in Law; for there was no express Covenant; and therefore as the Interest granted to the Defendant by that Word is joint, so must the Covenant be; and if so, then this Action being brought against the Defendant alone, cannot be maintained, but it ought to be brought jointly against the Defendant and T. S. who both were the Lessors. 1 Salk. 137. *Coleman versus Sherwin, Shower, &c.* 79. S. C.

(B)

Who shall not join and be joined, and in what Actions. See (A) 15.

1. TWO cannot join in an Action of Slander, because the Defamation of one is not the Defamation of the other. *Trin.* 28 H. 8. *Dyer* 19.

2. Two brought Trespass against the Defendant for Breaking their Close; upon Not guilty pleaded, the Jury found, that one of them was sole seised of the Lands, and that he *exposuit ad culturam* to the other to plough and sow by Halfs; adjudged, that no Estate passed to the other by these Words, but that he was still sole seised, and by Consequence they could not join in this Action. 1 Leon. 315. *Hire versus Oakly, Goldsb.* 77. S. C.

3. In Replevin, the Defendant made Conusance as Bailiff of G. D. for Damage-feasant, setting forth, that W. R. was seised of the Lands, and devised them to G. D. &c. but because it appeared in the Pleading, that the said G. D. was Tenant in Common with the Heir at Law, Exception was taken to the Conusance, for that Tenants in Common ought to join in an Avowry, and the Conusance must be in both their Names; but adjudged, that a Tenant in Common may defend alone, without his Companion, and he alone may distrain and justify the Taking, tho' his Avowry be by Way of Action. *Cro. Eliz.* 530. *Wilks versus Fletcher*. *Postea* Verdict. (G) 5. *Clotworthy versus Mitchell*. S. P.

4. Tenants in Common cannot join in an Action of Waste against their Lessee; but 'tis otherwise in the Case of Coparceners or Jointenants. *Moor* 34. See (A) 13.

5. Two Persons exhibited two Informations at the same Time, against a Parson for Taking a Lease of Lands contrary to the Statute 21 H. 8. adjudged, that he shall not plead to either of them; 'tis like two Replevins brought at the same Time for the same Taking, &c. the Defendant shall answer neither. *Moor* 864. *Pye versus Cook*.

6. Three covenanted jointly and severally with Two severally, this is a good Covenant; but the Three cannot join in an Action of Covenant. *Trin.* 17 Car. *March* 103.

7. Case, &c. wherein the Plaintiff declared, that in Consideration her Father would surrender a Copyhold to the Defendant, he promised to give his two Daughters 20 l. a-piece, and the Action was brought by one of them; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff had declared upon a joint Promise made to Two, and the Action was brought by one, whereas the other ought to be joined; but adjudged, that they had distinct Interests, and by Consequence the Action is well brought by one of them. *Style* 461. *Thomas's Case*.

8. *Assumpsit* brought by two Plaintiffs, in which they declared, that the Defendant, in Consideration of 10 l. paid to him by the Plaintiffs, promised to procure their Cattle which were taken by a third Person, to be redelivered to them on or before such a Day, &c. upon *Non Assumpsit* pleaded, the Plaintiffs had a Verdict; and the Defendant moved in Arrest of Judgment, that the Plaintiffs ought not to join in this Action, because the Promise on which it was founded was not one, but several Promises made to each of them; but adjudged, that the Promise was joint and not several, and the Consideration was intire, and cannot be divided. *Style* 203. *Vaux versus Draper*, and 157. *ibid.* *Vane versus Steward*.

9. Case, &c. against two Defendants for Speaking scandalous Words of the Plaintiff; upon Not guilty pleaded he had a Verdict against both, but could never get Judgment, because this Action will not lie against two Defendants jointly; the Plaintiff ought to have brought his Action against them severally, because where the Causes are several, the Actions must be so too. *Palm.* 313. *Chamberlaine versus Hillmore*. 2 Cro. 647.

10. Error to reverse a Judgment in the Borough-Court; this Writ was brought both by the Principal and Bail, and for that Reason it was abated, for the Principal and Bail cannot join in a Writ of Error. *Palm. 567. Plaw versus Richards.*

11. Case, &c. the Plaintiff had delivered the Goods of *T. S.* to the Defendant, who, in Consideration of so much Money paid to him by the Plaintiff, promised to deliver them to *T. S.* the right Owner, but did not; adjudged, that either the *Deliverer* or the *Owner* might bring the Action, but they cannot join in it, because the Consideration was not joint; so where a Promise is made to the Father for the Benefit of the Son, they cannot join, but either of them may bring the Action; and if brought by the Son, the Declaration must be upon a Promise made to his Father. *Hurdres 321. Bell versus Chaplin.*

12. The Father and Son covenanted with the Purchaser to sell Lands, &c. *Item*, 'Tis agreed, that the Purchaser shall pay the Purchase-Money to the Son; the Action was brought in the Name of both; and upon a Demurrer to the Declaration, it was held ill, because the Duty is vested in the Son, and he alone ought to have brought the Action. *3 Mod. 263. Tippet versus Hawkey.*

(C)

Of Actions against Two or more jointly, and one acquitted or released:

1. **T**respas against one Defendant, who pleaded, that the Trespass was done by him and one *W. R.* whom the Plaintiff had released; the Plaintiff replied and traversed the Release; adjudged, that the Declaration is good against one Defendant alone, because, tho' two were guilty of the Trespass, and tho' both ought to be sued, yet this Matter doth not appear on the Plaintiff's own Shewing, but comes in on the Part of the Defendant. *Mich. 29 Eliz. 1 Leon. 41. Henley versus Broad. Antea Declaration. (A) 2. S. C.*

2. Trespass against Two for Taking a Gun; one of them justified, for that the Plaintiff assaulted *B. G.* with his Gun, and for the Preservation of the Peace and the Life of the said *B. G.* he took away the Gun; the other pleaded Not guilty; the Plaintiff replied to the Justification, and the Jury found the other guilty, and the Justification was held good; it was objected, that the Action being brought against both of the Defendants jointly, and the Justification of one of them being good, the other cannot be guilty; but adjudged, that he who was found guilty shall not take Advantage of the Justification made by the other, but it shall rather be intended he took away the Gun at another Time; but if one Defendant justifies by the Gift of Goods, and 'tis found for him, the Plaintiff cannot have Judgment against the other, because it appears he had no Cause of Action. *2 Cro. 134. Marlar versus Arloffe.*

1 Roll. Rep. 233. 3. Trespass against Three; one of them pleaded Not guilty, and the other Two justified; the Plaintiff replied, and the Defendants demurred to the Replication; and before the Demurrer was argued, the Issue was tried against the other Defendant, and Judgment against him; then the Plaintiff entered a *Nolle prosequi* against the other two Defendants, and they all brought a Writ of Error in the Exchequer-Chamber, and assigned for Error, that the *Nolle prosequi* was a Discharge to all of them; adjudged, that if it had been before Judgment, it would have discharged all the Defendants, and so it would if Judgment had been given against all of them, but because Judgment was given against one, there was an End of the Action as to him, and there being none against the other Two, therefore they were not discharged. *Hob. 70. * Parker versus Lawrence. Cro. Car. 173, 239. Walsh versus Bishop. S. P. See Postea pl. 8.*

* 1 Roll. Rep. 233. S. C.

4. Adjudged, that where a Plaintiff brings a personal Action against two Defendants, and they plead severally, and he is nonsuited against one before he hath Judgment against the other, in such Case he is barred against both, because the Nonsuit works in Nature of a Release of the Whole; but where there is but one Defendant, and he pleads to Issue as to Part, and demurs to the rest, the Plaintiff may be nonsuit as to Part, and proceed for the rest. *Hob. 180. Showly versus Evelyn. 2 Bulst. 316. S. C. Postea Traverse. (D) 14. S. C.*

5. Trespass against *W. R.* for Breaking his Close at *D.* and Beating him 10 Octob. 10 Jac. the Defendant pleaded, that he, together with one *M. M.* at the Time of the Trespass, supposed, did jointly break the Plaintiff's Close and beat him, and that afterwards, (*viz.*) 13 Junii 11 Jac. the Plaintiff did by Writing, &c. release to the said *M. M.* all Actions, &c. and averred, that the Trespass for which the Plaintiff complained, and that which the Defendant and *M. M.* did jointly, was one and the same, & non alia neque diversa; adjudged, that tho' the Trespass was joint, yet the Plaintiff might sue alone, or all, but that in such Case all make but one Trespasser, and that either of them is answerable for the Act of the other; and therefore a Release made to one dischargeth the whole Trespass, for against joint Trespassers there can be but one Satisfaction. *Trin. 12 Jac. Hob. 66. Cork versus Founger.*

6. Case, &c. against two Defendants; one of them pleaded to Issue, and the other demurred to the Declaration, and the Plaintiff had Judgment upon the Demurrer; and now he relinquished the Issue as to the other, and brought a Writ of Inquiry of Damages against him who demurred, and the Writ being returned, he prayed Judgment; but it was objected, that the Plaintiff having relinquished the Action as to one, that was a Relinquishment as to the other; but it was adjudged

ed otherwise, (*viz.*) that the Plaintiff might relinquish as to one Defendant, and have Judgment against the other. *Moor 624. The Lady Warwick versus Atwood and Davis.*

7. Debt upon Bond against Two; after Appearance the Plaintiff entered a *Retraxit* against one of them; it was held, that this amounted to a Release, and by Consequence was a Discharge to both. *March 95. Paine versus Dennis. Postea Retraxit. (A) 3. S. C.*

8. Two covenanted to build an House artificially, and in an Action of Covenant brought against them, there was Judgment against one of them by Default; the other pleaded, that they Two did artificially build the House, upon which they were at Issue, and the Defendant had a Verdict, and yet the Plaintiff moved for a Writ of Inquiry against the other, against whom Judgment passed by Default, but it was denied, because the Covenant was performed, for that is the principal Matter, and 'tis not material whether by both or by one of them; and 'tis not like where two covenant to go to Rome, because that is *personal*, and one cannot plead that he went thither, but must shew that both went, for one cannot go by Deputy, but one may build an House by Deputy. *Sid. 76. Boulter versus Ford. See pl. 3. 2 Cro. 134.*

9. In Covenant, &c. the Cafe was, one covenants with Two, that he would not make any Agreement to farm the Excise of Beer in Cornwall, without the Consent of the other Two; and one alone brought this Action, and assigned the Breach, that he (the Defendant) did make an Agreement to farm the Excise without his (the Plaintiff's) Consent; after a Verdict for the Plaintiff, it was objected, that the Plaintiff and the other had a joint Interest, and therefore this Action could not be brought by the Plaintiff alone, without joining the other: *Sed per Curiam*, here is no joint Interest, but each of the Covenantees may maintain an Action for his particular Damages, so the Plaintiff had Judgment. *2 Mod. 82. Wilkinson versus Lloyd.*

10. Assault and Battery, &c. against four Defendants; after a Verdict for the Plaintiff a Writ of Error was brought, to which the Defendant in Error pleaded a Release of one of them; and upon a Demurrer to this Plea, *per Curiam*, this Release shall not bar the other Three of a personal Thing as this is; but where several are to recover in the Personalty, the Release of one is a Bar to the rest; but 'tis not so in Point of Discharge, as in the principal Cafe. *3 Mod. 109. Anonymus.*

*See Rud-
dock's
Cafe.*

11. In Trover against Two, upon Not guilty pleaded by one, the Plaintiff had a Verdict; the other pleaded a Release of all Actions, and there the Verdict was against the Plaintiff; upon a Motion for Judgment against him, who was found guilty, it was denied *per Curiam*, because the Trover being joint against both, a Release of all Actions discharges both. *4 Mod. 379. Kiffin versus Willis & al'.*

12. Two Joint Merchants made T. P. their Factor, one of them died, leaving an Executor; adjudged, that he and the surviving Merchant cannot join in an Action against the Factor, for the Remedy survives, yet the Duty doth not; therefore the Action must be brought by the Survivor; and if he recover, he must be answerable to the Executor of the other. *2 Salk. 444. Martin versus Crump.*

13. Cafe, &c. for Money had and received to the Plaintiff's Use, it appeared upon the Evidence, that Layfeild and the other Defendants were Bankers and Partners, and that the Plaintiff had given 20 s. to Layfeild, for a double Exchange Lottery-Ticket, who undertook to pay what Benefit should happen, and the Ticket came up a Benefit of 40 l. for which this Action was brought against all the Partners; it was objected at the Trial, that Layfeild only ought to be charged, because it did not appear that the other Defendants had undertaken to be Trustees; but adjudged, that the Adventurers put their Money in upon the Credit of all the Partners, and the Act of one shall bind the rest, unless he could shew a Disclaimer, and a Refusal to be concerned in it. *1 Salk. 292. Layfeild's Cafe.*

(D)

Of joint and several Actions. See *Tithes. (R) 5. Trespafs. (K) 22.*

1. **A** *Sumpfit* in Consideration the Plaintiff would permit the Defendant to enjoy such Lands for five Years, he promised to pay at the Feast of *All-Saints* next coming, and so yearly 20 l. at the Feasts of the *Annunciation* and *All-Saints*, by equal Portions, during the Term; and alledged, that he had enjoyed the Land for half a Year, and had not paid the 20 l. adjudged, that these were several Duties, and so several Actions were maintainable; so where one Gascoigne promised to give a Man 700 l. in Consideration he would marry his Daughter, and to pay 100 l. every Year, till the whole Sum was paid; adjudged, that a several Action might be brought for every 100 l. *Mich. 29 Eliz. Gascoigne's Cafe. Owen 42. Hunt versus Thorney.*

2. Cafe for Riding the Plaintiff's Horse, and Trover and Conversion for a Horse and a Mare; it was held, that any Actions may be joined where the Plea of Not guilty goes to all, as Trespafs on the Cafe, and Trespafs *Vi & Armis*; so in the 8th Rep. the Writ was *de libero Tenemento*, and the Plaint was *de quatuor Acris Salici*, and to have reasonable Estovers; and it was challenged, because the Plaintiff had joined two Freeholds in one Plaint, but the Challenge was not allowed, so the Plaint was held good. *8 Rep. 47. B. Lutw. Abr. 36. Cowper versus Towers. Cro. Car. 20. S. P. Allen 9. S. P. Sid. 244. S. P. Matthews versus Hopkins.*

3. Eject-

- 1 Brownl. 235. 3. Ejectment and Trespass, and Assault and Battery were brought against the Defendant; upon Not guilty pleaded, the Plaintiff had a Verdict both for the Ejectment and Battery, and entire Damages assessed; the Court took Time to advise what Judgment should be given, because it was without Precedent; but they agreed, that the Damages for the Battery could not be released, because they were entire with the Ejectment. *Hill. 16 Jac. Hob. 249. Bird versus Snell.* Justice *Winch* was of Opinion, that 'tis not good.
4. Trespass against the Defendant, for that he *simul cum T. S.* with Force and Arms did assault him 1 *Junii, &c.* The Defendant, as to the Force, &c. pleads Not guilty, and as to the Assault he pleaded, that the Plaintiff had brought another Action against *T. S.* for the same, and had Judgment and Damages for the same Trespass, &c. and upon a Demurrer to this Plea it was insisted that it was well laid; for tho' the Plaintiff had Judgment against one, yet that shall not bar him from his Action against the other, because the Assault of the one is not the Assault of the other: *Sed per Curiam*, the Plea is a good Bar against another's Action, for 'tis the same Trespass, and the Plaintiff shall not have a double Satisfaction. 2 *Roll. Rep. 224. Honey versus Rice.*
5. The Bill was *in placito transgressionis super casum*, and the Declaration and all the Proceedings were in Nature of a Conspiracy; after a Verdict for the Plaintiff, it was moved, that the Declaration was not warranted by the Bill, and that the Judgments in those Actions were several and different: *Sed per Curiam*, if a Bill contain Matter at Common Law, and the Declaration Matter on a Statute, the Plaintiff shall have Judgment as at Common Law; so he may have a general Writ of Trespass for Breaking his Park, where a Remedy is given by the Statute *de malefactoribus in Parcibus*; so he may have Trespass or an Appeal of Maihem by the Statute. 2 *Roll. Rep. 49. Cranbank's Case.*
6. The Husband was indebted to the Plaintiff in 200*l.* and died, and his Wife administered; and she likewise was indebted to the Plaintiff in 70*l.* and upon an Account between them, she promised to pay all the Money, and for Non-payment the Plaintiff brought an *Assumpsit*; upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict and Judgment; but upon a Writ of Error brought, it was reversed, because the Defendant ought to be charged in two several Actions, in one as Administratrix, and in another in her own Right, and not in one *Assumpsit* for the Whole. *Hill. 12 Jac. Hob. 88. Herenden versus Palmer, and Style 472. Conge versus Laws. S. P. Postea Joint Executors. (D) 9, 10.*
7. In Trespass for Assault and Battery against two Defendants, the Plaintiff declared against one for the Battery, and against the other for *Taking away his Goods*, and had Judgment for joint Damages against both of them; but adjudged, they could not be joined in one Action, because the Trespases were of several Natures. *Mich. 24 Car. Style 153. Cutsworth's Case.*
- 1 Lev. 141. 8. Action for a Penalty on a new Statute 12 *Car. 2.* which gives so much to the right Incumbent, if he who was the present Incumbent did not secure to him half a Year's Profit, &c. and an *Indebitatus Assumpsit* for *Tithes* generally, without setting forth any particular Agreement; upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict; adjudged in Arrest of Judgment, that so much of the Declaration which relates to the Penalty of the Statute is discontinued by this Issue; but if the Defendant had pleaded *Not guilty*, it might have been otherwise; and as to a general *Indebitatus Assumpsit* for *Tithes*, it shall be intended after a Verdict, that a Special Agreement was made; and tho' it was said *pro decimis*, without saying *deliberatis*, yet 'tis well enough, for an *Indebitatus pro equo* is so, the Word *Pro* implying a Sale. *Sid. 223. Wright versus Beale.*
- Vent. 365. 9. Case, &c. wherein the Plaintiff declared upon the Custom of the Realm, and that the Defendant 10 *May* was a common Carrier, and that the Plaintiff 6 *May* was possessed of 50*l.* which on the same Day, &c. he delivered to the Defendant to carry, which he did so negligently, that it was lost; and he also declared in *Trover* for the same Sum; the Defendant pleaded Not guilty, and the Plaintiff had a Verdict generally; it was objected, that an Action on the Case and *Trover* could not be joined, because one is founded on a Custom and the other on a Wrong, to which it was answered, that the Plea of Not guilty goes to both; but adjudged, that this Declaration and Verdict is ill, for tho' Not guilty goes to both, yet the Verdict ought not to be for the Plaintiff generally. *Sid. 245. Matthews versus Hopkins. See Sid. 223. See pl. 15. S. P.*
10. Error of a Judgment in *C. B.* where the Plaintiff joined *Assumpsit* and *Trover* in one Declaration, and the Jury found for the Plaintiff in the *Assumpsit* and for the Defendant in the *Trover*: *Hale Ch. Just.* held, that tho' the Causes are made several by the Verdict, yet the Declaration being void *ab initio*, the Judgment is void. 2 *Lev. 101. Holmes versus Taylor. See Hardres 166. 3 Lev. 99. Bage versus Bromnell. S. P.*
11. Case, &c. upon the Custom of the Realm, and *Trover* against a common Carrier, joined in the same Action, and adjudged good, because the Plea Not guilty goes to both; but if a Carrier loseth Goods committed to him, a general Action of *Trover* doth not lie against him. 1 *Vent. 223. Owen versus Lewin. Sid. 244. Matthews versus Hoskins. S. P. contra. 1 Vent. 365. Denison versus Ralphson. S. P.*
12. *Assumpsit* and *Trover* in the same Declaration, the Defendant pleaded *Non Assumpsit* as to one, and Not guilty as to the other, and the Plaintiff had a Verdict upon the *Assumpsit*, and the Defendant was found Not guilty upon the *Trover*; and now, upon a Writ of Error brought, the Joining these Actions was assigned for Error, and it was held Error. *Raym. 233. Tailour versus Holmes.*

13. *Trover* of several Goods; the Defendant pleads an Action of *Trespass vi & armis* was formerly brought against him for taking and disposing the same Goods; and that upon Not guilty pleaded, there was a Verdict and Judgment for him, &c. Judgment *si actio*, &c. the Plaintiff demurred to this Plea, and had Judgment, because *Trover* and *Trespass* are Actions sometimes of a different Nature; for *Trover* will lie, where *Trespass vi & armis* will not; as where one delivers Goods to another to keep for the Use of the Deliverer, who afterwards demands them, and they are not delivered; here *Trover* will lie, but not *Trespass*, because the Taking was not wrongful; but where there is a wrongful Taking and Detaining the Goods, the Plaintiff may have either *Trespass* or *Trover*; and in such Case a Recovery in the one is a good Bar to the other; for the Rule is, (*viz.*) where the same Evidence will maintain both Actions, there the Recovery in one is a good Plea in Bar to the other; and as to this Purpose *Ferrers's Case* is good Law; so in this Case it shall be intended, that the Plaintiff* had mistaken his first Action, by bringing *Trespass vi & armis*, when he had no Evidence to prove a wrongful Taking; but his Proof consisted only in a *Demand and Refusal*, which is proper Evidence in a *Trover*; and for that Reason the Verdict passed against him in the Action of *Trespass*, and therefore he was obliged to begin again in *Trover*. *Raym. 472. Putt versus Rawsterne.*

2 Mod.
318.
3 Mod. 1.
*See *Rose v. Stan den.*

14. *Trespass*, &c. for taking a Mare, and converting her to his own Use; the Defendant justified under a *Levari facias*, &c. and upon a Demurrer, it was objected against the Declaration, that *Trespass* and *Trover* ought not to be joined in one Action; but adjudged, that the *Conversion* was only alledged by Way of Aggravation of Damages; and that since the Plea of Not guilty goes to both, the Declaration was good. 2 *Lutw. 1524. Hardall versus Smith & al.* See Execution. (D) 15. S. C. and 14. S. P.

15. *Assumpsit* on the Custom of the Realm, and *Trover* in the same Declaration against a Common Carrier; after a Verdict for the Plaintiff, and entire Damages, the Judgment was arrelted; because an *Assumpsit* is quasi ex * *contractu*, and a Contract and a Tort cannot be joined in one Action. 1 *Salk. 10. Sir John Dalston versus Johnson.* 2 *Salk. 703. The Pleadings.* See *Mutthews versus Hopkins. S. P.* See Trial. (F) 10. See pl. 9. S. P.

5 Mod. 95.
* 3 Mod.
321.
3 Lev.
258.

16. *Indebitatus Assumpsit* brought by the Plaintiff as Administrator to T. S. upon a Promise made to his Testator, and an *in simul computasset* between the Plaintiff and the Defendant, for Money due to himself; the Defendant demurred to the Declaration, and had Judgment; for the Plaintiff cannot sue for his own Right, and for that of another, in one and the same Action, because the Costs will be entire, and he cannot distinguish how much he is to have as Administrator, and how much for himself. 1 *Salk. 10. Rogers versus Cooke.*

17. *Case*, &c. in which the Plaintiff declared, that he was Master of a Ship laden with Corn in such a Port, and ready to sail, &c. and that the Defendant entered and seized the said Ship, and detained her, by Reason whereof he lost his Voyage; there was an ill Plea, and upon a Demurrer to it, there was an Objection to this Action, that it should not be *Case*, but *Trespass*; but adjudged, that this Action is well brought for the Special Damages which the Plaintiff had sustained, as he was Master of the Ship, and could only recover for his particular Loss; 'tis true, he might have brought an Action of *Trespass* upon his Possession. 1 *Salk. 10. Pitts versus Gainer.*

Joint and Several.

(A)

1. **L**ease of Lands to two for their Lives, without Impeachment of Waste, during the Lives of the said Lessees, naming them, &c. one died, and the Lessor brought an Action of Waste against the Survivor; adjudged, that the Action will not lie; for these Words, without Impeachment of Waste, shall follow the Interest which survives. 1 *And. 151.*

2. The Conusor entered into a Statute in Nature of a *Recognisance* for 580 *l.* and a Defeasance was made, that if the Conusor paid the Money at several Days therein mentioned, the *Recognisance* should be void; the Conusor paid Part of the Money on the Days of Payment, and the Conussee acknowledged the Receipt of 150 *l.* and did acquit, release and discharge the Conusor thereof, and of so much of the Sum mentioned in the Defeasance, and of so much contained in the *Recognisance*, &c. and afterwards the Conusor brought an *Audita querela*, pretending, that the whole *Recognisance* was discharged by this Release; for it being entire, a *Discharge of Part is so of the Whole: Sed per Curiam*, tho' the *Recognisance* it self is entire, yet the Sum therein contained, is not so; for that may be devided and paid at several Days, and several

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Acquittances may be given for the respective Sums received, and an Acquittance of Part is not an Acquittance of the Residue. 1 *And.* 235. *Cook versus Bacon.*

3. *Tenant for Life* and he in Reversion joined in a Lease; afterwards the *Tenant for Life* died, and the Lessee having committed Waste, he, who was the Reversioner, brought an Action of Waste against him for Waste done in the Lands, which he (the Plaintiff) had demised to the Defendant; who pleaded, that the Lease was made to him by the Plaintiff, and by the *Tenant for Life*, and traversed, that it was made by him alone; adjudged, that this Traverse was ill, because tho' at first it was the Lease of the *Tenant for Life*, and the Confirmation of him in Reversion, and so joint; yet when the *Tenant for Life* died, 'tis then the Lease of him in Reversion, and so several. *Moor* 72. *Newdigate's Case.*

1 *And.*
161.

4. Lease for Years to Husband and Wife, if they, or any Issue of their Bodies, should so long live; one of them died, and they had no Issue, yet the Lease is not determined, for it shall be intended to continue so long as either the Husband, Wife, or any of their Issue should live; and not so long as the Husband and Wife should jointly live; for in this Case the disjunctive *or*, shall be taken distributively to either. *Moor* 239. *Baldwin versus Cook.*

5. Debt upon Bond, conditioned to stand to the Award of *four Persons*, so as the same be made by *four or three of them*, and *three only* made the Award; adjudged good, for Awards shall be taken by Equity, that all Parts may stand together; and *Coke* argued, that there was a Difference between an *Interest and Authority*; as where the next Avoidance was granted to *four & uni eorum conjunctim & divisim*; in such Case one of them cannot present, because the *Interest is joint*; but if a *Letter of Attorney* be made to *four & uni eorum conjunctim & divisim*, there if 'tis executed by one, 'tis good, because that is only an Authority to do a Thing without any Interest in the Thing it self; so if a Covenant is made with *four conjunctim & divisim*, if that Interest on which 'tis founded is joint, then the Covenant is joint, otherwise not. *Moor* 849. *Barry versus Perin.*

6. Upon an *Information* against an Engrosser of Cattle, he justified the Buying and Selling so many Cattle under two Licenses, without distinguishing how many he bought and sold by one License, and how many by the other; and upon Demurrer the Informer had Judgment for that Reason. *Moor* 879. *Dawkes versus Hills.*

7. Upon a Bill in the Exchequer, the Case was, several Commissioners of the Excise were bound each for himself, &c. to make true Payment of all Money received by himself, or by any other for him, and by his Means, Consent or Procurement; and it was held by Ch. Baron Hale, if the Words had been, Or by his Means, Consent or Procurement, that each would have been bound for the Receipts of the other joint Commissioners; so if they had been joint Accountants, each would have been liable for the Whole, tho' not received by himself, especially it being in the Case of the King; 'tis true, it would not be so in the Case of a Common Person, as in joint Executors, each is chargeable for no more than comes to his Hands; but yet, if by Agreement amongst themselves, that each shall intermeddle with such a Part of the Testator's Estate, each of them shall in such Case be chargeable with the Whole; because the Receipts of each are pursuant to the Agreement made by both. *Hardr.* 314. *Gill versus Attorney General.*

8. Covenant upon a Charter-Party between *Bolton* the Owner and *Lee* and *Morgan*, Merchants and Freighters of a Ship, by which *Bolton* lent the Ship for 48*l.* per Month, &c. and it was mutually covenanted between the Parties & *quemlibet eorum*, &c. and the Action was brought against *Lee* alone; and upon Demurrer to the Declaration, it was insisted, that the Action ought to be against both; that *quemlibet eorum* doth not make it several, for that shall be referred to the Plaintiff, who is the sole Party on one Side; so that 'tis disjunctive between him and the other two, but 'tis still joint as to them; but adjudged, that 'tis joint and several on both Sides. 2 *Lev.* 56. *Bolton versus Lee.*

2 *Lev.* 6.

9. *Assumpsit*, &c. to perform an Award, which was afterwards made, and it was that the Defendant should pay to the Plaintiff several Sums, and at several Times, and to sign mutual Releases; and the Plaintiff shewed, that one of the Times, in which Part of the Money was to be paid, was past, and that the Defendant had not paid it; there was an ill Plea, and a Demurrer; and it was objected against the Declaration, that this Action did not lie till all the Days were past, on which the several Sums were to be paid; but adjudged, that the Action was well brought for the Money which was then due, and the Plaintiff shall recover Damages accordingly, and that he may bring a new Action when another Sum is due, and so *toties quoties*. 2 *Saund.* 337. *Cook versus Whorewood.*

10. Debt upon Bond for Performance of Articles, brought by the Plaintiff as Administrator of *Wm. Waite*; the Defendant pleaded, that the said Articles were made between him and the said *Wm. Waite*, reciting, that the said *Waite* being entituled, in Right of his Wife, to the Thirds of the Estate of one *Amery*, whose Widow she was; and that the Defendant having married the only Daughter and Heir of the said *Amery*; and it being incertain to how much the Thirds would amount, it was agreed between him and the said *Waite*, That *Waite* should accept 10*l.* yearly, during the Life of his Wife, in Satisfaction for her Thirds, which the Defendant covenanted to pay him half yearly, for so long Time as his Wife should live, which had performed, &c. the Plaintiff replied, that *Waite's* Wife lived after Lady-day 1 *Jac.* 2. and that 5*l.* was due to the Plaintiff after the Death of *Waite*, for half a Year; and upon Demurrer to this Replication, it was adjudged, that by the Intent of the Articles, the 10*l.* was to be paid only during the joint Lives of *Waite* and

and his Wife, and he dying first, nothing could be due after his Death. 2 *Lutw. Rep.* 323. *Reeves versus Sheppard.*

11. Debt upon a Bond made to a Woman *dum sola*, conditioned, that the Defendant should pay to her 10 *l.* yearly, so long as *he and she should live together, &c.* the Woman afterwards married, and this Action being brought by the Husband and Wife, the Defendant pleaded in Bar, that he and the Plaintiff's Wife *did not live together*; and upon Demurrer the Plaintiff had Judgment; the Question being, whether the Words *live together*, shall be taken as *living together in the same House*, or *living together at the same Time*; and adjudged, that the Money should be paid during their *joint Lives*. 1 *Lutw.* 555. *Gatland, & Ux' versus Charfield.*

12. Debt upon Bond, for Performance of Covenants in Marriage-Articles; setting forth, that a Marriage was intended between the Defendant and *A.* the Widow of *S. C.* and that she was seised of Lands of the yearly Value of 80 *l.* for her Life, Remainder to such Person to whom she should devise the same, whether sole or married, and that the Defendant was to receive the Profits after the Marriage, *during the joint Lives* of him and the Wife, &c. and that he covenanted in Consideration of the Marriage, to pay unto the Plaintiff 20 *l.* yearly from *Michaelmas* next after the Marriage, &c. in Trust, and for the Benefit of the Wife, which he had not done, &c. the Defendant pleaded Performance; the Plaintiff replied, and assigned the Breach, that after the Marriage he did not pay 10 *at Lady-day*, 35 *Car.* 2. and averred, that the Wife was then living; and upon Demurrer to this Replication, it was objected, that the 20 *l.* being by the Articles to be paid yearly, and not saying every Year, or for how long, it should be therefore paid but one Year, for that answers the Word *yearly*; but adjudged, that the Defendant being to receive the Profits of his Wife's Lands during their joint Lives, the Payment of the 20 *l.* shall be intended to continue so long. 1 *Lutw.* 459. *Death versus Dennis.*

13. A *Latitat* was sued out against four Defendants in Trespass; the Plaintiff was nonsuit, for want of a *Declaration*, and the Attorney for the Defendant entered four Nonsuits against him; adjudged irregular, because the Trespass is joint; and tho' the Plaintiff may declare severally in Trespass, yet it remains joint till severed by the Declaration. 2 *Salk.* 454. *Allington versus Vavasor.*

14. In Covenant, &c. the Plaintiff declared, that the Defendant and *W. R.* *convenerunt pro se & quolibet eorum*, that they, or either of them would freight such a Ship, &c. The Defendant pleaded in Abatement, that there were Covenantors living, and not named, &c. and upon a Demurrer it was adjudged, that this was joint and several; like *obligamus nos & utrumque nostrum*; but *Holt Ch. Just.* held, that there was a Difference between this and that *W. R.* and *T. P.* *conveniunt & quilibet eorum convenit*; for there the last Words make it several; but *convenerunt pro se & quolibet eorum*, goes to the Thing to be done, and imports, that both or either of them would do it. 1 *Salk.* 393. *Robinson versus Walker.* *Farr.* 153. *S. C.*

15. *W. R.* having a Discourse with the Defendant concerning the Marriage of his Daughter with the Defendant's Son; it was agreed, that *W. R.* should give 50 *l.* with his Daughter, and that if she survived, then the Defendant should pay her 100 *l.* after the Death of her Husband; and so mutual Promises were made between *W. R.* and the Defendant; the Parties inter-married, *W. R.* died Intestate, having paid the 50 *l.* the Wife survived her Husband, and now the Administratrix of *W. R.* brought an Action on the Case against the Defendant, and assigned the Breach, that the Defendant had not paid the 100 *l.* *in Retardationem Administrationis*, &c. after a Verdict for the Plaintiff, upon *Non Assumpsit* pleaded, it was objected in Arrest of Judgment, that the Action ought to have been brought by the Daughter; but adjudged, that the Consideration moved from *W. R.* and the Promise was made to him; but true it is, that the Action might have been brought by the Daughter. *Allen* 1. *Bafield versus Collard.* See *Rippon versus Norton* *S. P.*

Joint Executors.

Where one proves the Will, and the other refuses. (A)	Of Actions, where they are Plaintiffs, good, and not good, and what may be joined in Actions by them. (D)
Where the Act of one shall bind the other. (B)	Of Actions, where they are Defendants, good, and not good. (E)
Where the Act of one shall not bind the other. (C)	

(A)

Cases, where one proves the Will, and the other refuses.

1. **J**oint Executors are accounted in the Law but as one single Person, for they all represent the Person of the Testator; and therefore any act done by one of them, which relates to the Delivery, Gift, Payment, Possession, Sale or Release of the Goods of the Testator, is esteemed and taken to be the Act of every one of them, altho' they have a joint and entire Authority over the Whole.
2. There is a Case in *Dyer*, where one of the Joint Executors proved the Will, and the other refused; afterwards he who proved the Will appointed T. S. to be his Executor, and died; it was held, that T. S. was by this Means become the Executor of the first Testator, because the Power of the other Executor was determined by his Death: 'Tis true, my Lord *Dyer*, who reports the Case, puts a *Quare* to it, which shews, that he did not take the Law to be clear in this Point; but since that Time it hath been adjudged otherwise; as for Instance, two Executors; one of them proved the Will, and the other refused; afterwards he who proved it, died *Intestate*, and T. S. took out Administration *cum Testamento annexato*, which was adjudged wrong; because the Proving the Will by one, made them all Executors, and no other Person can administer during the Life of the surviving Executor; therefore, because it did not appear, that both the Executors were dead, the Bill was dismissed. *Dyer* 160. *B. Hardr.* 111. *Pawlett versus Freak.*
3. In *Henfloe's* Case it appears, that they are all Executors, tho' one alone proves the Will and the other refuse; as where an Action of Debt was brought against Joint Executors, one of them refused before the Ordinary, and the rest proved the Will, yet he who refused may come in when he pleases; therefore they who proved the Will must join him in every Action; but if they all refuse, then the Ordinary may grant Administration to a Stranger. 9 *Rep.* 39. *Henfloe's* Case.

(B)

Where the act of one shall bind the other.

1. **J**oint Executors, one of them had a Bond for Money due to the Testator, which Bond he gave to T. S. in Satisfaction of his own Debt, and died; the surviving Executor brought an Action of *Detinue* against T. S. for this Bond; and it was insisted for him, that tho' one Executor may give a Thing which was actually in his Possession, or may release a Debt due to the Testator, and it shall bind his Companion, because these are Things executed, and nothing remains for his Companion to do; yet the Delivery of a Bond is a Thing of another Nature, for the Debt it self, (which is the Chose in Action) remains, and by Consequence, if so, there must be a proper Remedy for the Bond it self, which is this Action of *Detinue*; but adjudged, that the Action would not lie, because one Executor alone might have released the Debt, and if he might, by Consequence he might dispose the Deed it self, by which the Debt is created. *Cro. Eliz.* 478. *Kelfick versus Nicholson.*
2. Two Executors, one gave an Acquittance for a Debt due to the Testator; adjudged, that the other Executor is barred by it, because they being accounted but as one Executor to their Testator, therefore each of them hath an Authority over the whole Estate; the Law is the same where there are two Executors, and a Suit being commenced against them, one of them confesseth the Action; this shall bind the other for so much as was in his Possession. 2 *Browl.* 183. *Lawry versus Aldred.* *Kelw.* 23. *S. P.*

3. Two had a Lease for Years as Joint Executors, one of them sold the Term; adjudged, that the Sale was good without the other joining with him, because each of them had an absolute Power to dispose the Whole, both of them being possessed of it as one Person in Right of the Testator, and that is the true Reason why one of them cannot assign the Term to the other, because he was possessed of the whole Term before. *Cro. Eliz.* 347. *Pannell versus Ferne.*

4. Joint Executors divide the Bonds of their Testator, and one of them took some of the Bonds and the other the rest; afterwards one of them released a Bond, which the other had for his Share, the Debtor having Notice of the Partition made between them, but he could have no Relief in Equity, unless the Release had been procured by Fraud for a lesser Sum than was really due; for in such Case the Debtor shall satisfy the rest. *Moor* 620.

(C)

Where the Act of one shall not bind the other.

1. **T**HREE joint Executors, one of them wasted the Goods of the Testator, and died; and in an Action of Debt brought against the Survivors, they pleaded *plene administraverunt*, and thereupon they were at Issue; and the Jury found, that the dead Executor had wasted, &c. and that the Defendants had Goods of the Testator to the Value of 16*l.* only; adjudged, that they shall be charged with no more than was found, and not for the Waste done by the dead Executor, for where there are Joint Executors, the Act of one is not to charge the rest any farther than for what he actually possessed of the Goods of the Testator, but not *de bonis propriis*. *Cro. Eliz.* 318. *Hagthorne versus Milforth.* 2 *Leon.* 209. *S. P.* *Keilw.* 23. *B. S. P.*

2. Joint Executors, one of them cannot compel his Companion to account, because both are as one Person, and are possessed of the whole Estate of the Testator in Judgment of Law; 'tis true, Mr. *Siderfin*, who reports this Case, puts a *Quare* to it, and compares it to the Case of Jointenants, where one may compel the other in a Court of Equity to account; but these Cases are not alike, for tho' the surviving Jointenant is entitled to the whole Estate by Survivorship, yet whilst they are both living, each of them is entitled to a Moiety, and that is the true Reason why he may compel his Companion to account; but 'tis not so in the Case of Joint Executors, for they are not entitled to any Moiety, but to the Whole, unless they are made *Residuary Legatees* as well as Joint Executors; for if so, and one of them dies Intestate, his Administrator shall have a Moiety of the Surplus of the personal Estate of the Testator, after Debts and Legacies paid, because the Testator intended an equal Share to both, and his Intention will prevent any Right by Survivorship. *Sid.* 33. 1 *Ch. Rep.* 238. *Cox versus Quantock.*

(D)

Of Actions, where they are Plaintiffs, good, and not good; and what may be joined in an Action by an Executor or Administrator.

1. **W**HERE two Joint Executors have commenced a Suit against the Defendant, and one of them dies pending the Action, it shall abate, tho' he so dying had been summoned and seivered; and the Law is the same where they are Defendants, and one of them dieth pending the Action against them.

2. Two Joint Executors, one of them had the Possession of the Testator's Goods, which were afterwards taken from him, yet they must both join as Plaintiffs in an Action of Trespass against him who took them away, because the Possession of one is the Possession of both; and for that Reason, if one alone should bring the Action, and the other should release it, such Release would be good. 3 *Leon.* 209. 4 *Leon.* 56. *S. P.*

3. Two are Joint Executors; Proviso, that one shall not administer, yet the Action shall be brought in the Name of both. *Dyer* 3. *B.*

4. Mother, and Son an Infant, were made Joint Executors, and Administration was granted to the Mother during the Minority of her Son, afterwards she married, and then the Husband and Wife as Executrix, brought an Action of Debt against the Defendant, who pleaded in Abatement, that there was another Executor, but not named in this Action; and upon a Demurrer to this Plea the Defendant had Judgment; but if the Plaintiffs had set forth this Matter specially in their Declaration, that there was another Executor under Age, it might have been good, tho' he was not joined in the Action. *Tel.* 130. *Smith versus Smith.* 1 *Brownl.* 101. *S. C.* *Postea pl.* 7. *S. P.*

5. The Testator made two Executors, and then he devised, that if they should refuse, that in such Case *G. D.* and *T. S.* should be his Executors and died, afterwards those who were first named did refuse; adjudged, that they shall not be joined in an Action with the other Two as Plaintiffs, because 'tis plain, that the Testator did not intend them all to be Executors, but Two alone, and that but upon a Condition, that if the other Two should refuse.

6. The Testator made three Executors, and two of them brought an Action of Debt against the Defendant as Administratrix to one *Truelock*, upon a Bill of their Testator; who pleaded, that

by the Will *Truelock* was made Executor with the Plaintiffs, and that the Testator appointed, that he should pay to his other Executors all such Debts as he owed to him, before he shall meddle with the Will; and then pleads, that *Truelock* had proved the Will with the other Plaintiffs, and that he had in his Life-time paid them the 16 L. for which the Action was now brought, &c. and upon a Demurrer to this Plea the Plaintiffs had Judgment, because Payment without an Acquittance is no good Plea, he ought to have pleaded an Acquittance of the 16 L. *Moor* 11. *Stapleton & al' versus Truelock*.

7. Error in the Exchequer-Chamber on a Judgment in B. R. the Testator obtained a Judgment in his Life-time and made an Infant and another of full Age Joint Executors and died; the of full Age was his Wife, and the Infant was his Daughter, to both whom he had devised his Estate; the Wife proved the Will, with a *Reservata potestate* to the Daughter when she should come in, and afterwards the Wife alone brought a *Scire facias* upon this Judgment, setting forth all this Matter, and that there were two Executors, and that one was under the Age of seventeen Years; adjudged, that the *Scire facias* was well brought by her alone, because the Infant could not prove the Will during her Infancy, and it would be very inconvenient, if no Execution could be had upon the Judgment till the Infant should be of full Age, the Judgment was affirmed. 1 *Mod.* 297. *Hutton versus Miskell*. *Raym.* 198. S. C. 1 *Lev.* 181. S. C.

T. Jones
199.

8. But if both the Executors had been of full Age, and one alone had proved the Will and brought the Action without joining the other, it had been wrong, because tho' the other had refused, he is still an Executor and may administer as such, when he will. 2 *Lev.* 239. *Colborne versus Wright*.

9. One Executor or Administrator may join different Things in one Action, as where an *Administratrix* declared upon an *Indebitatus Assumpsit* to her self, but did not say as *Administratrix*, and upon an *Insimul computasset* to her as *Administratrix*, and concluded her Declaration with a *Proferet hic in Cur' literas*, &c. upon *Nu Assumpsit* pleaded the Plaintiff had a Verdict and entire Damages; and it was moved in Arrest of Judgment, that the first Promise must be intended in her own Right, and the second must be in Right of the Intestate, because it was warranted by her producing the Letters of Administration; but adjudged against the Opinion of *Justice Twissden*, that both might be joined in one Declaration, and that after a Verdict it shall be intended, that the first Debt was due to her as *Administratrix*. 2 *Lev.* 110. *Curtis versus Davis*. *Antea* Joint Actions. (D) 6. S. P.

10. *Anno* 30 *Car.* 2. the like Judgment was given, (*viz.*) that an Executor might declare upon two Promises, one made to himself and the other to his Testator, but that he could not be jointly sued with another, because he is to be charged *de Bonis Testatoris*, and the other *de Bonis propriis*. 2 *Lev.* 228. *Hall versus Hufsam*.

11. Action by two Executors, in which they declared as Executors, and that they had proved the Will; the Probate being set forth, it appeared that one of them proved it, and thereupon the Defendant proved this Matter in Abatement, but he had Judgment to answer over, because both the Executors have a joint Right, and he who did prove the Will may come in at any Time, and cannot refuse, during the Life of the other. 1 *Salk.* 3. *Brooks versus Stroud*. *Farr.* 39. S. C.

(E)

Of Actions, where they are Defendants, good, and not good.

1. TWO Joint Executors cannot plead distinct Pleas, because they both represent but one Person, (*viz.*) the Testator, who, if living, and an Action should be brought against him, could have but one Plea himself.

Raym.
123.

2. Two Joint Executors, one of them made his Will and *W. R.* Executor, and died, and the other likewise died, but Intestate; afterwards a Legatee libelled against the Executor of him who died first, who pleaded this Matter; and upon the Refusal of this Plea by the Judge of the Spiritual Court, the Defendant moved for a Prohibition, but it was denied, for tho' the surviving Executor is entitled to the Whole of the Testator's Estate by our Law, and might have been sued without joining the Executor of the dead Executor; yet it may be otherwise in their Law, for the Executor of him who died first might have the whole Estate in his Possession, or he might be an Executor of his own Wrong, and the Matter is purely testamentary and triable in that Court. 1 *Lev.* 164. *Guillam versus Gill*.

3. Two Joint Executors; an Action of Debt was brought against one of them, who pleaded, that T. S. was made Executor with him, but not named in the Writ; and he did not aver in his Plea, that T. S. had administered; and upon Demurrer it was adjudged an ill Plea, for tho' where an Executor is Plaintiff, the Defendant may plead that there was another Executor with the Plaintiff not named in the Writ, without setting forth, that he administered, because 'tis a Thing not properly in the Knowledge of the Defendant; yet where an Executor is Defendant, he must plead and aver, that the other Joint Executor did administer, for this is a Thing which falls under his Knowledge. 1 *Lev.* 161. *Swallow versus Emberson*. *Sid.* 242. S. C.

4. Robert made his Brother William Executor, and died, and afterwards William made his Wife Lucy and one Todd Executors, and died; Lucy alone proved the Will, and she made two Executors

Executors, and died; then *Todd* renounced the Executorship of *William*, and Administration was granted to the Defendant of the Goods of *Robert*; but the Executors of *Lucy* insisting, that Administration ought to be granted to them; it was decreed by the Delegates, that *Todd* being Joint-Executor with *Lucy*, and surviving her, the sole Right to the Executorship of *William* did survive to him, tho' he never acted as Executor; that this Right could not be devested but by an *actual Renunciation*, and then, and not before, both *William* and *Robert* died Intestate, so as to entitle the Ordinary to grant Administration to the Defendant; and the Common Lawyers held, that if one Executor renounces before the Ordinary, and the other proves the Will, yet at Common Law he who renounced may at any Time come in and administer; and tho' he never acted whilst his Companions lived, yet after their Death he shall be preferred before any of their Executors; but the Civilians held, that a Renunciation is peremptory by the Civil Law. 1 *Salk.* 311. *House and Downs versus Lord Petre.*

Dyer 160.
9 Rep.
Hensloe's Case.
Hardr.
111.

5. Decreed by *Harcourt*, Lord Chancellor, that where there are two or more Executors, one alone may give a Discharge, and the Joining of the other is not material; but if they join in a Receipt, and one of them only receives the Money, each of them is liable to the Whole, as to Creditors, who are to have the utmost Benefit of the Law, but not as to Legatees, and to those who claim Distribution, who have no other Remedy but in Equity; for as to them the substantial Part is to be considered, which is the Receiving the Money, and that ought to be regarded in Conscience, and not the Joining in the Receipt, which is only Matter of Form. 1 *Salk.* 318. *Churchill versus Hopson.*

Jointenants and Tenants in Common.

What shall be a Jointenancy of a Freehold, either by Deed or Will. (A)

What shall not be a Jointenancy of a Freehold, but a Tenancy in Common. (B)

Of Jointenants and Tenants in Common of a Chattel. (C)

By what Acts a Jointenancy shall be severed, (*viz.*) by Fines, Recoveries, &c. (D)

By what Acts a Jointenancy is not severed. (E)

Where, and what Acts by one Jointenant alone shall be good without his Companion. (F)

Where, and by what Acts one Jointenant cannot prejudice his Companion; and of Actions by Jointenants and Tenants in Common. (G)

(A)

What shall be a Jointenancy of a freehold either by Deed or Will.

1. **L**EASE to Two, *habendum* to them for the Term of their Lives jointly, and to the Survivor of them and his Assigns, whoever of them should first happen to die, during the Life of the Survivor, and not otherwise, this made them Jointenants; then if one of them should assign the Whole, and die, a Moiety only passeth. *Mich.* 31 H. 8. *Dyer* 46.

2. Feoffment in Fee to the Use of himself and his Wife, who shall be hereafter; adjudged, when he marries, the Wife shall take jointly with him, tho' at first all the whole Estate vested in the Husband. 1 Rep. 101. in *Shelley's Case.* 17 Eliz. *Dyer* 340. S. P.

3. The Testator having only two Daughters who were his Heirs, devised his Lands to them and their Heirs for ever; adjudged, they were Jointenants by this Devise, because they take in another Manner than what the Law would have given them, which would have been as Coparceners by Descent, but here the Survivor shall have the Whole. *Mich.* 38 Eliz. *Cro. Eliz.* 431. *Goldsb.* 28. 141. S. C. *Mich.* 40 Eliz. *Dyer* 350. S. C. See *Postea* pl. 14.

4. The Testator devised his Lands to his eldest and to his youngest Sons; it was objected, that the Sons were Tenants in Common, because the eldest should take by Descent; but adjudged, that they were Jointenants, and that the eldest Son shall take by the Will, for the Benefit of him in the Remainder. *Mich.* 29 Eliz. *Goldsb.* 28.

5. The

5. The Father gave Lands to his Son and his Wife, & *eorum primogenit' proli successive*, they having no Issue at that Time, but afterwards they had Children; adjudged, that after the Death of the Son and his Wife, their Issue should take nothing by this Grant, because *they were not in Being* at the Time when it was made; and by the Grant, 'tis plain, that the Issue were to take jointly with them. *Mich. 30 Eliz. Cro. Eliz. 121. Stevens versus Lawton.*

6. The Testator devised his Lands to T. P. in Fee, and in the same Will he devised the same Lands to W. C. in Fee; adjudged, that they were Jointenants. *Cro. Eliz. 9. 3 Leon. 11. S. C.*

7. The Father having three Houses, and one Son and two Daughters, devised all his Houses to his Wife for Life, Remainder of one of his Houses, &c. to his Son and his Heirs, Remainder of another House to his eldest Daughter and her Heirs, Remainder of the third House to his youngest Daughter and her Heirs; and if any of his three Children should die, *without Issue of his or her Bodies*, then the other surviving shall have *totam illam partem* between them, *equally to be divided*; the Testator and his Wife and one of his Daughters died, but that Daughter left Issue; then the Son died without Issue, and afterwards the surviving Daughter and her Husband entered into the House devised to the Son, then she died, and her Husband held the Possession as Tenant by the Curtesy; the Question was, if his Wife, who was the surviving Daughter, should have all that Part devised to the Son, who was dead without Issue; or whether the Child of the other dead Sister should be Coparcener with her; adjudged, that these Words *totam illam partem* shall extend to the House, and not to the Estate in the House; and that if both the Daughters had survived the Son, they would have been Coparceners, not by the Will, but by Descent; and the Will being of the same Effect, and making no other Disposition than what the Law would have done without it, therefore as to that Matter 'tis void, and in such Case the Law shall take Place, and the Child of the dead Daughter shall be Coparcener with the Survivor; so the Husband could not be Tenant by the Curtesy. *Hill. 29 Eliz. 3 Leon. 180. Pettiwood versus Cook. 1 And. 180. S. C. 2 Leon. 129, 193. S. C. Cro. Eliz. 52. S. C. Latch 40. S. C. Estate for Life. (B) 4. S. C.*

8. So where the Testator devised several Parts of his Lands to his respective Sons in Tail, and if any of them should die without Issue Male, that the Survivor each to be the other's Heir, but did not say by *equal Portions; adjudged, that by this Clause the Sons were Jointenants, and this will plainly appear by transposing the Words thus, (*viz.*) *each Survivor shall be the other's Heir*, so that when one of them dies without Issue, (as it happened the eldest Son did in this Case) the next Brother shall not have his Part alone, but all his surviving Brothers shall be Jointenants. *Goldsb. 100. Hamblenden versus Hamblenden. Owen 25. S. C. Cro. Eliz. 163. S. C. 1 Leon. 166. S. C. Case the Words By 3 Leon. 262, and cited in 1 And. 194.*

* 1 And.
194.
Fowler v.
Ongley,
in that
Case the
Words By
equal Portions
were in the Will,
and that is a Tenancy
in Common.

9. Now as to the Word *Equally*, it generally makes a Tenancy in Common, as where the Testator devised his Lands to his Children, *equally to be divided between them*; but if the Devise had been to *Two equally*, and to *their Heirs*, this would have made them Jointenants, because they have equal Estates. *2 And. 17. Lowen versus Bedd. Postea (B) pl. 5. S. P.*

10. Not long before the last Case there was a contrary Resolution, as reported by Croke and Gouldsb. 182. Moor 594. S. C. *Gouldsborough*, (*viz.*) the Testator devised his Lands to his Children, *equally to be divided between them*, this was held to be Jointenancy; but those Reporters must be mistaken, not only because Serjeant Moor, who reports the same Case, tells us that it was adjudged a Tenancy in Common, but 'tis expressly against the fifth Resolution in Ratcliffe's Case, which was thus, (*viz.*) the Mother devised her Lands to her Son in Tail, Remainder to her two Daughters and to the Heirs of their Bodies begotten, *by equal Portions, equally to be divided amongst them*; the Son died without Issue; adjudged, that the two Daughters were Tenants in Common, for these Words in a Will *equally to be divided, &c.* make a Tenancy in Common. *Cro. Eliz. 330. Dickens versus Marshall. 3 Rep. 39. in Ratcliffe's Case. Estate for Life. (B) 9. S. C. truly reported.*

11. The Testator surrendered Copyhold Lands to the Use of his Will, and devised it to his two Sons and the Heirs Males of their Bodies, and that they should not enter till their several Ages of twenty-one Years; and farther, that his Executors should have the Lands for the Performance of his Will until his Sons should come to their respective Ages of twenty-one Years; adjudged, that the Sons are Jointenants, and if one enter when he comes of Age, the other being still under Age, that shall not destroy the Jointenancy. *Yelv. 183. Ailett versus Choppin. 2 Cro. 259. S. C. Postea (E) 3. S. C.*

12. Three Jointenants, one of them let his Share to the other, and then they Two made a Lease of the Whole, and in Ejectment the Plaintiff declared upon this Lease, supposing it to be made by both as Jointenants of the Inheritance, which was false, for they Two let only their two Parts jointly, and one of them having the Share of the Third as Tenant in Common, he alone let that Part, and not jointly with his Companion. *2 Cro. 83. Jordan versus Steere.*

13. The Father by Deed made between him and his eldest Son, bargained and sold his Lands to the Son, *habendum* to him and to his Heirs and Assigns, to the only Use of the Father and Son, their Heirs and Assigns for ever; adjudged, that they were Jointenants. *Mich. 7 Jac. Samm's Case.*

14. The Father having two Sons, devised his Lands to them jointly and severally; adjudged, that they were Jointenants and not Tenants in Common, notwithstanding the Word *Severally*, because 'tis added and coupled to the Word *Jointly*. *Poph. 52. Morgan's Case. See pl. 3.*

15. In Trespafs on a Special Verdict, the Cafe was, a Lease was made to Husband and Wife, and to their Son, *habendum* to all three from the Date of the Lease, *pro termino vite eorum & cujuslibet ipsorum alteri post alterum diutius viventi*, with a Letter of Attorney to make Livery, &c. adjudged, that the Lessees took jointly, and not severally. *Moor 636. Mellow versus May.*

16. The Testator being seised in Fee, devised his Lands to his Wife for Life, and after her Decease to his three Daughters, and the Heirs Males of their Bodies, and for want of such Issue to their Heirs Females; the Wife and two of the eldest Daughters died; adjudged, that the surviving Daughter shall have the whole for her Life, because the three Sisters were Jointenants for Life, and where severally Tenants in Tail of the Inheritance. *Lea 47. Fletcher's Cafe.*

17. The Father having two Daughters and a Son, devised his Lands to his Daughters equally to be divided between them; adjudged, that if the Will had gone no farther, the Daughters had been Tenants in Common by that Clause; but there were these Words following, *to have and to hold to the Survivor of them, and to the Heirs of the Body of such Survivor, until each of them receive 150l. at one entire Payment, upon Condition, that upon Payment of the Money, the Will to be void*: Now by this subsequent Clause it seems, that the Testator intended his Daughters should be Jointenants for Life, and that the Survivor should have an Estate-tail in the Whole, in Trust to pay her Sister's Portion, which otherwise might never be paid; for if the Daughters had been Tenants in Common for Life, even in that Cafe the Survivor would have been still Tenant in Tail, and by the Death of the other, her Portion would never have been paid; because her Estate was determined by her Death; and this would be contrary to the very Condition of the Will, which plainly shews, that the Testator did not intend, that her Estate should determine, or that the Will should be void, before the Portion was paid. *Style 211. Furze versus Weeks, or Ford versus Lenthall. 1 Roll. Abr. 90.*

18. *H. Hill* being seised in Fee covenanted, &c. that in Consideration of the Love which he had for *William Hill*, and for that he was of his Name and Kindred, and for preserving and continuing his Lands in the Name of the Hills, and in Consideration of a Marriage to be had between *Richard Hill*, the Son of the said *William*, and *Ursula*, the Daughter of *T. S.* covenanted to assure his Lands to himself for Life, and after his Decease, Remainder to the Use of the said *Richard* and *Ursula*, and to the Heirs of the Body of the said *Richard*, Remainder over, &c. and afterwards he made a Feoffment, and levied a Fine to the said Uses: *Richard* married another Woman, and *Ursula* another Man; the Question was, what Estate *Ursula* had; and adjudged, that she was Jointenant with *Richard*, notwithstanding the Marriage did not take Effect, because the Feoffment and Fine were to that Use; but if it had been made in Consideration of Marriage, &c. and they had not married, she would then have nothing. *IV. Jones 347. Jones versus Boyleson.*

19. Adjudged, that Tenants in Common may join in an Action on the Cafe for hindering a Watercourse. *Noy 135. Stone versus Browick.*

20. Feoffment in Fee, in Trust for himself for Life, and afterwards to pay the Profits to *John, Robert* and *Nicholas Dickens* in ratable and equal Manner; and when they should come to the Age of twenty-one Years, then to convey the Premises to them and their Heirs; the Question in Chancery was, whether this Trust was a Jointenancy, and so should survive, or a Tenancy in Common; and decreed a Tenancy in Common, as well of the Inheritance as of the Profits, and as well by a Deed as by a Will, in both which the Intention is to be considered. *2 Lev. 232. Bois versus Roswell and Dickens. See 4 Anna cap. 16.*

21. In Waste, the Cafe upon the Pleadings was, that one Tenant in Common brought an Action of Waste, without joining his Companion; & per Curiam, the Action of Waste is well brought by one alone; 'tis true, they must join in Personal Actions, where Damages are to be recovered, but they must sever in the Realty; now Waste is a mixt Action, and it favouring of the Realty, that shall draw over the Personalty to it, and by Consequence this Action by one alone is good. *2 Mod. 61. Curtis versus Bourn.*

22. *Indebitatus Assumpsit*, &c. upon a Trial at Bar, the Cafe was, a Grant was made of the Office of the Clerk of the Papers to two, for their Lives, and for the Life of the Survivor; one of them consents, that another shall be admitted, and accordingly a new Grant was made of the same Office to the Person consenting and to another; and this was likewise for their Lives, and for the Life of the Survivor; one of the first Grantees dies, and whether the other should have the whole Profits by Survivorship, was the Question: *Et per Curiam*, where two have an Office for their Lives, and for the Life of the Survivor, if one of them surrenders to the other, and a new Grant is made to this other and a Stranger, they are then both jointly seised, and he hath barred himself of the Survivorship. *2 Mod. 95. Woodward versus Aston.*

23. Cafe, &c. in which the Plaintiff declared, that he was Owner of a sixteenth Part of a Ship, and the Defendant was Owner of another sixteenth Part of the same Ship, and that he fraudulently and deceitfully carried the said Ship into Places beyond the Seas, and disposed her to his own Use, by Reason whereof the Plaintiff lost his sixteenth Part, *ad damnum*, &c. Upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment; because Tenants in Common have no Remedy by Action against each other; and here the Plaintiff and Defendant were Tenants of Common of this Ship, and tho' it was laid in the Declaration, that

1 Vent.
296

1 Lev. 27

that the Defendant *deceptive* disposed the Ship, and it was so found by the Verdict; yet it will not help, because the Law supposes a Trust between Tenants in Common, and that there can be no Fraud between them. *Raym. 15. Graves versus Sawcer.* See *Noy 14. Croffe versus Abbott.*

Sid. 157.
1 Lev.
107.

24 Two Tenants in Common had a Lease, in which there was a Covenant for the Lessee to repair, and in an Action of Covenant for not repairing, the Plaintiffs had a Verdict; and it was objected in Arrest of Judgment, that Tenants in Common ought not to join in this Action, because to repair a House favours of the Realty; 'tis true, in Real Actions, they may not join, but in all Personal Actions, where Damages are to be recovered, they may join, as in Debt for Rent; and so is *Keilw. 114.* They may join in a *Detinue* of Deeds; they may join or sever in mixt Actions; as in *parco fracto*, *Moor 452.* so in Account, *Godb. 90.* So if two Tenants in Common make a Lease for Years, rendring Rent, and then one of them dies, the Executor and the Survivor may join in an Action of Debt, or sever; so the Plaintiffs had Judgment. *Raym. 80. Kitchin versus Bulkly.*

25. In Replevin for taking his Cattle in a Place, called *Fludder-Park*; the Defendant avowed for that the Place where, &c. contained twenty Acres, and that he was seised in Fee of a *third Part of a Messuage* or Tenement, called *Trewint*, of which the said twenty Acres are Parcel, and that he demised the said third Part to *T. R.* for 99 Years, rendring Rent, &c. and for two Years Rent arrear he distrained, &c. the Plaintiff replied in Bar, and confessed the Seisin of the third Part, and the Lease *prout*, &c. but saith, that before the Taking, &c. one *William Spry* was seised in Fee of the other *two Parts of the said Messuage*, and being so seised, he licensed the Plaintiff to put his Cattle in and upon the said twenty Acres; and that by License, as aforesaid, he put them in, where they remained till the Defendant took them, &c. and upon Demurrer it was adjudged, that the Plaintiff and Defendant being Tenants in Common of undivided Parts, one of them could not distrain the Cattle of the other, or of a Stranger, who put them in by his License, for Rent due to the other; and that the Plaintiff having confessed and avoided, it had been impertinent for him to have *traversed*, that the Cattle were taken *in tertia parte tantum.* 2 *Vent. 227, 283. Kemp versus Corey & al.* See *Moor versus Newman.*

26. Covenant to stand seised to the Use of *T. P.* for Life, and afterwards to *W. R.* and *S. W.* equally to be divided, and to their Heirs and Assigns for ever; the Lord Keeper North decreed, that this was a Tenancy in Common as well of the *Inheritance*, as of the *Estate for Life*, and that the Words shall not be construed to make a Tenancy in Common for Life, and a Jointenancy of the Inheritance; for in such Case there would be a Survivorship of the Inheritance, which is never favoured in Law, in Prejudice of the Heir; and he held, that a *Devise to two equally*, would make a Tenancy in Common. 2 *Vent. 365.*

2 Lev. 11.

27. In Replevin for taking his Cattle, the Defendant avowed, for that the Place where, &c. Time out of Mind was Parcel of the Manor of *Old Fillongley*, &c. and that the Mayor and Bailiffs and Commonalty of *Coventry*, and one *Millon* and others, were seised thereof in Fee; and by Indenture made between them of the one Part, and one *Bushnett* of the other Part, &c. demised the Premises, rendring Rent; there was an Issue and a Verdict for the Plaintiff; but it was arrested, for that the Avowant had alledged, that the Corporation and *Millon*, and other natural Persons, were seised in Fee, &c. when by the Law a Corporation and a Natural Person cannot be Jointenants. 2 *Saund. 319. In Bennett and Holbeck's Case.*

28. In a Special Verdict in Ejectment, the Case was, the Testator being seised in Fee, and having two Daughters, *Frances* and *Jane*, and *Frances* having Issue *Phillip* and *Frances*, he devised his Lands to *Jane* his Daughter, and to his two Grand-Children, for thirty Years, to hold by equal Parts, (*viz.*) his two Grand-Children to have one Moiety of the Rents and Profits, and his Daughter *Jane* the other Moiety; and that if either of them should die before the Term expired, then for the Benefit of the Survivor; afterwards he made a Codicil, by which he gave Power to his Executors to let his *whole Lands* for the Benefit of his Children for thirty Years; one of the Grand-Children died, but left a Child; this being adjudged a Tenancy in Common in *C. B.* a Writ of Error was brought in *B. R.* and the first Question was, whether the Power given to the Executors by the Codicil, did take away the Interest vested in the Children by the Will; and *per Curiam*, it shall not, because the Executors had only a bare Authority, and no Interest: The next Question was, whether the Devise to his Daughter and Grand-Children by equal Parts, and that if any die without Issue, then it should survive to the other; whether *Frances* the Grand Child, being dead, but leaving a Child, her Interest should survive to her Brother *Phillip*, or go to her own Child; and *per Curiam*, it shall go to her own Child, because the Testator having made them *Tenants in Common*, by equal Parts, and devised it by Moieties, there can be no Survivorship in such Case by Law. 3 *Mod. 209. Anonymus.* See *King versus Rumball.*

3 Lev.
373.

29. In Ejectment, the Case was, the Father devised his Lands to his two Sons, and their Heirs, and to the Survivor of them, *equally to be divided* between them and their Heirs, after the Death of his Wife; *Treby*, Ch. Just. and two other Judges were of Opinion, that the Sons were Tenants in Common, because by these Words it appeared, that the Father intended not only to provide for them, but for their Posterity; for the Words are, *equally to be divided between them and their Heirs*; 'tis true, by the first Words 'tis given to them and their Heirs, and to the Survivor; but the last Words explain what he meant by the *Survivor*, (*viz.*) that the Survivor should have an equal Share with the Heirs of him who should first die; here the *Inheritance* is

appointed to be *equally divided* between the Sons and their Heirs ; and 'tis observable, that these Words immediately follow the Word *Survivor*, which shews, that he intended a Division in the Case of Survivorship ; and this differs from *Style* 211, and 2 *Roll. Rep.* 90. for there the Inheritance was fixed in the Survivor ; but *Powell Justice* held, that by the Word *Survivor*, there was an exprefs Jointenancy devised, and no Construction shall be, what the Testator intended against such exprefs Words. 1 *Salk.* 226. *Blissett* versus *Cranwell*. See 2 *And.* 17. 3 *Cro.* 443, 695. *Lewin* versus *Dodd*, S. P. *Moor* 558. S. C. *Styl* 434. *Torrell* versus *Frampton*, S. P. A Devise to three Sons, and to their Heirs respectively, makes a Tenancy in Common.

30. In a Trial at Bar in Ejectment it was resolved, that the Possession of one Jointenant is the Possession of both, so as to prevent the Statute of *Limitations* ; and that if one Jointenant levy a Fine, it severs the Jointenancy ; but it doth not amount to an actual Turning out his Companion. 1 *Salk.* 286. In *Ford* and *Grey's* Case.

31. In Trover, upon Not guilty pleaded, the Case was, the Defendant was Tenant by the Curtesy of Lands in *Ireland*, and had cut down and sold the Trees ; the Reversion belonged to the Plaintiff, and two others in Coparcenary ; adjudged, that in all local Actions, as in Trespass *quare clausum fregit*, the Plaintiff cannot prove a Trespass, but where he lays it ; nor lay it in any other Place but where it was done ; but in transitory Actions, as Trover, he may lay the Conversion here, and prove it to be done in *Ireland* ; that one Jointenant, or Tenant in Common, or Coparcener, cannot bring Trover against his Companion ; if he does, 'tis good Evidence upon Not guilty ; but he may against a Stranger, and then 'tis pleadable in Abatement. 1 *Salk.* 290. *Brown* versus *Hedges*.

32. In Replevin, the Defendant made Conusance as Baliliff to the *Countess of Salisbury* for 5 *Mod.* Rent arrear ; and it appeared in the Conusance, that the Reversion descended to the said *Countess*, 141. and to her Sister, as Coparceners, &c. and upon a Demurrer, it was adjudged, that the Conusance was ill, because both the Sisters ought to join, for they take as one Heir by Descent. 1 *Salk.* 390. *Stedman* versus *Bates* or *Page*.

33. Adjudged, that one Tenant in Common may disleise his Companion ; but it must be by actual Turning him out, and not by a bare Perception of the Profits. 1 *Salk.* 392. *Reading's* Case.

34. In Replevin, the Defendant made Conusance, as Bailiff to *W. R.* and *T. P.* and shewed, that 5 *Mod.* such an one being seised in Fee of the Place where, &c. granted an *Annuity of 100 l. per Annum*, to 25. five Persons, to be *equally divided amongst them*, to have and receive 20 l. to each of them during their Lives, and the Life of the Survivor ; and that if one died, his Share should be *equally divided amongst the Survivors*, and that *W. R.* and *T. P.* were the Survivors ; the Avowant had a Verdict and Judgment ; and it was insisted in Arrest of Judgment, that the Grantees of this Annuity were Tenants in Common, and not Jointenants ; and if so, then Tenants in Common cannot join in an Avowry, but must avow severally. *Holt*, Ch. Just. held, that the Words, *equally to be divided*, did not make a Tenancy in Common in a Deed, tho' they might in a Will, so that this is but one Rent, and one Grant undivided ; and if so, then they are Jointenants ; and so it was adjudged. 1 *Salk.* 390. *Ward* versus *Everard*. See *Knight's* Case, in which there is but one Reservation, and the Land at first is charged with the intire Rent.

35. Surrender of Copyhold Lands to the Use of *A. B. C.* and their Heirs, *equally to be divided between them and their Heirs, respectively* : Two Judges held this to be a Tenancy in Common ; but *Holt*, Ch. Just. held it a Jointenancy ; for if a Feoffment is made to *A.* and *B.* equally to be divided, they are Jointenants, because they have the Lands by one Title, and the Words, *equally to be divided*, import no more than what was implied before ; but if it be to *A.* and *B. habendum* one Moiety to *A.* and the other to *B.* the *Habendum* makes them Tenants in Common ; for they have several Titles, and there must be several Liveries and Seisins ; that the Word *divided* did not import a Tenancy in Common, because, tho' such Tenants hold by several Titles or Rights, yet their Possession is entire and undivided : a Devise to two and their Heirs, *equally to be divided*, was formerly held a Joint Estate, but now it makes a Tenancy in Common, not by Force of the Words, but by the Intention of the Testator, that there shall be no Survivorship : a Devise two *equally to be divided, habendum* to them, and to the Heirs of the Body of the Survivor, makes a Jointenancy. 1 *Salk.* 391. *Fisher* versus *Wigg*. 3 *Cro.* 330. *Dyer* 25. 151. *Bendl.* 19. *Style* 211, 434

36. Two Coparceners ; there was Judgment had against one of them, and the Goods of both were taken in Execution, and adjudged good ; for if the Sheriff had seised only a Moiety, and sold it, the other Coparcener would have a Right of a Moiety of that Moiety ; therefore he must seise the Whole, and sell the Moiety thereof undivided, and then the Vendee will be Tenant in Common with the other Coparcener. 1 *Salk.* 392. *Heydon* versus *Heydon*.

(B)

What shall not be a Jointenancy of a Freehold, &c. but a Tenancy in Common. See antea (A) pl. 9, 10, 17.

1. **I**F before the Statute 27 H. 8. of *Uses*, a Feoffment had been made to a Man and Woman, and to their Heirs, and they afterwards married, and then the Statute was made; in such Case they hold by Moieties; and if the Husband alieneth, 'tis good only for a Moiety, because the Statute executes the *Possession* according to the Quality, Form and Manner which they had in the *Use*. *Plowd.* 58. *Talbot's Case*.

2. Lands were given to three in the Premises of the Deed, *habendum* to one for Life, Remainder to the other for Life, Remainder to the third for Life; adjudged, that they were not *Jointenants*, but should take successively. *Pasch.* 5 *Mar.* *Dyer* 160.

3. So where Lands were given to the Mother and her Son, *habendum* to them for Life, or to one of them after another, as they are named in the Deed, and not *jointly*; adjudged, that they were not *Jointenants*. *Mich.* 20 *Eliz.* *Dyer* 361.

4. *Tenant for Life*, Remainder to three others for their Lives; *he in the Reversion levied a Fine sur Cognissance de droit, &c.* to the Use of the *Tenant for Life*, for his Life, and afterwards to the Use of one of the Remainder Men in Fee; the *Tenant for Life* died, and so did he in Remainder for Life, who took the Estate in Fee by the Fine; adjudged, that his Part shall descend to his Heir, and shall not survive to the other two, who had the Remainders for Life. *Cro. Eliz.* 481. *Child versus Hestcott.* 2 *Rep.* 6. *S. C.* *Postea* (D) 2. *S. C.*

5. Devise of Lands to his two Sons, *equally to be divided between them*; this makes them *Tenants in Common*, and not *Jointenants*; for *Tenants in Common* are those who have an *equal Right* to Lands, and hold them by several Titles; but *Jointenants* are those who hold Lands jointly by one Title, and without Partition; and they must jointly plead, and be jointly sued, and so must *Coparceners*; but there is a Survivorship between *Jointenants*, but none between *Coparceners*. 1 *Bull.* 113. *Newman versus Edwards.* See (C) pl. 1. (D) pl. 5. *S. C.*

6. In an Action of Debt for Rent reserved upon a Lease, the Case upon the Pleadings was, the Testator being seised of the Lands in Fee, devised them to *Thomas and John Lewin equally, and to their Heirs*; the Question was, whether they were *Jointenants*, or *Tenants in Common*; and adjudged, that they were *Tenants in Common*, by the Word *Equally*, tho' the Ch. Justice *Popham* was of Opinion that Word was not put in the right Place; for if it had been to them, and to their Heirs *equally*, it would have made a *Tenancy in Common*, but not where that Word is placed before the Word *Heirs*, as in the principal Case. *Moor* 558. *Lewin versus Cox.*

7. Devise to *B. G.* and *W. R.* and to four more, to hold to them, *their Heirs and Assigns* for ever, and that all of them should have an equal and like Share, *Part and Part alike*; adjudged, that by this Devise to them, their *Heirs and Assigns*, and that they should have *Part and Part alike*; they were not *Jointenants*, but *Tenants in Common*. *Cro. Car.* 53. *Thorowgood versus Collins.*

8. The Testator having four Daughters, devised his Lands to his Wife for Life, and after her Decease, *equally to be divided amongst his Daughters, Or their Heirs*; the eldest Daughter at that Time had a Daughter, but afterwards the Mother died, and then the Question was, whether that Daughter should have the fourth Part of the Lands which would have been the Share of her Mother, if she had been living; and adjudged, that she should, for the Word *Heirs* was not added of Necessity, so as to make all the four Daughters take by Purchase; but to make the Heir of the eldest Daughter a Title to her Part of the Lands; and 'tis the stronger, being in the Disjunctive. *Mich.* 3 *Car.* *Godb.* 362. *Tailour versus Hodgkins.*

(C)

Of Jointenants and Tenants in Common of a Chattel.

1. **T**HE Testator being possessed of a *Term for Years*, devised it to his two Sons *equally*; this was made a *Quære*, whether they were *Jointenants*, or *Tenants in Common*, in *Anno* 27 H. 8. *Dyer* 25. But in *Hillary-Term*, 29 *Eliz.* it was resolved, that they were *Tenants in Common*. *Cork versus Perwell.* 3 *Rep.* 33. In *Ratcliff's Case.* *S. P.*

2. A Lease was made to two; provided, that if they died within the Term, that it should cease; they made a Partition, and afterwards one died; adjudged, that his Executor shall have the divided Moiety. *Dyer* 67. *Farrington's Case.*

3. Lease for twenty-one Years to *Husband and Wife*, if *he or she*, or any Child begotten between them, should so long live; the Wife died without Issue; the Question was, whether the Lease was determined; and adjudged, that it was not, because by the Disjunctive, *if he or she*, &c. so long live, it appears, that the Intent was, that it should not be determined by the Death of one of them. *Pasch.* 29 *Eliz.* *Goldf.* 71. *Corn versus Baldwin.*

4. Adjudged, that where a Tree grows in a Hedge which divides the Lands of *B.* and *W.* so that the Roots thereof are nourished by each of their Lands, that they are Tenants in Common of this Tree. 2 *Roll. Rep.* 255.

(D)

By what Acts a Jointenancy shall be severed, (viz.) By Fines, Recoveries, &c.

1. **T**WO Jointenants of a Term for Years, one of them grants Part of the Term to another, this is a Severance of the Jointenancy; but if the Husband hath a Term for Years in Right of his Wife, and grants Part of it to another, the Wife shall have the Residue, which was not granted, if she survive her Husband. *Cro. Eliz.* 33. *Simms's Case.* *Mich.* 21 *Eliz.* 2 *Leon.* 159. *Pleadall's Case.* *S. P.*

2. Tenant for Life, Remainder to *W. R.* and to another for Life, Reversion to *M. M.* and his Heirs, who levied a Fine to the Tenant for Life, and to *W. R.* to the Use of the Tenant for Life, for his Life, Remainder to the Use of *W. R.* in Fee; then the Tenant for Life died; adjudged, that by his Death, the Jointure between *W. R.* and the other who were Jointenants for Life, was severed, and that the said *W. R.* was now become Tenant in Common with the other; and this Difference was taken, (viz.) when a Fee-simple is limited by a new Conveyance, there one may have the Fee, and another an Estate for Life; but when both of them are Tenants for Life first, and then one of them gets the Fee-simple, there the Jointure is severed. 2 *Rep.* 6. *Wiscott's Case.* *Cro. Eliz.* 481. *Antea* (B) 4. *S. C.*

3. The Case was, two Jointenants for Life, one of them makes a Lease to *T. S.* to commence immediately after his Death, and afterwards he died, and the Lessee entered; adjudged by nine Judges, that this Lease shall bind his Companion, as well as if it had been to take Effect in Possession in the Life-time of the Lessor; but three Judges held it void, because 'tis impossible it should take Effect and commence in the Life-time of the Lessor, unless he survive the Lessee; for by a Lease in Possession the Jointure is severed, tho' the Freehold still remains. 2 *And.* 26.

4. Husband and Wife, Jointenants of a Manor, and to the Heirs of the Body of the Husband, Remainder to *B.* in Tail; the Husband alone in the Life-time of his Wife suffers a Common Recovery with Voucher, the Remainder Man is attainted of Treason, and the Husband died without Issue, and then his Wife died; now, tho' she was jointly seised and ought to have been named in the Writ, which is not good without naming her; yet the Vouchee by entering generally into the Warranty, hath admitted it to be good, and so the Recovery shall be a Bar to one Moiety. *Marquess of Winton's Case.* 3 *Rep.* 1.

5. Devise of Lands to Two, equally to be divided, &c. they are not Jointenants; but if a Reversion do descend upon one Jointenant; in such Case the Jointure is severed, and by Operation of Law they are then Tenants in Common. 1 *Bull.* 113. *Newman versus Edwards.* *Antea* (B) pl. 5. *S. C.* *Postea* (E) pl. 2. *S. C.*

6. Two Jointenants, the one by Deed grants, bargains and sells all his Estate, Right, Title, &c. to the other; adjudged, that this amounts to a Release; and in Pleading it must be set forth *quod relaxavit*, because one Jointenant cannot grant to another. 1 *Vent.* 78. *Chester versus Wiljon.* *Sid.* 452. *S. C.* 2 *Saund.* 96. *S. C.* *Raym.* 187. *S. C.*

7. In Ejectment, the Case was, the Father having two Sons and eight Daughters, covenanted to stand seised to the Use of his second Son for Life, Remainder in Tail to his Issue, and for Default of Issue, to all his Daughters in Tail, so that they were Jointenants by this Settlement; the Father died, and his second Son intending to settle the Estate upon his elder Brother, he and four of his Sisters join in a Common Recovery to the Use of himself for Life, and afterwards to his Sons in Tail, and afterwards to his elder Brother in Tail Male, and afterwards to his said four Sisters in Tail, and died without Issue; the elder Brother entered and suffered a Common Recovery, in which the other Sisters joined and limited new Uses, and then died without Issue; the Daughters entered and conveyed to several, and some of them died without Issue; the Question was, whether by the first Recovery the Estate of four of the Sisters was turned into a Right, who did not join in that Recovery; and adjudged that it was, for where there are several Jointenants, and some of them suffer a Common Recovery of the Whole, the Estate of the others is turned into a Right; and by this first Recovery the second Brother had destroyed the contingent Remainders, and gained a new Estate. *Sid.* 241. *Morgan's Case.*

(E)

By what Acts the Jointenancy is not severed.

1. **I**F a Feme Sole and *B. G.* purchase a Term for Years jointly, and afterwards they intermarry, this is no Severance of the Jointenancy. *Bracebridge's Case.* See 14 *Eliz.* *Dyer* 318.

2. Where Lands are given to Two, and to the Heirs of one of them, and afterwards the *Reversion* descends upon one, this shall not sever the Jointure. 1 *Bulst.* 113. *Newman versus Edwards.* *Antea* (D) pl. 5. S. C.

3. Devise to his two Sons, and to the Heirs Males of their Bodies, but that they should not enter till their several Ages of twenty Years, and that his Executors should have his Lands to perform his Will in the mean Time; adjudged, that these Clauses shall be transposed, so as to make the Estate of the Executors precede the joint Estate to the Sons, (*viz.*) that his Executors shall have his Lands in their Possession until his Sons come of Age, and then they shall have it; and that by the Entry of one of them, when he came of Age, the Jointenancy was not severed, because his Entry was only to take the Profits, and not as to the Estate which he held jointly with the other. 1 *Bulst.* 42. *Ailett versus Choppin.* *Yelv.* 183. S. C. 2 *Cro.* 259. S. C. *Antea* (A) 11. S. C.

4. Adjudged, that where one Jointenant made a Lease for Years, rendring Rent, this was no Severance of the Jointenancy, because the Lessor had still a Title to the *Reversion* expectant upon the Determination of the Lease, and his Companion hath the Inheritance in Possession, and is likewise intitled to the *Reversion*, if he survive, but not to the Rent. 2 *Lutw.* 1173. 1 *Inst.* 155. a. S. P.

(F)

Where, and what Acts by one Jointenant alone shall be good without his Companion, and what not. See *Antea* (E) per totum.

1. TWO Jointenants for Life, one of them leaseth his Moiety for Years, rendring Rent, and died; adjudged, that the Term did continue, and should not be determined by his Death, so that the Survivor might have the whole Freehold discharged of it, but that the Lessee should still enjoy his Lease discharged of the Rent. *Mich.* 3 *Eliz.* *Dyer* 187, and 103. S. P. *Plowd.* 102. *Fulmerstone versus Steward.* S. P. *Poph.* 96. * *Harbin versus Chart.* S. P. *Postea* pl. 4. S. C. *Postea* pl. 14. S. C.

* Noy
157.

2. John Arundell being seised in Fee, made a Lease to Two for their Lives, and granted the *Reversion* to B. G. for Life, to which Grant one of the Jointenants for Life attorned, and then surrendered all his Estate to the said B. G. and died, who entered and claimed to hold in Common with the surviving Jointenant for Life; and adjudged that he might, for the Attornment of one Jointenant for Life shall vest the entire *Reversion* in the Grantee, because the Estate of joint Lessees is entire, and by Consequence the *Reversion* which depends on such Estate is likewise entire, and the Attornment of one Jointenant is the Attornment of both, for it passes no Interest, but only perfecteth the Grant; so if one Jointenant gives Seisin of Rent, that shall bind the other, and one Jointenant may prejudice his Companion in the Personalty, tho' not in the Realty; therefore if one receive all the Profits, or releaseth a personal Action, the other is * without Remedy, because of the Privity and Trust which is between them; and the Folly shall be imputed to him, to keep a joint Estate with such a Companion when he may sever it. 2 *Rep.* 66. *Tooker's Case.* See *Postea* pl. 14. The Law altered as to this Matter.

* *Postea*
(G) pl. 15.
contra,
for he shall
be account-
able to the
rest.

3. Judgment in an Action of Debt is had against one of the Jointenants for Life, who before Execution released to his Companion; adjudged, that the Moiety is still liable to the Judgment during the Life of the Releasor; but if he had died before Execution, the Survivor should have held the Land discharged of the Debt and Judgment. 6 *Rep.* *Lord Abergavenny's Case* 78.

4. Two Jointenants, one cannot make a Feoffment to his Companion, but he may release to him, and if they are Jointenants of a Lease, and one doth covenant and agree that the other shall possess the Whole and sow it with his own Corn, this doth not transfer any sole Interest to him; but if he agree that he shall sow it solely, this excludes him. *Owen* 102. *James versus Portman.*

5. Lessee for Years was bound to relign to the Lessor on a particular Day, upon Request; before the Day came the Lessor assigned the *Reversion* to Two, *habendum to them and their Heirs*, so that they were Jointenants; one of them required the Lessee to deliver Possession according to the Purport of his Agreement with the Lessor; it was a Question whether this Request by one Jointenant as Assignee of the Lessor was good; and adjudged that it was, and that he need not alledge any Notice of the Assignment, for every Act done by one Jointenant, for the Benefit of his Companion, shall bind, and it shall be intended to be the Act of both. *Owen* 129. *Lingen versus Paine.* 2 *Cro.* 475. S. C. *Bridgm.* 129. *Godbolt* 272. S. C.

6. There were four Jointenants of an Advowson, one of them granted his Interest; this was adjudged a good Grant, and that the Survivorship should not take Place, tho' the Advowson is a Thing entire. *Goldf.* 81. *Kemp versus Bishop of Winton.*

1 *Roll.*
Rep. 309.

7. Two Jointenants for Life, one of them made a Lease of his Moiety for sixty Years, if he and his Companion should so long live, and then surrendered his Moiety, and died; adjudged, that the Lease determined by his Death, and that it continued no longer than the joint Estate. 2 *Cro.* 377. *Daniell versus Waddington.* *Dyer* 187. * *Harbin versus Burton.* S. P. pl. 1. S. C. *Postea* pl. 12. S. C.

* Noy
157.

1 *Roll.*
Rep. 401.
441.
3 *Bulst.*
272. S. C.

8. Husband and Wife, in the Right of his Wife, who was Jointenant with B. G. for the Lives of the Wife and the said B. G. made a Lease of the Moiety for twenty-one Years; the Wife died, and then B. G. the surviving Jointenant entered, supposing that the Lease was determined

by the Death of the Wife, for that the Husband was not Jointenant with her, but in her Right, and therefore had not Power to contract for any longer Time than for her Life; but adjudged, that the Lease was good, until she, or one who claimed in Privity by her, avoid it by Entry, which cannot be done by the surviving Jointenant, because he is in Paramount the Wife, and not under her Title, therefore the Lease shall bind as long as the other Jointenant Lives. 2 Cro. 417. *Smalman versus Agborow*, and *Bridgman* 43. S. C. *antea*.

9. By what ever Means one Jointenant comes to the Estate of his Companion, it shall enure 2 Roll. By Way of Release, for both Estates being in him, the Law shall so vest it in him, as if he had it from the Feoffor; for if one Jointenant bargains and sells by Deed enrolled to his Companion, tho' that vests the Use, and the Statute the Possession, yet it being in him, the Law will construe it to be entirely in him, and not by Division of Estate. 2 Cro. 649. *Eustace versus Scawen*. Rep. 444. 47. 485. W. Jones 55.

10. Jointenants as to the Possession of the Lands in Jointure are seised by Entireties of the Whole, and of every Part equally; but as to the Right of the Land, they are seised only of Moieties; therefore if one grant the Whole, a Moiety only passeth. 1 Bulst. 3. *Proctor versus Johnson*. Cro. E. 12. 809. S. C. 2 Cro. 233. S. C. Yelv. 175. 2 Brownl. 212. S. C.

11. Where one Tenant in Common entereth on the whole Land and claimeth it, this Entry shall not dispossess his Companion; for a Coparcener, a Jointenant, or a Tenant in Common, can never be disseised by his Companion; and 'tis for the same Reason, that if one Tenant in Common brings an Action of Trespass against a Stranger, it shall be abated by Pleading, that the Plaintiff is Tenant in Common with another, tho' he entered on the Whole. Hob. 120. *Small versus Dale*. Moor 868. S. C.

12. Two Jointenants in Fee, (but Popham tells us, for Life) one of them made a Lease for Years. to commence after his Death, and afterwards he died; the Question was, whether this Lease was good against the Survivor, and adjudged that it was good. Moor 395. *Harbin versus Barton*. *Antea* pl. 2, 4. S. C. See Baron and Feme. (F) 10. *Postea* (G) pl. 4. *contra*.

13. Two Jointenants of an Office committed the Seal thereof, and the Receiving the Profits, to T. S. and afterwards exhibited a Bill in Equity against him to have an Account thereof; then one of the Jointenants gave a Release to the Defendant T. S. of all Actions, Accounts, &c. whereupon the other Jointenant exhibited another Bill against his Companion; and the said T. S. suggesting that the said Release was obtained by Combination, and for a valuable Consideration paid in Money, to which Bill T. S. pleaded the Release, and adjudged a good Plea, tho' the Bill seeks Relief against it, for the Release is good in Law, and there appears no Combination or Default in him in obtaining it; and it being for a valuable Consideration, Equity ought not to set it aside; and if the Plaintiff has any Remedy, it must be against his Companion alone. *Hardres* 168. *Griffith versus Munser*.

14. Before the Statute 4 *Annæ*, cap. 16. one Jointenant had no Remedy against his Companion to recover Damages for what he had received more than his Share (as may be seen before pl. 2. in *Tooker's Case*) either out of the Rents or Profits of the joint Estate, or for any Goods or Chattels of which they were Jointenants, and converted to the Use of one of them; but the other was to make Reprisals if he could, because there was a Privity in Trust between them, which is the Reason that they must all join in an Action; but if Two alone brought an Action where there were Three or more, and the Defendant did not take Advantage of it by Pleading the Jointenancy in Abatement, but pleaded the General Issue; there, if they have a Verdict they shall recover two Parts, &c. 1 Lev. 232.

15. But now by the Statute before-mentioned, an Action of Account is given to one Jointenant or to one Tenant in Common, his Executors or Administrators, against his Companion as Bailiff or Receiver, if he receive more than his Share or Proportion, and likewise against their Executors or Administrators, &c.

(G)

Where, and by what Acts one Jointenant cannot prejudice his Companion; and of Actions by Tenants in Common and Jointenants. See *Antea* (A) 11.

1. TWO Jointenants, one is indebted to the King and dieth, the other shall hold the Land discharged of this Debt; but if Husband and Wife purchase a Term jointly, and the Husband is indebted to the King, and dieth, in such Case the Term shall be subject to the Debt, because the Husband might have disposed the whole Estate. *Plowd.* 321.

2. Two Jointenants of a Term for Years, one of them sells all that which to him appertained; adjudged, that the Whole should not pass, but only his Part and Share. 28 H. 8. *Dyer* 33.

3. One Jointenant shall not prejudice his Companion as to any Matter of Inheritance or Freehold, tho' he may as to the Profits of the Freehold, for there is a Privity and Trust between them as to that, and therefore if one of them taketh all the Rents or Profits, the other hath no Remedy. 2 Rep. 62, in *Tooker's Case*.

4. Two Jointenants for Life, one of them by Indenture covenanted, granted and agreed, that L. E. should enjoy the Moiety of the Lands after the Death of the other Jointenant for sixty Years, if he the Covenantor should so long live, but the Covenantor died first; adjudged, that where there

there are two Jointenants for Life, and one maketh a Lease for Years to begin after his Death, 'tis good to bind his Companion. 2 Cro. 91. *Whitlock versus Hartwell*. Noy 14. S. C. *Moor* 776. S. C. *contra*, that the Lease is void. *Antea* (F) pl. 12. *contra*.

5. Husband and Wife were Jointenants, and the Action was brought against the Husband alone, who made Default; thereupon the Wife prayed to be received, but it was not allowed, because she was no Party to the Writ; but he in the Reversion may be received, and may plead Jointenancy in Abatement of the Writ. *Moor* 242. *Caine's Case*.

6. Two Tenants in Common of a Manor brought a Writ *de parco fracto*; and upon Demurrer it was adjudged, that the Action lies without shewing how they came to be Tenants in Common, and one alone might have this Writ. *Moor* 452. *Wentworth versus Russell & al.* Cro. Eliz. 530. S. C.

2 Roll. 7. In Replevin, the Question was, whether one Tenant in Common might distrain upon his
Rep. 212. Companion, and adjudged that he might. 2 Cro. 611. *Snelgar versus Henston*.

2 Cro. 8. Case, &c. for disturbing them to have a Seat in *Beckenham Church* in *Kent*, in which they
611. S. C. prescribe to have a Pew in that Church, as belonging to the Manor to which the Advowson is ap-
1 Roll. pendant, and that they were Lords of the Manor and Founders of that Church; the Defendant
Rep. 202. pleads, that he was seised of a Messuage, &c. and that Time out of Mind the Pew belonged to the
S. C. said House, and traversed the Prescription of the Plaintiffs *modo & forma* as they had alledged; and they being at Issue upon this Traverse, the Evidence upon the Trial proved them to be *Tenants in Common*, whereas by there own Shewing they were Jointenants; now, if they are Tenants in Common, then they could not join in a Prescription, which is very true, if this Action was for the Right of the Seat; but this was only a possessory Action for the Disturbance, to which the Prescription was only an Inducement, and Tenants in Common may join in a possessory Action, because they have an undivided Possession jointly, tho' the Right is several; but adjudged, that since it appears by the Declaration, that they are Jointenants, the Evidence that they are Tenants in Common will not maintain this Action: for tho' 'tis personal, yet when they claim the Possession by Virtue of a Title derived out of a Prescription, that Title is several, and by Consequence they ought to prescribe severally. *Palm.* 161. *Snelgrave versus Brograve*.

9. The Plaintiff declared, that he and T. S. were Tenants for Years as Tenants in Common of a Messuage, &c. to which he had Common appendant, and that the Defendant had ploughed the Lands, so that he was damaged in his Common; it was objected, that this Action would not lie by one Tenant in Common against his Companion; but if he had any particular Damage by Distress of his Cattle, &c. 'tis otherwise. *W. Jones* 144. *Hammond versus White*.

10. In Debt for a *Moiety* of the Tithes of D. the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that it appears by the Declaration, that the Plaintiff was Tenant in Common with another of these Tithes, because he declared for a *Moiety*; and Tenants in Common ought to join in personal Actions, as in Debt, &c. but adjudged, that it being after Verdict, it shall be intended, that the Plaintiff had a Title to a *Moiety* in Law, and not to a *Moiety* in Common; and that if there are two Tenants in Common of a Rectory for Years, and one is outlawed; yet the other upon shewing that Matter may have an Action of Debt for his *Moiety*. *Sid.* 49. *Cole versus Banbury*.

11. There were three Jointenants of Goods, two of them bring an Action of Trover; the Defendant pleaded Not guilty, and they recovered for two Parts in Damages; 'tis true, the Defendant might have pleaded this Matter in Abatement *quoad tantum*; but having pleaded Not guilty, they, tho' Jointenants with another, shall recover Damages for their proportionable Shares. 2 Lev. 113. *Nelthrope versus Dorrington*.

12. In Assise of an House, upon a Trial at Bar, the Evidence was, that there were *two Tenants in Common* of an House, and one of them nailed up the Doors and made a Wall against them, that the other might not enter, and this was resolved to be no Disseisin. *Allen* 8. *Waters's Case*.

13. If Tenant in Common bring a personal Action alone, without joining his Companion, in such Case the Defendant must take Advantage of it by Pleading in Abatement; but if he plead Not guilty, 'tis good, and the Plaintiff shall recover Damages only for a *Moiety*; so if he deliver an Ejectment alone, he shall recover only a *Moiety*. 1 Mod. 102.

14. In Dower, the Demandant counted for 350 Acres; the Defendant pleaded as to fifty Acres, Jointenancy with T. S. &c. The Demandant replied, and averred the sole Tenancy of the Tenant at the Time of the Writ brought, without a Traverse of the Jointenancy; and upon a Demurrer, *per Curiam*, this Replication is not good without a Traverse, for it might be, that the Tenant was both sole seised and jointly in the same Day. T. Jones 6. *Lady Cobham versus Thomson*.

5 Mod. 110. 15. Adjudged, that one Jointenant cannot avow for a Rent-Charge without making himself Bailiff to his Companion. 5 Mod. 71. *Pullen versus Palmer*. 2 Lutw. in *Osmere and Sheafe's Case*. S. P. See *Tooker's Case*.

16. Trespass against two Defendants, one of them pleaded in Abatement, that the other was Tenant in Common with the Plaintiff, &c. The Plaintiff replied, that he was sole seised; there was a Demurrer and Joinder in Demurrer; and adjudged, that in Trespass the Defendant cannot plead Tenancy in Common with the Plaintiff, because he may give it in Evidence at the Trial, but he may plead that another is Tenant in Common with the Plaintiff, for that will be no Proof that he is not guilty of the Trespass. 1 Salk. 4. *Hywood versus Davis*.

Jointure.

(A)

What it is, and where it shall be a Bar to Dower, where not.

1. **T**HE Husband covenanted, to stand seised to the Use of himself and his Heirs, till the Marriage should take effect, and afterwards to himself, his Wife, and *their Heirs*; adjudged, that tho' this was an Estate in Fee to the Wife, yet it was a good Jointure within the Statute 27 H. 8. for 'tis a competent Livelyhood for her to take effect immediately after the Decease of her Husband. *Hill. 8 Eliz. Dyer 248. Sir Maurice Dennis's Case.*

2. The Father, in Performance of Covenants upon the Marriage of his Son with E. R. made a Feoffment to the Use of the said E. F. for Life, for her Jointure; the Marriage took Effect, the Father died, and the Son had other Lands holden of the King, as of his Dutchy of Lancaster, and the Wife would have Dower of those Lands; but adjudged, she could not, because the other was a good Jointure within the Statute 27 H. 8. *Dyer 228. Ashton's Case.*

3. A Jointure is a competent Estate of Freehold in the Wife, to take Effect immediately after the Death of the Husband; therefore if he make a Feoffment in Fee to the Use of his Wife, for the Life of W. R. for her Jointure, this is not within the Statute of Jointures, because the Estate is not for the Life of the Wife. *3 Rep. in Vernon's Case.*

4. Feoffment to the Use of himself, without Impeachment of Waste, and after his Decease to the Use of his Wife, for her Jointure, *upon Condition, that she should perform his Will*; the Husband died, the Wife entered and agreed to the Estate; adjudged, this is a good Jointure within the Statute 27 H. 8. tho' it was limited to the Wife, *upon a Condition*, because she accepted it; otherwise it could not be averred, to be for her Jointure, because that is to take Effect immediately after the Death of the Husband; that where a Jointure is made before Coverture, the Woman cannot afterwards waive it, and take her Dower, as she might, if it had been made after Coverture; but if Lands be conveyed to her *before Coverture for Part of her Jointure*; and if after her *Marriage more Lands* are conveyed to her *in full* of her Jointure, she may waive the Lands conveyed to her *after Coverture*, and retain the other Land, and her Dower also. *4 Rep. 1. Vernon's Case.*

5. Devise to his *Wife generally*, without expressing for what Estate; this cannot be *averred* to be for her Jointure, because a Devise cannot be averred to any other Use than to the Devisee; but a Devise to a *Woman for Life or in Tail*, for her Jointure, this is good within the Statute 27 H. 8. *Leak versus Randall, cited in Vernon's Case.*

6. Where an Assurance was made to a Woman, and it was not expressed, that it was made for her Jointure; adjudged, that it may be *averred*, it was made for that Purpose, and such an Averment is not traverfable. *Trin. 7 Eliz. Owen 33.*

7. The Husband devised Lands to his Wife till his Daughter should be 19 Years old, and afterwards to his said Daughter in Tail, and that then she should pay to her Mother 12 l. *per Annum* for her Life, in *Recompence of her Dower*; and if she failed, then her Mother should hold the Lands for her Life; afterwards the Husband died, and then the Wife brought a *Writ of Dower* before her Daughter was 19 Years old, and after she came to that Age, then the Mother likewise *entered for Non-payment of the Rent of 12 l. per Annum*; adjudged, that by her bringing the Writ of Dower for her Thirds, she had waived the Benefit of Entry into the Lands, so as to hold them for her Life; and that it was against the Intent of the Testator, that she should have both the Dower and the 12 l. *per Annum* for her Life. *Cro. Eliz. 128. Goffin versus Warburton. 1 Leon. 137. S. C.*

8. The Father made a Feoffment to the Use of himself for Life, and afterwards to the Use of his Son and his Wife, for their Lives, for the Jointure of the Wife; adjudged, this was no Jointure to bar the Wife of her Dower, because it might not commence immediately after the Death of the Husband, for he might die in the Life-Time of his Father; so if a Feoffment be made to the Use of the Husband for Life, Remainder to W. R. for Years, Remainder to the Wife for Life for her Jointure; this will not bar her Dower. *Hutt. 51. Sherwell's Case 2 Cro. 489. Wood versus Shirly. S. P. Postea 14. S. C.*

9. The Father of the intended Wife in Consideration of 200 l. paid to him by the Father of W. Jones the intended Husband, and in Consideration of a Marriage to be had between his Daughter 254. and the Son of the other, covenanted to assure certain Lands, *to the Use of the Husband and Wife, and the Heirs of her Body to be begotten by the Body of the Husband*, Remainder over; the Marriage took effect; the Husband died, and the Wife married again, and they by *Fine* conveyed the Lands to the Defendant, upon whom the Issue entered for a Forfeiture by the Statute

11 *H. 7.* adjudged this was no *Jointure* within that Statute, because it was an *Advancement of the Woman by her own Father*, and not by the Husband or his Ancestors; and tho' it was found, that Money was paid by the Ancestor of the Husband, yet 'tis not found to be of the Value of the Land; and the Estate being to take Effect immediately in the Husband, that may be sufficient for the Money. *Cro. Car. 244. Copland versus Piatt. 2 Cro. 624. Kinaston versus Loyl. Palm. 212. S. C. Jones 13.*

10. But where the Father covenanted, that as well in Consideration of 200 *l.* paid, &c. as of a Marriage between his Son and the Daughter of the Covenantor, that he would convey Lands to them, and to the Heirs of the Body of the intended Wife, and died before he made such Conveyance, which was afterwards made by the Son, in Performance of his Father's Covenant, and they had Issue; and then the Son made a Feoffment to *W. R.* and he and his Wife joined in a Fine to the Feoffee, and then their Issue entered for a Forfeiture upon the said Statute 11 *H. 7.* adjudged this was a Jointure within the Letter and Meaning of that Act, because it was made by the Husband to his Wife, and not by any of her Ancestors. *2 Cro. 479. Kirkman versus Thomson.*

11. The Master, in Consideration of Service done by *N. T.* his Servant, and for divers other Considerations, granted Lands to him, and to a Woman whom the Servant intended to marry, and to the Heirs of their two Bodies to be begotten; the Marriage took effect, and they had Issue two Sons; the Husband died, and afterwards his Widow married *W. R.* and then the Husband and Wife made a Feoffment of the Lands to the eldest Son; then the second Husband died, and the Widow entered on the Lands; and afterwards the eldest Son, to whom the Feoffment was made, levied a Fine to the now Defendant; and the Widow made a Feoffment in Fee to her youngest Son; the Question was, whether by this Grant to the first Husband and his Wife, she had a Jointure, or not, within the Statute 11 *H. 7. cap. 10.* for if it was a Jointure, then the Feoffment which she made to her youngest Son, is a Forfeiture, and the eldest Son might enter upon the Lands as forfeited to him; adjudged, that it was not a Jointure, for it was not a Gift of the Husband, or of any of his Ancestors, but of his Master, and in Consideration of his Service, which will not make him such a Purchaser as the Law requires. *Hill. 3 Jac. 2 Cro. 173. Ward versus Matthews. Moor 683. S. C. By the Name of Ward versus Ludman.*

12. Feoffment in Fee, upon Condition, that the Feoffees should make another Feoffment to the Use of the Son of the Feoffor, and to his (the Son's) Wife, in Tail, Remainder to the Right Heirs of the Feoffor, which Feoffment was made accordingly; the Son died; adjudged, that this is a Jointure within the Statute, and a good Bar to the Dower of the Wife, tho' she doth not claim the Jointure under the Ancestor himself, but under those Feoffees who derived their Power from him. *Moor 28.*

13. The Husband being seised of the Manors of *Northfield* and *Woolley* in the County of *Worcester*, and of Lands, called *Fernolds* in *Shropshire*, did in Consideration of a Marriage already had between him and *Ciceley* his Wife, covenant to stand seised of the Premises, to the Use of himself for Life, and afterwards to the Use of *Ciceley* his Wife, for her Life, for her Jointure, Remainder in Tail to the Heirs of the Husband; the Lands, called *Fernolds* were afterwards, and during the Coverture, lawfully recovered from the Husband by a Verdict and Judgment; then the Husband died, his Heir being within Age; adjudged in the Court of Wards, that the Wife shall have Recompence in Value of other Lands of the Heir for the Term of her Life, tho' she had accepted the other Lands which were not evicted. *Moor 717. Gervois's Case. See the Statute 27 H. 8. cap. 10. Of Jointures.*

2 Roll. Rep. 33. 14. In Dower, the Case was, that the Husband was Tenant in Tail, Remainder to his Wife for Life; then the Husband made a Feoffment in Fee to the Use of himself and his Wife, for Life, for her Jointure, and died without Issue; adjudged, that this Jointure was not pleadable in Bar to her Dower, because it was avoided by a Remitter to her first Estate for Life. *Moor 872. Wood versus Shirley. Pl. 8. S. C.*

Ireland. See **Error.** (H)

Issues. See **Amerciaments.**

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Issues joined.

Where Issue is well joined. (A)	} What Things are issuable, and what not. (C)
Where Issue is not well joined, and of Issues on collateral Matters, and of immaterial and dilatory Issues. (B)	

(A)

Where Issue is well joined. See *Juror*.

1. **I**N an Action of Conspiracy against *A.* and *B.* for procuring him (the Plaintiff) to be indicted for Robbery, the Defendant pleaded, that a Robbery was committed, and the Plaintiff was suspected, and carried before a Judge, who upon Examination advised them to have the Plaintiff indicted; and upon a Demurrer to this Plea, it was objected, that this was only Matter of Evidence upon Not guilty, and amounted to no more than the General Issue *Not guilty*: But *per Curiam*, 'tis well enough, for he confesses the Indictment, and avoids it by Matter in Law; besides the Plaintiff shall not take Advantage of this Matter, without a Special Demurrer. *Cro. Eliz.* 871. *Paine's Case*.

2. Trespass of Assault and Battery against three Defendants; two of them pleaded, that the Plaintiff leased certain Lands to them, and that afterwards the Plaintiff took away the Posts on the Land, and that they jointly took them from him; and the third pleaded, that he found the Plaintiff and the other contending about the Posts, and he to part them, *moliter manus imposuit*, &c. *quæ est eadem*, &c. the Plaintiff replied, *de injuria sua propria absque tali causa*, &c. upon which they were at Issue, and it was found for the Plaintiff; but it was objected, that here was no Issue, because there being two Pleas, and several Causes of Justification, (*viz.*) two justify by Reason of their Interest, and the Third, in Preservation of the Peace, the Plaintiff ought to answer both; for *absque tali causa* will not do; but adjudged, that the Word *Causa* shall refer to every Cause; and so the Plaintiff had Judgment, tho' 'tis not a good way of Pleading. *1 Leon.* 124. *English versus Smith & al'*.

3. Adjudged, that when any Special Point is in Issue, in such Case the Plaintiff is not obliged to set forth any other Matter. *Cro. Eliz.* 320. *Griffin versus Spencer*, and 899. *Baily versus Taylor*, *S. P.* *Yelv.* 24. *S. C.* and *Yelv.* 78. *Jefferrey versus Grey*, *S. P.*

4. In Trespass, the Defendant justified, and prescribed for Common belonging to *two Acres in Backwell Moor*; the Plaintiff replied, that *B.* was seised of 200 Acres, of which the said two Acres were Parcel, and traversed, that the Defendant had Right of Common to the said two Acres, *Parcel of the said 200 Acres*; upon which they were at Issue, and the Plaintiff had a Verdict, (*viz.*) that the Defendant had not Common to the said two Acres, and Judgment accordingly; and upon a Writ of Error brought, it was objected, that this Traverse was repugnant; for the Plaintiff replied, that he had Common to the two Acres, *Parcel of the 200 Acres*, and this he contradicts by his Traverse; for which Reason Issue is not well joined: *Sed per Curiam*, 'tis well joined; for the Issue at first is, that he had Common belonging to the two Acres, and the Addition of *Parcel of the 200 Acres*, is idle and superfluous. *1 Roll. Rep.* 28. *Newcomb versus Butworth*.

5. Debt on Bond, the Defendant pleaded Payment of the Money on the 14th Day of June 11 *2 Roll. Jac.* according to the Condition; the Plaintiff replied, that he did not pay the Money on the 14th Day of August, &c. upon which they were at Issue, and the Jury found, that he did not pay on the 14th Day of June; upon this a Writ of Error was brought, and the Error assigned was, that here was no Issue joined, because the Defendant pleaded Payment on one Day, and the Plaintiff replied to another Day, and concluded to the Country; but adjudged well enough, and that the Word *August* was superfluous and void, and that *prædict' 14 die*, without more, had been sufficient. *2 Cro.* 549. *Hill versus Bonithon*.

6. Debt upon the Statute 2 *Ed.* 6. for not setting out Tithes; the Defendant pleaded *nil debet*; and this was adjudged a good Issue. *Hob.* 218. *Bawtry versus Isted*.

7. In Replevin, the Defendant avowed Damage-feasant; the Plaintiff replied, that *B. G.* was seised of an House and Land, to which there was Common belonging, and being so seised, he made a Lease thereof to the Plaintiff 30 *Martii*, &c. to hold the same from *Michaelmas* following for a Year; the Defendant traversed the Lease, upon which they were at Issue, and the Jury found, that the said *B. G.* made the Lease to the Plaintiff 25 *Martii* for one Year; adjudged,

that tho' this could not be the same Lease set forth by the Plaintiff in his Replication ; yet the Substance of the Issue is, whether the Plaintiff had any Lease or not, from *B. G.* by Virtue whereof he might be entitled to have Common, and the Jury found, he had a Lease ; therefore the Plaintiff shall have Judgment ; but if they had found he had a Lease from *another*, and not from *B. G.* this had been altogether a Departure from the Issue ; and in such Case it much be against the Plaintiff. *Hob. 72. Pope versus Skinner. Postea Verdict. (E) 4. S. C.*

8. Trespass, &c. the Defendant pleaded, that *J. H.* was seised in Fee, and granted a Rent, &c. for which he distrained, &c. the Plaintiff replied, that before the Grant of the Rent, &c. *W. H.* was seised, who had Issue *J. H.* and *B. H.* and that he devised his Lands to his two Sons in Tail, and died, and that *J. H.* died without Issue ; and *B. H.* had Issue *A. H.* and died, and that the said *A. H.* gave Leave to the Plaintiff to put in his Horse, &c. *Absque hoc*, that the aforesaid *J. H.* the Father was seised in Fee prout the Defendant had alledged ; and upon this they were at Issue, and found for the Plaintiff ; it was objected, that here was no Issue at all, because the Defendant had not pleaded that *J. H.* the Father was seised, but only, that *J. H.* was seised, and the Traverse being taken upon the Seisin of the Father, and the Issue being on that Traverse, is no Issue ; but adjudged, that tho' the Word *Pater* is added in the Traverse, yet the subsequent Words (*viz.*) prout the Defendant had alledged, binds it to that very Person which the Defendant had alledged in his Plea. *Hob. 217. Blackford versus Atkins.*

9. *Assumpsit*, &c. the Father in Consideration of a Sum of Money paid to him by his Son, promised to suffer his Land to descend upon him, and then sets forth, that the Money was paid, &c. but that he did not suffer his Land to descend ; and upon Demurrer it was objected, that this was no good Issue, because he ought to have averred in Fact, that the Land did not descend to him, and not to say, that his Father did not suffer it to descend ; but adjudged good upon this Difference, (*viz.*) where the Case arising upon the *Assumpsit* is in the Affirmative, there the Fact ought to be averred ; but where it arises upon a Negative, as here, 'tis sufficient to say, that he did not suffer the Land to descend, &c. 2 *Bulst.* 28. *Grey versus Grey.*

10. The Conusor acknowledged a Recognizance of 300*l.* defeasanced, that if he paid to *B. G.* 300*l.* in six Years, *viz.* 50*l.* per Ann. at such a Place, that then, &c. and he pleaded, that he was ready every Day at the Place to have paid it, &c. but that *B. G.* was not there ready to receive it ; now, here was a proper Issue tendered in the Negative, and therefore the Plaintiff ought to have replied, that *B. G.* was there ready to receive it ; but instead of that he took it by Protestation, that the Conusor was not there ready to pay it, and for Plea said, that *B. G.* was ready at the Place to have received it, *Absque hoc* that the Conusor was there ready to pay it ; which upon Demurrer was adjudged to be wrong, because there was a good Issue tendered before. *Ido.* 38. *Hughes versus Phillips.*

11. Debt upon Bond, the Defendant pleaded a Tender at the Day, and having brought the Money into Court, the Judgment was, that the Defendant eat *sine die* ; but the Plaintiff, to have Damages, alledged a Demand, to which the Defendant demurred, and had Judgment ; for if the Plaintiff would have Damages, he ought to have received the Money out of Court, and the rather, because no Issue can be taken after a Judgment, *quod eat inde sine die.* 2 *Cro.* 126. *Harold versus Charworthie.*

12. In Debt against an Executor, the Jury found, that the Testator died in *Ireland*, and that the Defendant possessed himself of several of his Goods there, and administered them to the Value of the Debt ; and that he did not administer any of the Testator's Goods *infra regnum Angliæ* ; adjudged, that where the Place is material, and made Part of the Issue, there the Jury cannot find the Fact in another Place, because by the Special Pleading, the Point in Issue is restrained to a certain Place ; but upon the General Issue pleaded, the Jury may find all local Things, in another County ; and in the principal Case they had found the Substance of the Issue, which is, that the Defendant had *Assets*, and the finding they were in *Ireland* is Surplage. 6 *Rep.* 46. *Dowdall's Case.* See in that Case, *Glynn versus Constantine*, and *Pasch.* 15 *Jac.* *Murch Rep.* * *Oxford Countess versus Warhouse. S. P.*

* *Cro.*
Car. 575.
S. C.

13. In Trespass, &c. for taking his Goods, the Defendant pleaded, that the Plaintiff, Anno 5 *Jac.* acknowledged a Recognizance of 100*l.* to be paid at *Michaelmas next*, at which Day he did not pay the Money, and that two Years afterwards he extended the Recognizance upon his Goods, and so justified the Taking, &c. The Plaintiff replied, that the Money was paid anno 6 *Jac.* and concludes to the Country ; and upon the Trial, the Jury found for the Plaintiff ; and now the Defendant moved in Arrest of Judgment, for that there was no Issue joined, because the Defendant had alledged in his Plea, that the Money was not paid at *Michaelmas.* 5 *Jac.* and the Plaintiff in his Replication affirmed it to be paid Anno 6 *Jac.* which was a Year after the Day on which the Defendant had alledged the Default of Payment ; and so it was no Answer to the Plea ; and then he concludes to the Country upon his own Allegation, that the Money was paid Anno 6 *Jac.* without staying for the Defendant's Rejoinder, that it was not then paid ; but adjudged, that it was an Issue joined ; 'tis true, it might have been better ; but yet 'tis such an Imperfection as is helped by the Statute 18 *Eliz.* and tho' Payment simply is no good Plea to avoid a Recognizance, yet after a Verdict, the Defendant shall not take Advantage of it. *Pasch.* 11 *Jac.* 1 *Browl.* 225. *Mills versus Jones.*

14. Case, &c. on several Promises ; the Defendant pleaded *Non Assumpsit* as to all, & de hoc ponit se super patriam ; but did not put them severally in Issue ; yet this was held well. 2 *Cro.* 544. *Cro. Car.* 219. *S. P.* *Sid.* 332. *S. P.*

15. The Lessee covenanted to repair, and the Breach assigned was, that he suffered the House and Buildings to be ruinous, & sic non reparavit; the Defendant pleaded, that he did not suffer the Buildings to be ruinous, upon which they were at Issue, and the Plaintiff had a Verdict; and upon a Writ of Error brought, the Error assigned was, that the Issue was misjoined, for the Covenant was to repair; and the Breach assigned was, non reparavit, but the Issue was, non permittit esse in decusu; but adjudged, that non reparare is the same Thing as permittit esse in decasu, so the Plaintiff had Judgment. *Hide versus Dean and Canons of Windsor. Moor 399.*

16. Debt on a Bond, the Defendant pleaded the Statute of Usury, alledging, that it was agreed, that the Plaintiff should have so much Money for Forbearance, &c. the Plaintiff replied and traversed quod corrupte agreeatum fuit, upon which they were at Issue, and the Jury found for the Plaintiff; and it was moved in Arrest of Judgment, that the Issue was taken upon corrupte agreeatum fuit, which Word Corrupte is not in the Plea, but the Plaintiff had his Judgment, because the Plea was made good by the Replication; but if both the Plea and Replication had been ill, yet the Declaration is good, and therefore the Plaintiff shall have Judgment. *Moor 464. Rogers versus Jackson.*

17. Debt upon Bond, the Defendant pleaded the Statute of Usury, and that corrupte agreeatum fuit between them, and that the Plaintiff corrupte recepit so much, and Issue was taken upon both, and the Defendant had a Verdict; but it was moved in Arrest of Judgment, that the Plea was double, and so was the Issue, and therefore this was a Mis-trial and not remedied by any Statute; but adjudged for the Defendant; for when Issue is taken upon one Thing, which is immaterial, and both found for the Defendant, 'tis a sufficient Warrant for the Court to give Judgment for the Defendant. *Moor 574. Johnson versus Clerke.*

18. Error of a Judgment in Debt for 20*l.* Part whereof, (*viz.*) 16*l.* was upon a Bond, and 4*l.* upon a Mutuus; the Defendant pleaded as to the 4*l.* non debet, & de hoc ponit se super patriam, &c. and as to the Money on Bond, solvit ad diem, & de hoc ponit se super patriam, & præd. (the Plaintiff) similiter; and the Jury found for the Plaintiff quoad the Bond, and for the Defendant quoad the 4*l.* and it was assigned for Error, that here was no Issue, for the Defendant should have pleaded quod solvit, & hoc paratus est verificare; and the Plaintiff ought to have replied Non solvit, & hoc petit quod inquiretur per patriam; so that he should have tendered the Issue and not the Defendant, for then there had been an Affirmative and a Negative; but there was no such Thing in the Defendant's Plea; but adjudged, that the Defendant having pleaded Payment, & de hoc ponit se super patriam; and the Plaintiff having joined with him therein, and the Jury finding he hath not paid, 'tis well enough, and aided by the Statute of Jeofails. *Cro. Car. 231. Parker versus Tailor.* This last was denied to be Law. *Postea pl. 25.*

19. In Trespass, the Defendant justified for a Way, not only to go, to ride, and to drive his Cattle, but also to carry with Carts and Carriages, &c. the Plaintiff traversed in the very Words of the Plea, (*viz.*) Absque hoc, that he had a Way, not only to go, to ride, &c. but also to carry, &c. and thereupon they were at Issue, and it was found for the Plaintiff; it was objected, that this was not a good Issue, because it was not a direct Affirmative, but only by Inducement; but adjudged a good Affirmative, for to say, that not only B. G. hath been at Reading, but W. R. also is a plain Affirmative, that both have been there. *March 55. Hicks versus Webb.*

20. Debt on two Bonds, the Defendant pleaded non sunt facta, but did not put them severally in Issue; adjudged, that he need not, and that the Plea was good. *Noy 132.*

21. In a Prohibition upon a Suggestion of Unity of Possession in the Abbey and Rectory, and Lands, &c. and that they came to H. 8. by the Dissolution, &c. of the Abbey, and afterwards the Rectory was granted to one, and the Lands to another, and the Grantee of the Rectory libelled against the Grantee of the Lands for Tithes; the Defendant in the Prohibition pleaded, that at the Time of the Dissolution, and Time out of Mind, the Lands, &c. were leased for Years, and that for all that Time the Lessees paid Tithes, to which Plea the Plaintiff demurred and had Judgment, because it was too general, and no Issue could be taken upon it. *IV. Jones 412. Broadhead versus Lewis.*

22. In an Assault, &c. the Defendant pleaded specially and justified, the Plaintiff replied, de injuria sua propria, and Issue being joined upon it, he had a Verdict; it was objected, that this Replication did not answer the Special Matter in the Plea, nor was there any Traverse by an Absque tali causa, as it ought, and so there is no Issue joined, and by Consequence the Matter was not tried, and there can be no Judgment; it was adjudged to be an immaterial Issue, and a Repleader was awarded; it was likewise held, that if there are several Things in a Declaration, upon which an Issue may be joined; if 'tis joined in any of them, 'tis good, and that an Affirmative and an implied Negative will make a good Issue. *Style 151, 210. Jennings versus Lee.* See (B) 11. S. C.

23. An Executor brought Debt upon several Bonds for Money due to the Testator; the Defendant pleaded, that he paid a lesser Sum than expressed in the Bonds to the Testator in his Lifetime, and that he did accept the same in full Satisfaction of the Money due on the Bonds; upon Demurrer to the Plea, the Question was, whether the Payment or the Acceptance of the Money should be traversed; and adjudged, that it was indifferent to traverse either, but that it was more proper to take Issue upon the Payment, for if he did receive the Money, it shall be intended in Satisfaction of the Bonds, because he must receive upon such Terms as the other will pay. *Style 239. Bois versus Cranfield.*

24. Information, setting forth, that at *Gravesend* in the County of *K.* on such a Day and Year, and in such a Vessel there riding, *T. S.* seized 206 *l.* in Gold from certain Persons unknown, *then and there passing, or upon their Passage* in a certain Ship, from *Ratcliffe* in *Middlesex* to Parts beyond the Seas; the Defendant pleaded, that no Gold was found in any Vessel, *or any passing or in their Passage* from *Ratcliffe, &c.* upon which they were at Issue, and a Verdict against the Defendant; and it was moved in Arrest of Judgment, that the Issue was ill, because it was taken in the Disjunctive, (*viz.*) *passing or in their Passage*; but adjudged, that the Issue was good, because the disjunctive Parts are synonymous. *Hardres* 16. *Proteſtor* versus *Wyche*.

1 Lev.
183.

25. The Defendant covenanted that he was seized in Fee, and in an Action of Covenant brought by the Plaintiff, he assigned the Breach, that the Defendant was *not seized in Fee*; the Defendant pleaded, that he had not broke his Covenant, and thereupon they were at Issue, and the Plaintiff had a Verdict; it was moved for a Repleader, because it was an Issue on two Negatives, and would introduce great Incertainties in Issues, to suffer such general and involved Pleadings; and *Parker* and *Taylor's* Case has been denied to be Law; but adjudged, this is not an immaterial but an informal Issue, and cured by a Verdict; however, they disliked it, and ordered that the Attorney should be fined. *Sid.* 289. *Walsingham* versus *Coomb*.

26. *Assumpsit* for Wares sold, the Defendant pleaded Infancy; the Plaintiff replied they were for Necessaries suitable to his (the Defendant's) Estate and Degree, and concluded to the Country, and the Plaintiff had a Verdict; it was insisted in Arrest of Judgment, that here was no Issue joined, because there was no Negative, but only a single Affirmative, the Plaintiff therefore should have concluded his Replication, *& hoc paratus est verificare*, as where in Trespass for an Assault the Defendant pleaded *in Bar*, and the Plaintiff replied *de injuria sua propria*, without a Traverse *absque tali causa*; and this was held ill, and a Repleader ordered even after a Verdict; but in the principal Case it was adjudged, that this Replication was good after a Verdict, because the Matter which is the *Gist* of this Action was found, tho' there was no Negative and Affirmative to make the Issue, as where in Debt upon Bond the Defendant pleaded Payment, and concluded to the Country; now by this Plea the Plaintiff had no Opportunity to deny the Payment; yet, if upon the Trial, the Jury find the Money paid, this is good after a Verdict; as to the Plea *de injuria sua propria* before-mentioned, without a Traverse *absque tali causa*, that is good Law, because without such a Traverse the Bar is not answered. *Sid.* 341. *Burton* versus *Chapman*.

27. In *Assumpsit, &c.* the Defendant pleaded *Not guilty*, upon which they were at Issue, and the Jury found that he was *guilty, and that he promised in Manner and Form as aforesaid*; it was insisted in Arrest of Judgment, that *Not guilty* is no Issue in this Action, and the Jury finding farther Matter, is void, because it was not in Issue; but adjudged *Not guilty* is a good Issue in *Assumpsit*, for 'tis a Trespass on the Case, and that if it was not, 'tis cured by the Verdict. 1 Lev. 142. *Elrington* versus *Doshant*.

28. In Replevin for Taking his Cattle in *Filloughley Field, &c.* the Defendant avowed, for that the Place where, was Time out of Mind Parcel of the Manor of *Filloughley*, and that before the Time, in which the Taking is supposed to be, the Mayor, Bailiffs and Commonalty of the City of *Coventry*, and one *Millon* and others, were seized in Fee of the said Manor; and by Indenture made between them *testatum existit*, that the said Corporation and Natural Persons demised the said Manor to *Bassnett* for twenty-one Years, who assigned his Term to *Holbech* the Avowant, who 1 Novemb. Anno 18 Car. 2. demised the Place where, *&c.* to *Bennet* the Plaintiff *apud Filloughley, &c.* for one Year and over, at Will, rendring Rent; and for so much Rent arrear he avowed the Taking the Cattle; the Plaintiff replied in Bar to this Avowry, that *Holbech* on the first Day of Novemb. Anno 18 Car. 2. at *Filloughley, &c.* did not demise to the Defendant *modo & forma*, as he the Defendant had alledged; the Defendant rejoined, that he, on the first Day of Novemb. Anno 18 Car. 2. at *Filloughley*, did demise to the Plaintiff *modo & forma*, upon which they were at Issue; and the Jury found, that the Defendant, the Avowant, did not demise to the Plaintiff on the first Day of November, Anno 18 Car. 2. at *Filloughley, modo & forma, &c.* whereupon the Plaintiff had Judgment; and now the Avowant brought a Writ of Error in *B. R.* for that the Day and Place of the Demise was made Parcel of the Issue; and the Jury having found, that he did not make the Lease on that Day and at that Place, this is a Negative pregnant, for it implies, that the Avowant did make a Lease to the Plaintiff *Bennet*, tho' not on that Day mentioned in the Avowry; and this Fault was occasioned upon the Plaintiff's Replication in Bar to the Avowry, so that the Merits of the Cause was not tried thro' his Default; but adjudged, that admitting it to be a Fault, 'tis aided after a Verdict by the Statute 32 H. 8. cap. 30. for this is but a Misjoining the Issue, and that is expressly aided by that Statute. 2 Saund. 326. *Bennet* versus *Holbech*. See *Moor* 695. 2 Cro. 251. Cro. Car. 78. S. P.

Sid. 340.
1 Lev.
226.

29. Debt upon Bond, conditioned, that the Defendant should give the Plaintiff a true Account of all such Money and Goods of *W. N.* deceased, as shall come to his Hands; and upon such Account shall make an equal Dividend thereof; the Defendant pleaded, that no Money or Goods of the said *W. N.* came to his Hands, *&c.* the Plaintiff replied, that a *Silver Bowl, &c.* came to his Hands, *& hoc paratus est verificare*; and upon Demurrer it was objected, that this Replication was ill, because the Plaintiff had assigned no Breach of the Condition; for 'tis not sufficient for him to say, that such Goods came to the Defendant's Hands; but he ought farther to set forth, that he did not make a Dividend, as in an Action of Debt upon a Bond of Award; the Defendant pleads *nonnulla arbitrium*; 'tis not sufficient for the Plaintiff to reply and shew an Award, but

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he must assign the Breach to maintain the Action; besides, the Conclusion of this Replication is ill, for the Defendant having pleaded, that *no Goods* came to his Hands, &c. and the Plaintiff having replied, that a silver Bowl came to his Hands, here is a Negative and Affirmative, upon which an Issue might be joined, and therefore the Plaintiff ought to have concluded to the Country. 1 Saund. 102. * Heyman versus Gerrard. Yelv. 137. S. P. See Yelv. 24, 25. 3 Cro. 320. See Lev. 226. * See Breach of Conditions. (A) 16. this Case denied to be Law.

30. Debt upon Bond, the Defendant pleads in Abatement, that the Plaintiff was an *Esq*; at the Time of the Bill exhibited, and traversed that he was a *Knight*, &c. The Plaintiff replied, that at the Time of the exhibiting the Bill he was a *Knight*, & *hoc petit quod inquiretur per patriam*; and upon Demurrer to this Replication, it was objected, that this Issue ought to be tried by the King at Arms; but adjudged, that it may be tried *per patriam*. Raym. 379. Sir John Sparrow versus Draper.

31. In Replevin, the Defendant avowed upon the Statute 13 Car. 2. cap. 10. for killing Deer in his Park, and that the Plaintiff was aiding and assisting to the Killing, &c. The Plaintiff replies, that he was not aiding or assisting, and Issue thereon; the Jury found for the Plaintiff; and it was moved in Behalf of the Avowant, that this was an immaterial Issue, because the Aiding and Assisting was found before a Justice of Peace and shall not be tried over again; and so it was adjudged, tho' it seems plain that the Statute 32 H. 8. cap. 30. helps Misjoining of Issues, and so is Dighton and Bartholmew's Case. Cro. Eliz. 778. Gouldsb. 39. S. C. If the Bar is good and the Replication naught, the Plaintiff shall replead as to the Replication, but the Bar shall still remain; and if the Replication is good and Rejoinder naught, yet if the Bar is good, and the Issue is taken upon a naughty Rejoinder, the Defendant shall replead to the Rejoinder, and the Bar and Replication still remain good; but if the Bar is naught and the Replication good, and Issue is taken upon it, the Defendant shall replead to the Whole. Raym. 458. Sir Geo. Fletcher's Case.

32. In Debt for an Escape of one in Execution, after Issue joined upon *Nil debet*, the Defendant offered to acknowledge the Action with *relucta verificatione*; and upon Motion the Court would not allow it without the Consent of the Plaintiff, because probably he might have a Verdict, which cures many Faults. T. Jones 156. Cooling's Case, the Marshal.

33. Debt, &c. in which the Plaintiff declared upon a Bill, reciting, that whereas one *Gill* was arrested at the Suit of the Plaintiff for 250 *l.* the Defendant became bound, that *Gill* should put in good Bail, &c. otherwise he would pay the Debt due to the Plaintiff, and shews, that the Action against *Gill* was for 250 *l.* and that he had not put in Bail, &c. the Defendant pleaded, that *Gill*, at the Time of making this Bill, *non debuit* to the Plaintiff the said 250 *l.* *nec aliquem inde denarium*, upon which they were at Issue, and the Jury found *quod debuit* 167 *l.* Part of the 250 *l.* and as to the Residue *non debuit*; and upon a Writ of Error brought, it was objected, that this Bar to the Plaintiff's Action was collateral, and therefore the Issue ought to be intirely found for him or against him, and not by Parcels: *Sed per Curiam*, tho' *non debet* had been better Pleading, and a more direct Answer to the Declaration; yet since the Merit of the Cause is tried, and the Debt is made certain by the Verdict, the Impropriety of the Issue is now aided by it. T. Jones 134. Bloom versus Wilson.

34. *Sci. fa.* by an Administrator, upon a Judgment of 1000 *l.* obtained by the Intestate; the Defendant pleaded, that such a Day, before Administration was granted to the Plaintiff, it was granted to *T. P.* who is still alive at *B.* and concluded in Abatement; the Plaintiff replied, that *T. P.* was dead, and concludes to the Country; and upon Demurrer this Plea was held ill, for tho' it contradicts the Declaration, the one affirming, that Administration was granted to him, and the other, it was granted to *T. P.* yet this is not properly an Affirmative and a Negative upon which an Issue might be joined. 1 Vent. 213. Fortescue versus Holt.

35. *Quantum meruit*, &c. for Goods sold and delivered; the Defendant pleaded Infancy in Bar; the Plaintiff replied, that Parcel of the Goods for which he had declared, were for necessary Clothes of the Infant, and the Residue was for Meat and Drink; the Defendant rejoined, that Parcel was not for Clothes, and Parcel, &c. was not for Meat and Drink, & *de hoc ponit se super patriam*; and upon a Demurrer to this Rejoinder, it was objected, that the Defendant ought to put these Allegations severally in Issue, and not to have tendered one Issue to the Whole; but this Objection was disallowed. 1 Lutw. Rep. 239. Swinburne versus Ogle. Pleas. (F) 10. S. C.

36. Case for Money due for Barley sold, in which the Plaintiff declared upon an *Indebitatus Assumpsit*, a *Quantum meruit*, a *Mutuuus* and *Insimul computasset*; the Defendant pleaded, that the Causes of Action *nec earum aliqua*, accrewed within six Years; the Plaintiff replied, that the Causes, &c. *sive nonnulla earum* accrewed within six Years, and concluded to the Country; and upon a Demurrer to this Replication the Plaintiff had Judgment, because it was a plain Affirmative of what the Defendant had denied in his Plea, and therefore having tendered an Issue, the Defendant should have joined, and not have demurred. Lutw. Appendix. Scott versus Charleton.

(B)

**Where Issue is not well joined, and of Issues on collateral Matters;
and of immaterial Issues and dilatory Issues.**

1. **D**EBT upon Bond, conditioned, that whereas the Plaintiff was in Possession of such Lands, if *B. G.* nor *W. R.* nor *W. T.* did disturb him by any indirect Means, but by due Course of Law, then, &c. the Defendant pleaded, that *neque B. G. nec W. R. nec W. T.* did disturb him, &c. and adjudged, this could not be tried either by Judge or Jury; not by the Judge, because the Defendant had not alledged in certain what was the Course of the Law by which the Plaintiff was disturbed; nor by the Jury, because they are only to try Matter of Fact and not Matter of Law, (*viz.*) whether the Plaintiff was disturbed by due Course of Law. *Godbolt 62. Dighton versus Clerke. Mich. 29 Eliz. 2 Leon. 197. S. C.*

2. *Assumpsit*, &c. for 100 *l.* the Defendant pleads, that he had given the Plaintiff a Bond for the said 100 *l.* The Plaintiff replied and maintained his Declaration, and traversed that the Defendant gave him a Bond, &c. and concluded to the Country, & *prad'* the *Defendens similiter*, upon which they were at Issue; and the Jury found, that the Defendant did not give the Bond for 100 *l.* and thereupon the Plaintiff had Judgment in the Exchequer; but upon a Writ of Error brought, that Judgment was reversed, because here was no Issue joined, for that cannot be without an Affirmative and a Negative; now, here Issue was joined upon a Traverse, which ought not to be, because the Traverse ought to conclude with *hoc paratus est verificare*, and then the other Side ought to plead in the Affirmative, and to conclude to the Country, & *prad'* the Plaintiff *similiter*. 2 *And. 6. Roch versus Patten.*

2 Roll. Rep. 186, 204, 209. 3. In Debt, the Defendant pleaded *plene administravit*; the Plaintiff replied, that at another Time he brought an Action of Debt against the now Defendant, upon which he was outlawed; and upon Error brought the Outlary was reversed; whereupon he forthwith brought this Action, and that at the Time of the first Action the Defendant had Assets, and so concluded to the Country, & *prad'* defend' *similiter*, and upon Trial the Plaintiff had a Verdict; but upon Error brought it was assigned for Error, that here was no Issue joined, for the Plaintiff had alledged two Things in his Replication, (*viz.*) the Outlary of the Defendant in an Action, &c. and Assets at the Time of that Action, which the Defendant had no Opportunity to answer, because the Plaintiff did not aver it as he ought, but immediately concluded to the Country, and so it was adjudged; and the Judgment was reversed. 2 *Cro. 597. Aldrich versus Walthall.*

4. In Trespass for Breaking his Close; the Defendant justified for a Way; the Plaintiff replied, *de injuria sua propria absque tali causa*, upon which they were at Issue, and there was a Verdict for the Plaintiff; and it was moved in Arrest of Judgment, that the Issue was not well joined, for it ought to have been a Special Issue, and therefore the Defendant insisted on a new Trial, but it was not allowed, because it was helped by the Statute of *Jeofails*. *Trin. 14 Jac. 1 Brownl. 200. Swift versus Soley.*

5. In Replevin, the Case upon the Pleading was, a Lease was made for sixty Years, under the yearly Rent of 22 *s.* which was wrote in Figures; that the Plaintiff put the Figure (1) before the Figures (22) and caused the Figures (22) to be rased and changed into the Form of the Figure (5) &c. by Reason whereof the Deed was void; the Plaintiff replied, that he did neither the one or the other; upon which they were at Issue; but it was held to be treble, because there were several Offences alledged against the Plaintiff, therefore he ought to take all but one by Protestation, and offer an Issue upon that one, and no more. *Moor 80. Arden versus Mitchell.*

6. Debt upon Bond, conditioned to pay 20 *l.* within forty Days next after *his personal Being at Rome, and his Return into England*; the Defendant pleaded, that the Plaintiff *never was at Rome*; & *de hoc ponit se super patriam*; and upon a Demurrer it was objected, that the Issue should be *upon his Return into England*, for the other was not triable, and this was the better Opinion; but one Judge held, that if one was not triable the other must not, because the Condition was in the Copulative. *Moor 178. Mollineux's Case.*

7. In an Action of Trespass, the Defendant pleaded an Accord between the Plaintiff and others of the one Part, and the Defendant and other of the other Part, for the said Trespass, which was, that he the said Defendant should pay to the Plaintiff so much Money, which he had paid; the Plaintiff replied, there was no such Accord *between him and the Defendant*, as he (the Defendant) had alledged, upon which they were at Issue, and the Plaintiff had a Verdict; but upon a Motion in Arrest of Judgment, it was adjudged, that here was no Issue joined, because the Negative ought to be as broad as the Affirmative, which this was not, and therefore 'tis no Negative and Affirmative; as where the Defendant pleads a Feoffment for *four Acres*, and *Two* only are traversed, 'tis naught; so here the Accord is not averred to be *between the Plaintiff and the Defendant*, but between the Plaintiff and *A. and B.* of the one Part, &c. 1 *Roll. Rep. 86. Carpenter versus Barr.*

8. Debt upon Bond for Performance of Covenants on a Charter-Party, one whereof was *to deliver a Ship then in London at such a Port*, and no certain Time was appointed when he should deliver it; the Breach assigned was, that the Defendant did not deliver the Ship *on such a Day*, and

and Issue was taken upon *the Delivery*, and the Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought, the Error assigned was, that the Issue was not well joined, because the Defendant had any Time during his Life to deliver the Ship; but adjudged, that this Misjoining of Issue was remedied by the Statute of *Jeofails*, being after a Verdict. *Moor 695. Bishop versus Gyn.*

9. In Trespass, the Plaintiff declared, that the Defendant had broken, taken, and carried away twelve Boards of the Plaintiff's; Not guilty was pleaded, as to the Taking and Carrying away, and as to the Breaking the Boards, the Defendant justified, *for that the Plaintiff* had fixed them against the Defendant's House, and that they hindred his Light, and thereupon he broke them down *prout ei bene luit*; the Plaintiff replied, that *he did* not fix them to the Defendant's House, upon which they were at Issue, and the Jury found, that the Boards were fixed to the Defendant's House, but not by the Plaintiff; it was moved in Arrest of Judgment, that this was an immaterial Issue; for the chief Point was, that the Boards were fixed to the Defendant's House, and it was not material by whom: *Sed per Curiam*, the Defendant ought to have avoided this Matter by pleading; for where the Jury find for the Plaintiff upon such a Special and collateral Issue, he ought to have Judgment. 2 Roll. Rep. 242. *Gwin versus Dampart.*

10. Where the Declaration of the Plaintiff is good, and the Plea of the Defendant is ill, if the Plaintiff in his Replication tender an Issue upon such an ill Plea, and a Trial is had, and found for the Plaintiff, he shall have Judgment. *Cro. Car. 18. Knight versus Harvey.*

11. *Si. fa.* upon a Recognizance for the Good Behaviour, for that the Defendant, with others riotously and unlawfully entered into such a Close, and cut up a Quick-set Hedge, &c. the Defendant as to all but the entering the Close, and cutting the Hedge, pleaded Not guilty, and as to that, he justified by a Prescription for a Highway in the said Close, and because it was stopped with a Quick set Hedge, he cut it up; the Plaintiff replied, *de injuria sua propria & ex malitia præcognata*, the Defendant, with others, cut the Hedge, &c. upon which Issue was joined, and found for the Plaintiff; it was objected, that here was not any Issue joined, *for de injuria sua propria*, is no Issue where one justifies for a Way, or for any particular Thing; but in such Case the Plaintiff ought to traverse the Prescription, and conclude *absque tali causa*; and so it was adjudged. 2 Cro. 599. *The King versus Hopper.* 1 Brownl. 200. *Swaff versus Solley*, S. P. but helped by the Statute of *Jeofails*. See *Jennings versus Lee.* *Antea* Issue joined. (A) 22. S. C.

12. In an Action of Debt for 200 *l.* on the Statute 2 Ed. 6. for not setting out Tithes in *Royston*; the Defendant pleaded, that at the Dissolution of the Monasteries, the Lands were discharged of Tithes in the Hands of the Prior, &c. the Issue was upon the *Discharge*; but at the Trial the Defendant did not maintain his Plea, so the Court directed the Jury to find for the Plaintiff to the Value of 200 *l.* because the Issue being joined upon the *Discharge*, which is a collateral Matter, the Defendant had thereby confessed the Value of the Tithes as the Plaintiff had declared, but that he was discharged from the Payment of any Tithes; the Defendant should have taken the Value by *Protestation*, which, if he had done, then it must have been ascertained by a Writ of Enquiry. *Allen 88. Bowles versus Broadhead.*

13. Debt upon a Bond of 100 *l.* conditioned to pay 51 *l.* on such a Day; the Defendant pleaded, that he paid the said 21 *l.* at the Day, &c. the Plaintiff replied, that he, (the Defendant) did not pay the said 51 *l.* at the Day, and concluded to the Country, and had a Verdict and Judgment in C. B. and upon a Writ of Error brought in B. R. this Judgment was reversed, because there was no Issue joined; and there cannot be a Repleader upon a Writ of Error out of C. B. *Cro. Car. 593. Darby versus Hemmings.*

14. Adjudged upon a Motion in Arrest of Judgment, that where a Defendant pleads Not guilty to an Action on the Case on a Promise, 'tis not a good Issue, nor amendable by any Statute; but 'tis a proper Issue for a Deceit or any Wrong. *Palm. 393. Turner versus Turbervill.* 2 Roll. Rep. 568.

15. Case, &c. in which the Plaintiff declared upon a Custom of the Parish, for the Parson to keep a Bull and a Boar, for the Encrease of the Cattle of the Inhabitants, &c. and that the Defendant being Parson, &c. and the Plaintiff an Inhabitant, &c. the Defendant had not kept a Bull nor Boar for four Years, &c. the Defendant took the Custom by Protestation, and for Plea he pleaded *Not guilty*, and upon a Demurrer the Plaintiff had Judgment, because where the Offence or Injury is for a Nonfeasance, the Defendant should not plead Not guilty, but he should plead in the Affirmative, and shew, that he had done the Thing, for the not doing whereof the Plaintiff had declared; and the Protestation is not good to the Custom, which is the very Ground and Substance of the Action. *Moor 355. Yelding versus Fay.*

16. Debt upon a single Bill to pay Money, &c. the Defendant pleaded Payment at the Day, but did not set forth any Acquittance; and Issue was joined upon the Payment, and the Jury found for the Plaintiff in B. R. and upon a Writ of Error brought in the Exchequer-Chamber by the Defendant, he assigned for Error, that his own Plea was ill, because Payment is not to be pleaded without an Acquittance; but the Judgment was affirmed; for tho' it was an immaterial Issue, yet it being after a Verdict, and the Error being assigned by the Defendant in his own Plea, the Judgment shall not be reversed. *Moor 692. Chamberlaine versus Nicholls* Cro. Eliz. 24. S. C. 5 Rep. S. C. Nichol's Case. Cro. Eliz. 104. Peter's Case. S. P.

17. Error in B. R. to reverse a Judgment in *Formedon* in C. B. where the Case was, (*viz.* a *Formedon* in Remainder was brought against an Infant, who appeared by his Guardian, and pleaded, that the Lands descended to him, and prayed, that the Parol might demur during his Nonage; and upon this

1 Lev. 163. Raym. 118.

this Matter Issue was taken, and there was a Verdict for the Infant, and Judgment final given in *C. B.* that the Demandant should be barred; and the Judgment was affirmed in *B. R.* because Issue being taken upon a dilatory Plea, and which is meer Matter of Fact, in such Case the Judgment shall be final, tho' it might not be so upon a Demurrer, because it shall be intended, that the Matter of Fact is in the Knowledge of the Demandant, and if he will give the other Party Trouble and Charge in a Matter which he knows to be against him, in such Case the Judgment shall be final; tho' not upon a Demurrer, because that is Matter in Law. *Sid. 252. Amcott versus Amcott.*

18. Debt for Rent against Lessee for Years, who pleaded, that before the Rent due he assigned the Term to another, of which the Plaintiff had Notice, and they being at Issue upon Notice, the Defendant had a Verdict, but could not get Judgment, because the Issue was joined upon a Thing immaterial; for Notice of the Assignment will not discharge the Lessee from the Rent, without Agreement of the Lessor, or his Acceptance of the Rent from the Assignee; so a Repleader was awarded. 1 *Lev. 32. Serjeant versus Fairfax.*

19. Trespass for an Assault and Battery on such a Day and Place; the Defendant justified on another Day and Place, by Virtue of a Process, &c. and traversed, that he was guilty *aliter vel alio modo* at any other Place; the Plaintiff replied, that he was guilty *aliter vel alio modo*, and at another Place; upon which they were at Issue, and the Plaintiff had a Verdict; but the Judgment was staid, and a Repleader awarded for the Badness and Uncertainty of the Issue. 2 *Lev. Master versus Wood.*

20. Trespass against Husband and Wife, for entering his House, and continuing in Possession, &c. the Defendant pleaded, that the Plaintiff gave License to him to enter with his Wife there to dwell; the Plaintiff replied, that he did not give License to the Defendant and his Wife, to enter *modo & forma*, upon which they were at Issue, and the Plaintiff had a Verdict and Judgment; but it was reversed in Error, because it was an immaterial Issue; for the Defendant having pleaded a License for him to enter, with his Wife, the Replication, that the Plaintiff did not give License to him and his Wife, doth not meet with the Plea; for that is a License to the Husband only, to which the Wife hath no Title, if she survive; but the Replication is of a License to the Husband and Wife, in which she as Survivor will have it; which is a material Difference, and adjudged accordingly. 2 *Lev. 194. Jenson versus Jackson.*

21. In Covenant, the Breach assigned was, in not Repairing; the Defendant pleaded, *Non in-fregit conventionem*; adjudged no good Issue, being two Negatives. 3 *Lev. 19. Pitt and Russell's Case.*

22. Information *Qui tam*, &c. against a Justice of Peace for 100*l.* for neglecting upon Complaint to suppress a Conventicle; the Defendant pleaded *Non debet*, &c. to the Informer, & *de hoc ponit se super patriam, & predictis* (the Informer) *similiter*; whereupon they were at Issue, and the Informer had a Verdict; but adjudged, that the Issue was not well joined, because it was between the Informer and Defendant, without mentioning the King, whereas the Act gives a Moiety of the Forfeiture to the King. 1 *Vent. 122. Reynell versus Hele.*

23. In Replevin, the Defendant made Cognizance, as Bailiff to Robert Moor; for that Samuel the Father of Robert, being seised of the Place where, &c. settled it in Marriage upon Richard his eldest Son, and Bridget his Wife, in Tail Male, Remainder to Robert in Tail, &c. with a Power to make Leases for any Number of Years determinable upon three Lives, and that a Fine was levied between Father and Son, and a Common Recovery to the same Uses; that the Father was dead, and that Richard died without Issue, and that Robert being seised of the Remainder, took the Cattle, &c. the Plaintiff replied, and confessed the Seisin of the Father; but said, that before he made this Settlement, and before he levied the Fine, (*viz.*) 1 Novemb. 1648. he made a Feoffment of the Lands to the Use of Robert for Life, if the Father should so long live, and if he died, living Robert, then to the Use of Richard and his Heirs, during the Life of Robert; that the Father died in the Life-time of Robert, and thereupon Richard entered, and made a Lease to the Plaintiff Walters for 99 Years, if he the said Richard, and Walters, and two more, should so long live; that the Plaintiff entered by Virtue of the said Lease, &c. and that Richard being seised of the Reversion, granted it to T. M. to which Grant the Plaintiff attorned, &c. that the Defendant *de injuria sua propria* took the Cattle, and traversed the Seisin of the Father at the Time of the Fine levied; the Defendant replied, and took Issue upon the Traverse, and the Plaintiff had a Verdict; but in Arrest of Judgment, it was held, that this was an immaterial Issue, and that the Right was not tried, because the Plaintiff had not answered the Cognizance, as to the Fine levied by Richard the Son, who joined therein with his Father, and was now estopped by it; for he could not afterwards grant the Reversion to T. M. against his own Fine; if so, then the Rent reserved upon the Lease made by Richard, was due to his Brother Robert by Virtue of the Marriage Settlement, and 'tis not material, whether the Father was seised in Fee at the Time of the Fine levied, because Richard, who claimed under him, joined with him in that Fine, and by the Settlement had conveyed the Lands to Robert, and the Heirs Males of his Body; so that the Seisin in Fee of the Father, is only Formal, and to induce the Matter, and therefore not traversable; for which Reason a Repleader was awarded, and the Verdict set aside. 2 *Lutw. Rep. 1608. Walters versus Hodges.* See *Zouch versus Bampfild.*

24. *Scire facias* against the Defendant, who was Bail before a Judge for one Harris, at the Suit of Sparkes, who had obtained the Judgment against Harris for 46*l.* but that he had not paid the

the Money, nor rendered his Body to Prison; the Defendant pleaded in Bar, that after the Judgment there issued a *Ca. sa. against Harris*, and upon *Non est inventus* returned, he was taken upon a *Testatum Ca. sa.* in *Surrey*, and detained in Execution till the Plaintiff himself required the Sheriff to discharge him; the Plaintiff replied, that no such *Capias* issued; the Defendant rejoined, that such a Writ did issue, and that *Harris was taken in Execution*, and so concludes to the Country; and upon Demurrer to the Rejoinder, the Plaintiff had Judgment; for when he replied, that there was no such Writ, and the Defendant rejoined, that there was such a Writ, this was a direct Negative and Affirmative, upon which he should have offered an Issue, and not to have said, that *Harris was taken in Execution*, and conclude to the Country to both; for that is jumbling Matter of Record and Fact together. 2 *Lutw. Rep.* 1269. *Sparks versus Cole*.

25. *Indebitatus Assumpsit* against *Dorcas Pearson*, who pleaded in Abatement, that after the Writ brought, *she was married to Henry Dotting*; the Plaintiff replied, that *post impetrationem Breviis, &c. she was not married, &c.* the Defendant demurred specially, and for Cause shewed, that the Plaintiff in his Replication did not alledge, that the Defendant *was sole*, which he ought to do, and then traverse, that she took *Dotting* to her Husband, and by this Means the Marriage would have come in Question upon an Issue taken upon the Traverse, which Issue ought to be in the Rejoinder, and not in the Replication; but adjudged, that 'tis not material, whether the Issue be joined in the Replication or Rejoinder. 2 *Lutw.* 1638. *Pearson versus Hulse*.

26. Trespass, &c. for taking his Cattle in *H.* the Defendant justified the Taking in *B.* by Virtue of a Process, *the Teste whereof was impossible*, and traversed the Taking in *H.* the Plaintiff took issue upon this Traverse, and had a Verdict and Damages; it was objected in Arrest of Judgment, that this Issue was immaterial; for 'tis no Matter where the Defendant took the Cattle, since it was upon a void Process; which is very true; then the Defendant moved for a Repleader; but ruled, that it cannot be granted, because the Trespass was confessed; so the Verdict was set aside, and Judgment was entered for the Plaintiff upon Confession, and a Writ of Enquiry of Damages was awarded, because the Jury who gave the Verdict, had no Power to enquire of Damages. 1 *Salk.* 173. *Jones versus Bodenham*. See *Moor* 696. *Bartholmew versus Dighton*. *Telv.* 89. 3 *Cro.* 722, 778, 227, 214, 445. *Hob.* 327. *Reynolds versus Buckle*. 2 *Cro.* 678. *Johns versus Ridler*. 1 *Cro.* 25, 214.

27. Trespass for breaking his Close, called *Wharfe*, 31 *May*, and throwing down his Rails, and the like Trespass 7 *July* following; one of the Defendants pleads Not guilty as to all, &c. and the other pleads the like Plea, as to the Trespass 31 *May*, (*viz.*) as to the Force; but justifies the Entry and Throwing down the Rails, by Virtue of a Lease of the said Wharf, and for a Way over the same to certain Stairs on the *Thames*; and that being entitled to the said Way, the Plaintiff obstructed it with Rails, which the Defendant desired him (the Plaintiff) to open, but he refused; so he justified the Throwing them down, and pleads the like Plea as to the Trespass 7 *July*, and avers, that he had no other Way to the said Stairs and River *Thames*, &c. the Plaintiff as to the Plea of the first Trespass, replies, that the Defendant had another convenient Way to the River *Thames*, upon which they were at Issue; and as to the other Plea he demurs, *Ideo fiat Jurata* to try the Issue, and to assess contingent Damages on the Demurrer; and at the *Nisi prius* both the Defendants made Default, which being recorded, the Inquest was taken by Default, and one of the Defendants was found guilty as to the Trespass 31 *May*, and acquitted of the other Trespass; and the other Defendant was acquitted as to the Force 31 *May*, but as to the rest the Jury found, that he had no other Way to the said Stairs and River *Thames*, than thro' the said Wharf; and assess Damages on the Demurrer, and acquit him of the Trespass 7 *July*: It was held clearly, that this was an immaterial Issue; for the Defendant pleaded, that he had no other Way to the Stairs and River *Thames*, and the Issue was, that he had another Way to the River *Thames*, and the Jury found, that he had no other Way to the Stairs and River *Thames*; which might very well be, and yet he might have another Way to the River *Thames*; but tho' it was an immaterial Issue, it was cured by the Statute of *Jeofails*: Then the Question was, whether Judgment should be given for the Plaintiff upon the Demurrer, or upon the Default of the Defendant; that is, whether he (the Defendant) being out of Court, as to one Issue by the Default, shall be present in Court as to the other Issue in Law upon the Demurrer; 'tis true, the Day given on the *Nisi prius* is, *ad triand' exitum*, but the Day given on the Demurrer is, *ad audiendum judicium*, which is the Day in Bank; so that the Default at the *Nisi prius*, is only to that for which the Defendant had a Day there, (*viz.*) to try the Issue; which is very true; but yet the better Opinion was, that 'tis a Default as to the Day given on the Demurrer, as well as to the Day for Trial of the Issue; for tho' one is the Day of *Nisi prius*, and the other the Day in Bank, yet in Consideration of Law, they are the same. *Mod. Cases* 1. *Staple versus Haydon*.

5 *Mod.*
225.
1 *Saud.*
128.
Raym.
458.

1 *Salk.*
216.
Default.
(A) 6.

(C)

What Things are issuable, what not.

1. Judgment against the Testator, and a *Sci. fa.* brought against the Excutor, to shew Cause *Quare executionem non haber*, &c. the Defendant pleaded, that the Plaintiff sued out a *Ca. fa.* against his Testator, by Virtue whereof he was taken, and died in Execution; the Plaintiff replied, that the Testator was not taken by Virtue of that Writ, upon which they were at Issue, &c. which shews, that the Taking by Virtue of a Writ, is not Matter of Law, but Fact, and issuable. *Hob. 52. Postea Judgments. (D) 17. S. P.*

2. Debt upon Bond brought by the Bailiff of *Westminster*, conditioned, that *K.* should appear *die Sabbati prox' post OEtav' Pur'*, &c. to answer *B.* &c. the Defendant pleaded, that before he gave that Bond, the said *B.* prosecuted a Bill of *Middlesex* against *K.* returnable *die Venuris prox' post OEtav' Pur'*, and that by Virtue of a Warrant thereon, *K.* was arrested, and being in Custody, the Defendant gave the Bond for *Ease and Favour*, which the Plaintiff accepted *Colore Officii*; the Plaintiff replied, that *B.* prosecuted the Bill of *Middlesex* in *Hillary-Term*, returnable *die Sabbati*, &c. and that by Virtue of a Warrant on that Writ *K.* was arrested; and being in Custody, the Defendant gave Bond Virtute of that Warrant, and not of the Warrant set forth in the Plea; the Defendant rejoined, that *K.* was in Custody Virtute of the Warrant mentioned in his Plea, *Absque hoc*, that he was in Custody by Virtue of the Warrant mentioned in the Replication; and upon a special Demurrer, *Saunders* was Opinion, that the Taking or not Taking by Virtue of such Warrant, is Matter of Fact, and not of Law, and therefore issuable. 1 *Saund. 20.*

3. Debt upon an Escape in Execution, brought against the Head Bailiff of the Honour of *Pontefract*, who pleaded, that before the aforesaid Escape, an *Habeas Corpus* was directed to him, returnable *Craftin' Pur'*, (which is the third Return in *Hillary-Term*) commanding him to bring the Body of the Prisoner to *Westminster*; that by Virtue thereof he brought him into Court, and returned the Cause of his Commitment, and that he was sent to the Fleet, *quæ est eadem escapia*; the Plaintiff replied, that before the Escape an *Habeas Corpus* was directed to the Defendant, returnable *OEtav' Hillarii*, (which is the first Return in *Hillary-Term*) and that after the Day of the Return, he brought the Prisoner to *Westminster* by Colour of the said Writ, and then procured another *Habeas Corpus*, mentioned in his Plea, to be fraudulently prosecuted, and directed to himself, by Virtue of which last Writ the Prisoner was brought into Court and turned over to the Fleet, *absque hoc* that the Defendant by Virtue of the *Habeas Corpus*, set forth in his Plea, did take the Prisoner out of Gaol, and bring him to *Westminster*; and upon a special Demurrer to this Replication, the Plaintiff had Judgment; for the Taking or not Taking by the Writ was issuable, against the Opinion of the Chief Justice, who held, that the Authority of an *Habeas Corpus* was Matter of Law, and not issuable. 1 *Lutw. 627. Beale & Uz' versus Simpson.*

(D)

Of Issues on Things local and transitory.

1. CASE for calling the Plaintiff *Perjured Knave*; the Action was laid in *Devonshire*, and the Defendant justified, for that the Plaintiff made Oath in *Cornwall*, that he did not know that *T. S.* was Plaintiff in such an Action, when in Truth he did know it; there was an Issue and Verdict for the Plaintiff; and it was objected, that this Action ought to have been tried in *Cornwall*, where the Matter of Justification did arise: *Hale Ch. Just. Knowing or not Knowing*, is Matter transitory, and triable in any County; 'tis true, the making Oath in *Cornwall* is local, therefore this Issue was of two Matters, the one transitory, and the other local, and triable in two Counties; and if so, then this Trial in *Cornwall* is good, by the Statute 21 *Jac.* for that Statute extends to Cases where the Matter in Issue arises in two Counties, and the Trial is by one only, as well as where the Matter in Issue arises in two Places in one County, and the Trial is by one. 2 *Lev. 121. In Jennings and Hunkin's Case. See Trial and Mistrial. (F) 15. S. C.*

Issues

Issues and Profits.

(A.)

Devise of the Issues and Profits, &c. See *Authority*. (A) 5, 13:

1. **T**IS generally held, that by a Devise of the Issues and Profits of Lands, an Interest is vested in the Devisee as to the Lands devised; as for Instance, the Testator devised that his Executors should have the *Issues and Profits* of his Lands until his Son came of Age; that with the *Profits* they might pay his Debts and such Legacies as he had given, and educate his Children; one of the Executors died, then the surviving Executor made his Executor, and died; adjudged, that the Executor of the surviving Executor may take the *Profits* during the Minority of the Son, because his Testator had an *Interest* by the Devise of the Issues and Profits, and not an *Authority*, and no more. *Dyer* 210. *Cro. Eliz.* 190. *Parker versus Plommer. S. P.* and 159. *S. P.*

2. So where the Husband devised the *Profits* of his Lands to his Wife until his Son came of Age, this was held to be a Devise of the Land it self till that Time; but if he had devised the *Lands to his Son*, and that his Mother should take the *Profits* thereof till he came of Age, this would give her an *Authority* only and no *Interest*, and such *Authority* would determine upon her Death. 2 *Leon.* 221. *Moor* 635. *S. P.*

3. A Devise of the *Profits* and Occupation of his Lands to his Wife, during her Widowhood, is a good Devise of the Land it self, during that Time. *Owen* 7.

4. The Husband being possessed of a Rectory impropriate for a Term of Years, devised the *Profits* thereof to his Wife for so many Years as she should live, and afterwards the *Profits* to twenty of his poorest Kindred; and that then the Rectory should be leased out by the *Advice of the Overseers of his Will*, for as much Rent as could be got for the same, and distributed to twenty of his poorest Kindred; adjudged, that by a Devise of the *Profits* the Lands usually pass, unless there are other Words to shew the Intention of the Testator; but in this Case the Devise of the * *Profits* to the twenty poor Kindred, gave them no Manner of Property in the Term, because they had not the Power to make the Lease, for that was to be done by the *Advice of his Overseers*, and therefore the Property was in them, and a Trust or Confidence only in the poor Kindred. *Moor* 753, and 758. *Griffith versus Smith*.

* See
Authority.
(A) 5.

5. The Father devised his Lands to his Daughter and her Heirs, when she shall come to the Age of eighteen Years, and that his Wife should take the *Profits* thereof until that Time, for her own Use, without any Account to be given; adjudged a good Term for Years in the Wife, and that by her Marriage it was vested in the Husband. *Hutt.* 36. *Balder versus Blackbourne. Hob.* 285. *S. C.* 1 *Brownl.* 79. *S. C.*

6. The Father being seised in Fee, covenanted to levy a Fine to the Use of himself and his Heirs, until a Marriage between *Giles Strangeways* (who was his Son and Heir apparent) and *Frances Newton* should take Effect; and afterwards to the Use of the Father for Life, &c. and after his Decease to the Use of such Person or Persons as he should appoint by his Will for the Payment of his Debts and Legacies for any Term not exceeding thirty-one Years; and afterwards to the said *Giles* in Tail, Remainder over; the Will was made, by which the Father devised to his three Daughters 800*l.* a-piece, to be paid at their respective Marriages or Age of twenty-one Years, and to be raised out of the Lands mentioned in the Indenture; afterwards the Father died seised before his Son was married, and not long after his Death the Son married the said *Frances Newton*; the Lands out of which these Portions were to be raised were of the yearly Value of 200*l.* the Question was, whether a Term for Years, not exceeding thirty-one Years, shall be a Time of sufficient Certainty to raise 2400*l.* out of the Profits of 200*l.* if not, then the Father being Tenant in Fee when he died, and making such Will, whether this Devise shall take Effect by the Statute of Wills, and disturb the Rising of the contingent Use upon the Marriage of the Son, which happened after the Death of the Father; the Judges seemed to be of Opinion, that if the Land it self had been devised by the Will, that would have interrupted the future Use to the Wife in Jointure, and to the Son in Tail; but the Devise being of Portions to be paid out of the Profits of the Lands, 'tis otherwise. *Moor* 731. *Strangeways versus Newton*.

7. Devise of Lands to *Francis* his eldest Son in Tail, Remainder in Tail to his second Son; provided, if *Francis* die without Issue Male, and leaving Issue Female, then she to take the *Profits*, until he in Remainder pay her 400*l.* *Francis* had Issue only *Elizabeth*, who entered on the Lands and died before she had received the 400*l.* it was adjudged, that by this Appointment for her to take the *Profits*, an Interest was vested in her, for 'tis as much as a Devise of the *Profits* to her, and 'tis a Chattel which shall go to her Administrator; and tho' the *Profits* of the Land are only a Pledge for the Payment of the Portion, yet they follow the Portion it self. *Allen* 45. *Price versus Vaughan*.

8. The Father devised, that his Goods should be sold to raise Portions for his Daughters; and if the Goods were not sufficient, then the Portions should be raised out of the *Rents, Issues and Profits* of the Lands; it was decreed, that by the Words the Lands themselves were devised; but if it had been, that the Portions should be raised out of the *annual Profits*, then it had been otherwise. 1 *Ch. Rep.* 240. *Cary versus Appleton.* 2 *Ch. Rep.* 205. *Lingen versus Foley. S. P.*

Judge. See Officer. (D) per totum.

Judgment.

<p>Against one for the Whole, where Two are sued and one acquitted. (A)</p> <p>Of Judgments with a <i>Cessat executio</i>, when to be signed, and where not final, and not good, if not doggetted, and when to be entered; and of Arrest of Judgment. (B)</p> <p>Where a Judgment is good in Part,</p>	<p>and may be released or reversed in Part; and where not, and for what. (C)</p> <p>Of Actions of Debt on Judgments, and where, and how Judgments shall be pleaded in Bar to Actions, and where not. (D)</p> <p>Where the Defendant shall have Judgment tho' his Title is destroyed. (E)</p>
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(A)

Against one for the Whole, where two are sued, and one acquitted.

1. **I**N a Writ of Entry, &c. against the Mother and two of her Sons, she appeared by Attorney, and they *per guardianum*, and she pleaded *quod non disseisvit*, and so did the Sons; but the Jury found, that she *disseisvit*, and that the Sons did not disseise the Demandant; adjudged, that Judgment shall be given against the Mother for the Whole, and that the Plaintiff shall be *in misericordia* as to the Sons. *Trin.* 12 *Eliz.* *Dyer* 312.

Of Judgments in criminal Cases.

1. **T**HE Defendant was convicted of Perjury, and upon a *Capias* against him was outlawed; and now upon the Exigent a Motion was made, that the Judgment of the Pillory might be given against him; but adjudged, that no Instance could be given of a Judgment for a corporal Punishment in the Absence of the Party. 1 *Salk.* 400. *Duke's Case.*
2. The Defendant being convicted of a scandalous Libel, had Judgment to pay 100 Marks, and to go to all the Courts in *Westminster-Hall* with a Paper in his Hat signifying his Crime; when he came to the Court of Chancery he behaved himself impudently, and justified the Offence; whereupon his Punishment was encreased. 1 *Salk.* 401. *The Queen versus Fitzgerald.*

(B)

Of Judgments with a *Cessat executio*, when to be signed, and where not final, and not good, if not doggetted, and when to be entered; and of Arrest of Judgment.

1. **I**N a Writ of Dower against the Heir; if he plead, that the Demandant detains the Evidences, he shall have Judgment presently with a *Cessat executio*; so if Debt be brought against an Executor upon a Bond of the Testator, and he pleads *plene administravit*, this is a Confession of the Debt, and the Plaintiff may have Judgment immediately, but with a *Cessat executio* until the Defendant hath Asses. 4 *Rep.* in *Lutterell's Case.*
2. In a *Quare Impedit* against the Bishop of London and B. G. the Plaintiff declared, that the Earl of S. was seised of the Manor of W. to which the Advowson was appendant, and presented the said B. G. who was admitted, &c. that the Earl died seised, and the Manor descended to another

other Earl, who levied a Fine of the said Advowson to *W. R.* in Fee, who granted the next Avoidance to the Plaintiff, and afterwards *B. G.* resigned, &c. by which the Church became void, and that it belonged to the Plaintiff to present; the Bishop pleaded, that he claimed nothing but as Ordinary; the other Defendant *B. G.* pleaded, that he was Incumbent, &c. for six Months on the Presentation of the Earl of *S.* *Absque hoc*, that the Church was void *modo & forma*, &c. in this Case the Plaintiff prayed a Writ to the Bishop as to his Plea, which was granted, but with a *Cessat executio*, until the Plea between the Plaintiff and the other Defendant was determined. 6 *Rep.* in *Boswell's Case* 48. 7 *Rep.* 25, in *Hall's Case*.

3. Where Judgment is given that the Plaintiff shall recover, and because the Damages are not known, a Writ of Inquiry is awarded; this is not a perfect Judgment till the Writ is returned. 1 *Leon.* 309. *Dighton versus Saxles.* *Yel.* 97. *Harrington versus Lavaston.* *S. P.*

4. Error of a Judgment in a Writ of Right of Lands in *Durham*, where after an Imparlance the Defendant made Default, and Judgment final was given; the Error assigned was, that the Writ of Right ought to be returnable *coram Justiciariis de Banco*, and this was returnable *coram Justiciariis itinerantibus in Durham*; but it was answered, that was the Course there; then it was assigned for Error, that Judgment final was given in this Writ of Right after an Imparlance, whereas it ought to be a *Petit Cape*, for no such Judgment is given, even after a Plea pleaded and Issue joined, or upon a Demurrer, but always a *Petit Cape*, which is very true; but a Default after Imparlance and before a Plea pleaded, seems to be a Departure in Spight of the Court; and the Court was of that Opinion, if the Default be of the same Term after the Imparlance, but not if Day be given to another Term; but because the Writ of Right was dated 20 Feb. 6 Jac. and in the Declaration the Explees were alleged to be taken in the Time of Queen Elizabeth, and in the Seisin of the Demandant himself, which by the Statute 32 H. 8. of Limitations, cannot be but within thirty Years before that Time, and this Seisin might be before; for that Cause the Judgment was reversed. 2 *Cro.* 292. *Lilburne versus Heron.*

5. *Per Curiam*: The Course of *B. R.* is, that where Issue is joined, and the Jury find for the Plaintiff, he shall not enter Judgment till four Days afterwards, for so much Time the Defendant shall have to peruse the Record, that he may move in Arrest of Judgment; but if the Jury find for the Defendant, he may enter his Judgment immediately; and the Reason of this Difference is, because the Plaintiff hath the Management of the Record; and if there are any Faults in it, he shall be intended to know what they are, which the Defendant doth not, and therefore he shall have four Days Time allowed to look into the Record. 2 *Roll. Rep.* 434. *Farnell's Case*.

6. Case, &c. tried at the Assises, and the Jury found for the Plaintiff, and assessed Damages to Palm. 38 l. and Costs 6 d. and the Judgment was entered *Quod quarens recuperet damna sua prædicta* 509. *per juratores assesse ad 37 l.* and for Costs *de incremento 40 s. quæ in toto attingunt ad 39 l.* and upon a Writ of Error, *per Curiam*, the Judgment is well; for the Words *per juratores assesse ad 37 l.* are Surplusage; and the 38 l. is comprehended in these Words, *viz. quod the Plaintiff recuperet damna sua.* *W. Jones* 171. *Gosfer versus Gegerie.* *The Jury gave 4 d. Costs, and the Court de incremento 23 s. and in the Entry of the Judgment the 4 d. was left out, and for that Reason the Judgment was reversed in Error.* 4 *Leon.* 61. *Bushy versus Milfeild.*

7. The Plaintiff had a Verdict, but would not enter the Judgment; whereupon the Defendant intending to bring a Writ of Error or an Attaint, moved that he might enter up the Judgment against himself, and had a Rule to enter it accordingly. *Palm.* 281. *Petty versus Hockley.* See *Dyer* 194.

8. There was a Trial in *York* at the Summer Assises 20 Car. 2. and a Verdict for the Plaintiff; and upon a Motion in Arrest of Judgment, the Case depended till *Hilary-Term* 22 Car. 2. and then Judgment was given for the Plaintiff; afterwards it was said, that the Plaintiff was dead, upon Consideration whereof it was moved, that there were no Continuances entered, and this was in *Trinity-Term*, 22 Car. 2. and then it was prayed, that Judgment might be entered of *Michaelmas-Term* 20 Car. 2. that being the Day in Bank, at which Time, and long after, both Parties were living; and the Clerks affirming that it was usual to enter Judgments of that Term when the *Postea* were returnable, tho' they were not brought in till long afterwards; it was ruled, that this Judgment should be entered as of *Michaelmas-Term* 20 Car. 2. *Sid.* 464. *Crisp, &c. versus Mayor of Berwick.* See 1 *Leon.* 187. *Latch* 92. See *Helie versus Baker.*

9. There was a Verdict in Ejectment at the Assises for the Plaintiff; the Judgment ought not to be signed till four Days after the Return of the *Postea*, which in this Case happened to be on the 6th Day of May, on which very Day the Judgment was signed, but did not take out Execution till after a Day or Two, so that the Defendant had Time enough to move in Arrest of Judgment, or to bring a Writ of Error, yet because it was signed on the fourth Day after the Return of the *Postea*, it was ruled to be irregular, and the Judgment was set aside, and the Party had Restitution, &c. 5 *Mod.* 205. *Stanford versus Chamberlaine.*

10. By a late Statute 'tis enacted, that if a Judgment is not doggetted, (as required by the Act) it shall not affect any Purchaser or Mortgagee, or have any Preference against the Heir, Executor or Administrator, in the Administration of their Ancestors, Testators, or Intestate's Estates. 4 & 5 W. 3. cap. 20. 7 & 8 W. 3. cap. 6.

11. An Indictment for a Misdemeanor was tried three Days before the End of the Term, and Judgment was entered in the same Term; it was objected, that this was irregular, because the

Defen-

Defendant had not four Days to move in Arrest of Judgment; but adjudged, that if the *Districus* is returnable within Term, and the Party is tried two or three Days before the End of the Term the Judgment shall be entered that very Term. 1 *Salk.* 77.

12. 'Tis against the Course of the Court to make a Rule to stay Judgment, unless the *Postea* is brought into Court, and if there be Cause, they will make a Rule for that Purpose, and that Rule is Notice sufficient. 1 *Salk.* 78. *Wood versus Shephard.*

13. Ruled, that after a Rule to sign Judgment, there ought to be four Days exclusive of the Day on which the Rule was made before the Judgment is signed, because the Party may have a reasonable Time to bring a Writ of Error; but in *C. B.* they never give Rules for signing Judgment, but they stay till *quarto die post*, which makes but four Days inclusive. *Mod. Cases* 241. *Reignols versus Tipping.*

(C)

Where it is good in Part, and may be reversed or reversed in Part; and where not, and for what. See *Relinquishment per totum.*

1. **I**N every Conviction upon an Indictment, the Judgment must be *quod Capiatur*, because there is a Fine due to the King for the Defendant's Contempt. 1 *Cro.* 362. *Marquess of Winton's Case.*

2. Debt, &c. the Defendant pleaded the Release of the Plaintiff, who replied *Non est factum*, and so it was found, and the Judgment was *quod sit in misericordia*, upon which Error was brought, and assigned for Error, that it ought to have been *quod capiatur*; but the Judgment was affirmed, for tho' his Plea was false, yet it was not his own Deed which he pleaded, but the Deed of another, and the Judgment shall not be *quod capiatur*, but where he denies his own Deed. *Cro. Eliz.* 844. *Walker versus Hancock.* See *pl. 9. contra.*

3. Where the Declaration in *Trespass* wanted the Words *Vi & Armis*, it was adjudged Matter of Substance and could not be amended, for which Cause many Judgments have been reversed. 2 *Cro.* 597. *Ford versus Ford.* 37 *Eliz.* *Sheer versus Bridges.* S. P.

4. Case for Words spoken at several Times, and Judgment for the Plaintiff, both for Damages and Costs; and upon Error brought it was adjudged, that for the first Words the Action did not lie; and the Judgment was reversed *quoad* the Damages for these Words, and was affirmed *quoad* the Damages and Costs for the other. 2 *Cro.* 349. *Jacob versus Mill*, in *Allen* 75, denied to be Law, and *Hill.* 1 *Annae*, *Cutting versus Williams.* S. P. *Postea* 11. S. P. and 18. S. C.

5. Judgment against *B. G.* who died, and upon a *Scire facias* against the Heir and Tertenants, the Sheriff returned *W. R.* Tertenant of all the Lands and Tenements in *Balliva sua quæ fuerunt præd' B. G.* and Judgment was given, that the Plaintiff should have Execution against the said *W. R.* whereupon he prayed an *Elegit* to be entered on the Roll, (*viz.*) *Elegit sibi liberari medietatem omnium terrarum & tenementorum in Com' B.* and left out *quæ fuerunt præd' B. G. tenend' &c. quousq; &c.* and for that Cause the Judgment was reversed *quoad adjudicationem Executionis*, and yet the *Elegit* and Return of it were good. *Hob.* 90. *Reeve versus Owen.*

6. The King's Bench cannot reverse a Judgment, tho' it be of the same Term, without a Writ of Error, but that must be intended where Error lies in the same Cause and in the same Court, as upon an Outlary; but if no Error lies in the same Court but in Parliament, there they may reverse their own Judgment without a Writ of Error being in the same Term. *Poph.* 18. *Mayor of Maidstone's Case.*

7. *Assumpsit*, &c. for that the Defendant, in Consideration of a Sum of Money to be paid to him, promised to assure such Copyhold Lands to the Plaintiff, in such Manner as *B. G.* should advise; and sets forth, that he advised a Surrender, &c. and that he should give Bond for quiet Enjoyment against all Persons whatsoever; and the Breach assigned was, for not giving the Bond; upon *Non Assumpsit* pleaded, there was a Verdict for the Plaintiff and entire Damages; but the Breach in not giving the Bond being ill, because it was quite out of the Promise; and the Damages being given for that as well as for the other, (*viz.*) (*not surrendring*) the Judgment was stayed. 2 *Cro.* 115. *Stanirode versus Lacock.*

8. Where the Entry of the Judgment was *Ido concessum est per Curiam*, instead of *consideratum est*, &c. many Judgments have been reversed, tho' it was insisted, that *concessum est* is a Form of Entry, as in 1 *Rep.* *Alton Woods Case* for the Queen, and in 1 *Rep.* *Porter's Case* against the Queen, and in 8 *Rep.* the *Prince's Case*, and in 10 *Rep.* *Sutton's Case*; but it was resolved, that the Entry was not good, for the Words *consideratum est* are more significant, and imply more than *concessum est*, for they import that the Court gave Judgment, and that upon great Consideration. *Pasch.* 13 *Jac.* 3 *Bull.* 92. *Robins versus Sambel.* *Litch* 177. *Good versus Lawrence.* S. P. *Cro. Car.* 319. *Slocorai's Case.* S. P.

9. Debt by an Executor, the Defendant pleaded a Release of the Testator; the Plaintiff replied *Non est factum Testatoris*, and thereupon they were at Issue, and found against the Defendant, and the Judgment was *quod sit in misericordia*, upon which Error was brought; and it was reversed, because it ought not to be in *misericordia*, but *quod capiatur*, because his Plea was false. 2 *Cro.* 255. *Gibson versus Harbottle.* See *pl. 2. contra.*

10. *Trover* against Husband and Wife for a *Trover and Conversion* by the Wife during Coverture; upon Not guilty pleaded, it was found against them for Part, &c. and the Judgment was, that the Plaintiff, *recuperet damna*, and that the Wife *sit in misericordia*, when it should have been, the Husband and Wife *in misericordia*, because she cannot pay without her Husband; for which Cause the Judgment was reversed. 2 Cro. 437. *Wood versus Suckling*, and 538. *S. P. Miller versus Dom' Regem*, and 542. *Draycot versus Heaton*.

11. Case, &c. in which the Plaintiff declared, that in Consideration he, at the Instance of the Defendant, would wash his Linen, and provide Meat and Drink for his Servants, he promised to pay as much as he should desire; so as the Sum desired did not exceed so much; he also declared, that in Consideration the Defendant, upon an Account stated between him and the Plaintiff, was found in Arrear to the Plaintiff in 18*l*. he promised to pay the said 18*l*. Upon *Non Assumpsit* pleaded, the Plaintiff had Verdict, and several Damages upon each Promise, and entire Costs, and Judgment, that he should recover *damna sua prædicta necnon 6 l. de incremento*, &c. and upon a Writ of Error brought in the Exchequer-Chamber, it was adjudged, that the first Promise was good, and the second void for want of a Consideration, and that the Judgment and Damages given for the first Promise should be affirmed; and as for the Damages on the second Promise, and the 6*l. de incremento* entirely given for both, that the Judgment should be reversed. Moor 708. *Reymer versus Grinstone*. See *antea* pl. 4. *S. P.* denied to be Law.

12. Information for engrossing Corn; the Defendant pleaded Not guilty as to Part, and demurred as to the Residue, and afterwards the Informer entered a *Nolle prosequi* as to that Part to which Not guilty was pleaded, and having joined in Demurrer as to the other Part, he had Judgment; and now upon a Writ of Error brought, it was adjudged, that the Entry of a *Nolle prosequi* by the Informer was Error, for he cannot relinquish the Prosecution when he will, because it may be prejudicial to the King; but as to the Judgment upon the Demurrer, that was affirmed; for where the Judgments are several, as in this Case, it may be affirmed in Part, and reversed in Part. 2 Roll. Rep. 136. *Smith's Case*.

13. Judgment in Debt in *C. B.* and the Entry was, that the Plaintiff *recuperet debitum & damna occasione detentionis*, and this was assigned for Error, and a Difference was taken, where the Plaintiff had a Verdict, and Judgment *quod recuperet debitum & damna*, and Costs assessed by the Jury, & *de incremento per Curiam*, and where he hath a Judgment by Confession, Demurrer, or *Nil dicit*; for there 'tis *quod recuperet debitum & damna*, which includes Costs; but in the *C. B.* 'tis more Special, for 'tis *tam occasione detentionis quam pro misis & Custagiis*; and the Judgment there was affirmed. 2 Roll. Rep. 470. *Broad versus Nurse*.

14. The Judgment upon a Verdict in *Formedon* was, that the Demandant should recover *Seisin de uno messuagio & de duobus acris terræ & pastura*, not mentioning the Quality of the Land, nor the Quantity of the Pasture, which was held ill for the Incertainty upon Error brought, because the Judgment was entire both for the House and Lands, and being ill for Part, it was reversed for the Whole. Cro. Car. 338. *Goodier versus Platt*.

15. *Assumpsit*, &c. against three, who all appeared, and pleaded, whereas one of them was an *Infant*, and Judgment was given entirely against all; and upon a Writ of Error brought, it was adjudged void against the *Infant*, and it being an *Error in Law* against one, the Judgment was reversed against all the Defendants; but 'tis otherwise for an *Error in Fact*. Style 121. *Ailett versus Oates*.

16. In an Action of Debt for Rent, the Plaintiff had declared for more than was due, which the Defendant perceiving pleaded *Nil detinet*, but concluded his Plea with *hoc paratus est verificare*, and not to the Country, as he ought, and this was done on Purpose to make the Plaintiff demur, which he did, and had Judgment against the Defendant for this ill Conclusion of his Plea; but the Plaintiff afterwards finding his Mistake, entered a *Remittitur* for so much in the Declaration as was more than was due to him for Rent, and took Judgment for the rest; and thereupon the Defendant brought a Writ of Error in the Exchequer-Chamber, and this was assigned for Error, that the Plaintiff in an Action of Debt for Rent, must demand the very Sum which is due; but adjudged, if he demands more, he may release the Surplus, and if not, yet the Court ought to give Judgment for so much as is well demanded; and this agrees with the fourth Rule in *Godfrey's Case*, that where a Man brings an Action for several Things, and upon his own Shewing it appears, that he cannot have an Action for the Whole, yet he shall have Judgment for what the Action will lie, and shall be barred for the Rest. 1 Saund. 282. *Dupper versus Baskervill*.

17. In an Action of Debt for Rent arrear, and due at several Times; upon *nil debet* pleaded, the Plaintiff had a Verdict, and it was objected in Arrest of Judgment, that this being an Action of Debt for Rent, where the Demand is entire of a Sum certain, if the Plaintiff hath not any Cause of Action for the Whole, he shall never have Judgment for Part; now here he had declared for 100*l.* Rent due for so many Years, and in casting up the several Sums when they became due, it appeared, that he had declared for 8*l.* too much; 'tis true, if this had been an Action of Covenant instead of an Action of Debt, and the Breach had been assigned for Non-payment of Rent due at such Days, and the whole had not amounted to so much as was demanded, yet that might be well enough, because in Covenant Damages are to be recovered according to the Evidence, and not according as the Sums are computed by the Plaintiff; and this was * *Ferrar and Snelling's Case*; but in Actions of Debt 'tis otherwise, because the

* 3 Bull.
145.
1 Roll.
Plaintiff Rep. 355.

Plaintiff being Privy to the Sum in Demand, ought at his Peril to declare for the true Debt ; for if he would not, and yet happen to recover, he might afterwards bring a new Action for the true Debt, and so the Defendant would be doubly charged ; and this was * *Pemberton and Shelton's Case* ; but adjudged, that the Plaintiff might * release the Surplus and Damages, and take Judgment for the Residue. 5 *Mod.* 212. *Thwait's Case*

* 2 Roll. Rep.
* See Damages.
(F) 12. See Nomine pence. (A) 1. See Usury. (B) 2.

18. *Assumpsit*, &c. in which the Plaintiff declared upon two Counts, one upon the Promise to pay, &c. and the other upon a Promissory Note, as upon a Bill of Exchange upon the Custom of Merchants : Upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict and entire Damages in C. B. and upon a Writ of Error in B. R. it was adjudged, that the Plaintiff could not declare upon a Promissory Note upon the Custom of Merchants, and that the Court could not reverse the Judgment as to that, and affirm it as to the other Count ; 'tis true, where the Judgment is partly by the Common Law, and partly by the Statute, as in *Dower*, *Quare Impedit*, &c. it may be done ; for that which is a Judgment at Common Law, will remain a Judgment, and be compleat without the other. 1 *Salk.* 24. *Cutting versus Williams.* 2 *Cro.* 424. *Moor* 708. *Allen* 74. *Style* 121, 125. 1 *Vent.* 27, 39. 2 *Saund.* 179. *Antea placito* 4. *Noy* 117 *contra*.

(D)

Of Actions of Debt on Judgments ; and where and how Judgments shall be pleaded in Bar to Actions, and where not. See *Trover*. (E) 2.

1. **T**HE Plaintiff recovered, and had Damages assessed, and afterwards he brought an Action of Debt for those Damages ; the Defendant pleaded, that after the Judgment the Plaintiff had sued forth an *Elegit*, which was served, but he did not mention, that it was returned ; and yet it was adjudged a good Plea, because it appears on Record, that he made his Election what Execution to have. 13 *Eliz.* *Dyer* 299.

2. The Plaintiff had a Judgment against B. G. in an Action on the Case, and being indebted to W. R. he brought a Plea of Debt against him in London, and attached the Money which he had recovered, in the Hands of B. G. and had Execution ; afterwards the Plaintiff brought a *Sci. fa.* against the said B. G. upon the first Judgment, who pleaded the Judgment, and Execution upon the Attachment ; and upon Demurrer it was held an ill Plea, because that which was attached was a Duty which accrued by Record in one of the King's Courts, which shall not be defeated by such a particular Custom to attach, &c. 1 *Leon.* 29. *Flood versus Perrott*.

3. The Plaintiff had Judgment on a Bond, and would have brought a new Action upon the same Bond, insisting, that it would be unreasonable to compel him to take out Execution upon that Judgment, which might be erroneous, and for that Reason reversed ; but adjudged, that the Contract upon the Bond being now changed into Matter of Record, which is of an higher Nature, he shall not have a new Action so long as that Judgment is in Force ; for if he might have one he might have more ; and upon every Judgment the Defendant is amerced. 6 *Rep.* *Higgin's Case*.

4. Judgment against the Intestate, and upon a *Sci. fa.* against the Administrator, he pleaded, that before the said Judgment the Intestate did acknowledge a Statute to B. G. which was not paid in his Life-time, and beyond what would satisfy the said Statute, he had not Assets ; adjudged no Plea, because a Statute is but a Pocket Record, and shall not be paid before a Judgment. 1 *Leon.* 328. *Bond versus Bailies*, and *Conie versus Barham*, S. P.

5. Where a Judgment is recovered jointly against three Defendants, the Plaintiff cannot bring an Action of Debt upon that Judgment against one alone, because the Judgment is joint against all of them. *Pasch.* 16 *Eliz.* 2 *Leon.* 220.

6. *Scire facias* upon a Recognisance, and Judgment had therein in B. R. afterwards the Plaintiff brought an Action of Debt upon that Judgment in C. B. and had Judgment ; then he brought another *Scire facias* to have Execution of the Judgment he had obtained in B. R. and the Defendant pleaded in Bar the Judgment had in C. B. and upon Demurrer adjudged no Plea ; because one Judgment cannot determine another which is of equal Nature, no more than one Bond can determine another Bond. *Cro. Eliz.* 817. *Preston versus Perton*.

7. *Scire facias* on a Judgment, the Defendant pleaded, that before it was obtained, and pending the Action, the Plaintiff covenanted with him, that if he got Judgment, and that if the Defendant upon such a Day paid him 100 *l.* that he would not sue out Execution, and that the Judgment should be void, and averred, that he had paid the Money ; but adjudged no Plea, because one cannot make a Defeasance of a Judgment before 'tis obtained ; the Defendant must take his Remedy by an Action of Covenant. *Cro. Eliz.* 837. *Gage versus Shurland*.

8. The Plaintiff brought a *Sci. fa.* upon a Recognisance, and had Judgment by Default *quod habeat Executionem* ; afterwards he brought an * Action of Debt on that Judgment ; and the Defendant moved the Court against his Proceeding in that Action ; for that he ought to proceed

* 4 *Leon.* 185. *Bar-nard vers. Tuffer*. S. P.

upon the Judgment in the *Scire facias*, and to sue out Execution by *Elegit*; but if he should proceed upon the Action of Debt, then he might have a *Capias ad satisfaciend'*, which the Defendant would avoid; but adjudged, that the Recognizance is a Judgment of it self, and if there had been no Judgment upon the *Sci. fa.* an Action of Debt would have laid upon it. *Mich. 29 Eliz. 2 Leon. 14. Lovelace's Case.*

9. The Plaintiff brought a *Scire facias* upon a Recognizance taken in the Chamber of London, and had Judgment in the *Scire facias*, and now he brought an Action of Debt upon that Judgment; and upon a Demurrer to the Declaration it was objected, that it was ill, because the Plaintiff did not shew, that the Chamber of London is a Court of Record, and that they have used to take Recognizances there; but on the other Side it was said, that tho' the Judgment on the *Sci. fa.* might be voidable, yet Execution shall be awarded by *Fieri facias*; the Court was of Opinion, that there is a Difference where Execution is sued upon such a Judgment, and where an Action of Debt is brought upon it; for if the Plaintiff brings an Action of Debt, he must have a good Ground for his Action, otherwise he shall not recover; but he may have Execution upon a voidable Judgment, and it shall stand good till such Judgment is reversed. *Mich. 42. Eliz. 1 Leon. 82. Hollingshead versus King. Godh. 96. S. P.*

10. Debt upon Bond brought by an Executor; the Defendant pleaded, that one of them brought a former Action against him, in which he declared as *Administrator* upon the same Bond, to which Action he pleaded, that the Obligees *Robinson* made two Executors, &c. and traversed, that he died Intestate; the Administrator replied, that Administration was granted to him *pendente lite* between the Executors; and upon Demurrer to that Replication, the Defendant had Judgment; that afterwards these Executors proved the Will; then one of them died, and the Survivor, who brought the former Action as *Administrator*, now brought another Action as *Executor*; to which the Defendant pleaded in Bar the Judgment recovered in the former Action by the Plaintiff, as *Administrator*; but adjudged no good Plea, because the Judgment obtained against the Plaintiff as *Administrator*, was not upon the Right, but because he had mistaken his Action to sue as *Administrator*, when in Truth he was *Executor*; so that tho' 'tis true, that a Bar in a personal Action is a perpetual Bar, yet that must be understood where it goes to the Right, and not where the Judgment was had by a mistaking the Action. *5 Rep. 32. B. 2 Cro. 15. S. C. 6 Rep. 7. B. Cro. Eliz. 667. S. C. 2 Lev. 210. 1 Vent. 314. S. C.*

11. An Appeal of *Mayhem*, and an Action of Assault, are different Actions, yet because Damages are recoverable in both, a Judgment in Assault is a good Plea in Bar to an Appeal of *Mayhem*, and the Battery and Wounding may be averred to be the same; which Averment may be traversed. *4 Rep. 43. 1 Leon. 318. S. C. Moor 268. S. C. 2 Vent. 169. S. P.*

12. *Indebitatus Assumpsit* for Fees; the Defendant pleaded several Judgments, and that he had not Assets *ultra*; the Plaintiff replied particularly to every Judgment, and averred, that they were kept on Foot by Fraud; the Defendant rejoined, that the Judgments were all satisfied, and that he did not keep *separalia judicia predicta* on Foot by Fraud, but did not say, *nec aliquod eorum*; and upon Demurrer, the Plaintiff had Judgment, which was affirmed in Error in *B. R. 2 Cro. Car. 625. Warkhouse versus Simonds.*

13. Error of a Judgment in *Wales* on *Quod ei de forceat*, in Nature of a Writ of Right; the Plaintiff had Judgment by Default, and afterwards he brought a new *Quod ei de forceat*; the Defendant pleaded the former Judgment in Bar; and upon Demurrer the Plea was adjudged good, and final Judgment given; the Error assigned was, that such Judgment ought not to be given upon a Demurrer; but the Judgment was affirmed. *Moor 403. Ap Richard versus Penry. 5 Rep. 85. S. C.*

14. It was held by *Hale Ch. Just.* and the Court, that an Action of Debt may be brought on a Judgment after a Writ of Error brought. *1 Mod. 121. Draper versus Bridwell.*

15. In an Action of Debt on a Judgment, the Defendant pleaded in Abatement a Writ of Error depending in the Exchequer-Chamber, *prout patet per recordum*, and concluded his Plea *unde petit judicium de Brevi*; and upon a Demurrer, the Question was, whether a Writ of Error depending doth not hinder the Plaintiff from bringing an Action of Debt on a Judgment; and it was held, that it did not, because the Record remains below, and 'tis only a Transcript thereof which is sent into the Exchequer-Chamber: Now a Writ of Error depending is a *Superfedeas* to an Execution on a Judgment; but it seems 'tis not so to an Action of Debt on a Judgment, tho' there is no Difference in Reason why it should not; for in both Cases the Record continues in the same Court where the Judgment was obtained. *1 Lutw. 600. Denton versus Evans. Sid. 236. S. P.*

16. Trespass *Vi & armis*, &c. the Defendant pleaded in Bar a Recovery for the same Trespass in a *Court-Baron*; and upon a Demurrer to this Plea it was objected, that Trespass *Vi & armis* doth not lie in an Inferior Court, and if not, then the Recovery in such Court could not be for the same Trespass; but it was held, that Judgment in an Inferior Court, may be pleaded in Bar, or in Abatement to an Action in a Superior Court for the same Cause. *2 Lev. 93. Atkinson versus Woodburne.*

17. Debt upon a Judgment, the Defendant pleaded, that the Plaintiff had prosecuted a *Ca. sa.* against him, and by a Warrant thereon he was taken in Execution, and detained till he had paid the Money; the Plaintiff replied, that the Defendant was not taken in Execution, & *hoc petit quod inquiratur per patriam*; the Defendant demurred, and it was adjudged against him, that

his Plea was not good, because it was only a bare Affirmation of Payment of Money against a Record; he ought to have pleaded some Acquittance or Writing, to shew, that the Judgment was satisfied; and yet upon an *Audita querela*, to avoid an Execution upon a Judgment, a bare Suggestion, that the Money is paid, hath been held good; the Reason may be, because that is not only a Suit in Law, but in Equity; for 'tis a Commission to examine the Reason of the Judgment and to have Relief. 1 *Lutw.* 43 & 640. *Wentworth* versus *Squibb*. *Antea* Abatement. (E) 7.) S. C. *Cro. Car.* 328. S. P. 2 *Cro.* 19. *Antea* Issues joined. (C) 1. S. P.

18. Trespass, &c. for breaking his Close, called *Hustler's Farm-Close*; the Defendant pleaded in Bar a former Action of Trespass brought against him by the same Plaintiff, for breaking his Close, and that the Defendant pleaded to that Action, that the Close where the Trespass was supposed to be done, was called *Raine's Close*, and so justified as his Freehold; that the Plaintiff replied, that it was his Freehold; and upon a Demurrer Judgment was given against the Plaintiff, which Judgment the Defendant now pleaded in Bar to this Action, and averred, that *the Places where the supposed Trespasses were committed were the same*, and that both Actions were brought for the same Trespass; and upon Demurrer to this Plea, it was objected, that it was ill, because in the first Action the Defendant demurred, for that the Plaintiff had not made a new Assignment of the Place in his Replication, so that he agreed the Trespass was done in *Raine's Close*, which was the very Place where the Defendant had justified the doing it; but the Declaration in this Action was for a Trespass done in *Hustler's Farm Close*, which is impossible to be the same, and therefore cannot be averred to be the same; but the better Opinion was, that the Judgment obtained in the first Action being upon a Slip, and not upon the Merits of the Cause; for it was, because the Plaintiff had not in his Replication made any new Assignment of the Place where the Trespass was done, so that he agreed it was done in *Rain's Close*, which the Defendant alledged to be his Freehold; and the Plaintiff replied, it was his Freehold, and not the Freehold of the Defendant; he should have concluded to the Country, and not have traversed, that it was the Freehold of the Defendant. 2 *Lutw.* 1399 & 1414. *Hustler* versus *Raines*. See *Traverse*. (H) 14. S. C.

19. Judgment in an Hundred-Court for 58 s. and 4 d. and the Plaintiff brought an Action of Debt in B. R. Upon that Judgment for 58 s. only; and upon *Null tiel Record* pleaded, the Plaintiff demurred; *Sed per Curiam*, the Declaration is ill, for where ever a Debt on a Specialty is demanded, the Declaration must be for the whole Sum, or the Plaintiff must shew how the other was discharged; now here he declared for 58 s. only, and did not shew how the 4 d. was discharged. 3 *Mod.* 41. *Marsh* versus *Cutler*.

20. Debt upon a Judgment, the Defendant moved to stay Proceedings upon Payment of Principal, Interest and Costs; 'tis true, such Rules have been made in an Action of Debt on Bonds, because 'tis equitable to be relieved against the Penalty, but not in Actions of Debt upon Judgments; the Defendant may plead a *Tender & uncore prist*. *Mod. Cases* 60. *Burridge* versus *Fortescue*.

21. Debt lies in the *Marshalsea*, or in any other Court, upon Judgments in B. R. or in C. B. and if *Null tiel Record* is pleaded, the Issue shall be tried by *Certiorari* and *Mittimus* out of Chancery. 1 *Salk.* 209.

(E)

Where the Plaintiff shall have Judgment, tho' his Title is destroyed.

1. **I**N Replevin, the Defendant avowed and justified by Virtue of an Under-Lease made to him by the Devisee of a Term for sixty Years; the Plaintiff replied, that after the said Devise the Testator made a *Feoffment* to the Use of the said Devisee for sixty Years, upon Condition to cease, if he did not permit his Executors to carry away the Goods out of his House after his Decease, and that he did not permit them to be carried away, &c. and upon Demurrer the Defendant had Judgment, for tho' the Plaintiff had destroyed the Defendant's Title, which he made by the Devise, that being revoked by the Feoffment, yet he gave him another Title for sixty Years by Virtue of the Feoffment; so that he had a lawful Term in the Land, and the Court are to judge upon the whole Record. 8 *Rep.* 90. *Frances's Case*.

Jurisdiction. See Pleas to Jurisdiction. (C) per totum.

Jurors and Jury.

Concerning their Appearance. (A)	They are to try the Issue, and not to raise Questions in Things where the Parties are agreed. (D)
Concerning their Return. (B)	
Where, and for what to be punished. (C)	

(A)

Concerning their Appearance.

1. **T**HE Parties are always demandable before the Jurors; therefore if the Jury is not full, and the Defendant doth not appear, the Enquest shall be taken by Default; and if the Plaintiff doth not appear, he shall be nonsuit. *Mich. 9 Eliz. Dyer 265.*

2. If the Jury doth appear upon the Return of the *Habeas Corpora* or *Distingas*, and the Plaintiff doth not, he shall be demanded and nonsuited; but it was doubted, whether the Course was so in the King's Bench. *Hill. 12 Eliz. Dyer 286.*

3. If a Juror appear, and the Jury are adjourned to a certain Day, and he then makes Default, the Court cannot fine him presently, for his Companions must enquire of the Value of his Lands, and he shall be fined accordingly. *8 Rep. 38. in Greifley's Case.*

4. A Juror appeared, and was challenged and withdrawn, and a Tales was granted, and yet he appeared amongst the other Jurors and was sworn and tried the Cause; and after the Verdict was given, this Matter was moved to the Court in Arrest of Judgment, which was stayed for this Reason. *Cro. Eliz. 188. Hungate versus Hammond, and 429. Moor versus Vaughan. S. P.*

5. There being a Trial intended for certain Lands, the Tenant in Possession made a Brief of the Cause, and delivered Copies thereof to the Jury before they were sworn; the Cause was afterwards tried, but there was no Verdict, for the Plaintiff was nonsuit, yet the Jurors and the Tenant were censured in the Star-Chamber to pay a Fine, and stand committed: The Judges also declared, that either the Plaintiff or Defendant might Use their Endeavours for a Juryman to appear, but one who is no Party to the Suit cannot; for if he write or speak to a Juror to appear, 'tis Maintenance; so if the Parties themselves instruct the Jurors, or promise any Reward if they will appear, this is Embracery as well in them as a Stranger to the Suit. *Moor 815. Jepps versus Tambridge & al.*

6. An Attorney was thrown over the Bar, because he had given the Names of several Persons in Writing to the Sheriff, whom he would have returned on the Jury; and the Names of others, whom he would not have returned. *Moor 882. Hanfon's Case.*

(B)

Concerning their Return.

1. **B**Y the Statute *II. 2. cap. 28.* there ought to be twenty-four Jurors returned, and in an Action of Trespas in an inferior Court, eighteen only were returned upon the Panel; and upon Error brought, this was assigned for Error, and the Judgment was reversed. *Godb. 370. Holmes versus Wengreen.*

2. One of the Jurors was named *Richard Smith* in all the Procefs, and one *Rice Smith* was sworn at the Trial; and upon an Affidavit made, in which it was averred, that he was not the same Man as returned in the Procefs; the Court was moved in Arrest of Judgment, but it was denied, because such an Averment must not be allowed against a Record, for that would be to set aside a Trial upon an Affidavit; the Averment which is intended by the Statute *21 Jac. cap. 13.* is where a Juror is named by one Name in one Part of the Record, and by another Name in another Place in the same Record. *Trin. 4 Car. Hatley 107. Bing versus Hodges.*

3. In the *Venire facias*, a Juryman was returned by the Name of *Samuel Hunt*, and so upon *Cro. Car.* the *Distingas*, but in the *Nomina juratorum*, *Daniel Hunt* was returned and sworn, and the 563. Cause was tried, and the Plaintiff had a Verdict, and this Matter was moved in Arrest of Judgment; whereupon the Sheriff was examined, and also the said *Samuel Hunt*, who was found to be the same Person returned by the Sheriff, and for that Reason the Judgment was affirmed. *W. Jones 448. Bond versus Davis.*

4. Upon an Information of Perjury at Common Law, the Defendant was convicted; and it was moved in Arrest of Judgment, that twenty-four Jurors were returned, and that in the *Venire facias* one of them was named *W. R.* and in the *Distingas* it was *W. R. junior*, so that it could not be intended the same Person, and no Statutes of Amendments extend to penal Actions: But adjudged, that since *W. R.* did not serve of the Jury, but twelve others, it was well enough. *Sid. 66. The King versus Reed.*

(C)

Where, and for what to be punished, and for what not. See *Verdict.*
(B) per totum.

1. **T**HE Jury came into Court, and said, they were all agreed on their Verdict but one, and he would not agree with the rest, whereupon they were sent back, and afterwards he would not agree, (but having eat and drank) did join with the rest in the Verdict, and it was for the Plaintiff; the Judges did not impose a Fine upon him at the Assises, but gave him Time to appear the next Term, and then he was fined 20*s.* *Mich. 5 Eliz. Dyer 218.*

2. The Jury agreed upon two Verdicts and would conceal the later, if the Court was not satisfied with the other; this was a plain Combination and Misdemeanour to delude the Court; they were fined. *Cro. Eliz. 153. Brayne's Case.*

3. The Jury were fined by Popham Chief Justice and the Court, for giving a Verdict *contrary to the Direction of the Court*; but the same Case is reported by Mr. Noy, who tells us, that the Judges were Opinion, that the Jury *had been unlawfully dealt withal* to give their Verdict, which, if true, they were justly fined. *Tit. 23. H'barton's Case.*

4. At the *Nisi prius*, a Juror was withdrawn, being challenged, and afterwards he stayed with the Jury above half an Hour after they were gone out of Court to consider of the Evidence: *Et per Curiam*, this Act shall not set aside the Verdict, unless it could be proved that they had new Evidence given after they went out of Court; but 'tis a Misdemeanour in him who was challenged and punishable. *2 Roll. Rep. 85. Parker's Case.*

5. Where Jurors are sworn and afterwards some of them are discharged, they shall not be charged for what they did when they were sworn; and if two or more *conspire* against another, and afterwards the Conspirators are sworn upon the Jury, and they, with others, find a Bill against him, and against whom they conspired, no Writ of Conspiracy lieth against them, because it shall not be intended to be malicious, what they with several others do upon Oath. *Bridgm. 130. Agard versus Weld.*

6. The Jury were fined for acquitting one indicted for a Robbery, contrary to the Evidence and Direction of the Court; it was moved, that the Fine was not duly imposed, because it was not said in the Record, that they found for the Defendant *contra Evidentias suas*; but adjudged, that the Court of B. R. may fine a Jury, who found against the Direction of the Judges; but Justices of Assises could not fine, but only for a Misdemeanour in Eating or Drinking, &c. *Mich. 1 Car. B. R. Norris's Case. Bondl. 153.*

Palm.
380.

7. In Ejectment, there was a Verdict for the Defendant, but the Court was informed, that three of the Jurors had Sweet-meats in their Pockets, and those Three were for the Plaintiff till they were searched and the Sweet-meats found upon them, and then they agreed with the other Nine, and found for the Defendant; the Court was of Opinion, that whether these Three eat or not, they were finable, it being a great Misdemeanour; but because this was moved after the Jury were discharged, the Court did not know which Three to send for, and because the Nine brought over the Three to agree with them, they would not stay the Judgment; otherwise, if the Three had brought over the Nine. *Trin. 21 Jac. Godb. 353. Sely versus Playles. Palm. 380. S. C. By the Name of Rogers versus Smith.*

2 Lev.
205.

8. After a Verdict for the Plaintiff, it was moved to set it aside and to have a Trial, because the Jury gave their Verdict by the Pillip of a Sixpence; if Crofs for the Plaintiff, if Pile for the Defendant, and the Sixpence coming up Crofs, they all agreed to find for the Plaintiff; the Verdict was set aside; and the Jury being all of *Northumberland*, were ordered to attend the next Term. *T. Jones 83. Fry versus Hordy.*

9. A Verdict was set aside, upon *Affidavit* that the Jury cast Lots, and gave it as the Lot fell. *2 Lev. In the Case of the King and Lord Fitzwater. 2 Lev. 205. Foster versus Harwood. S. P. the Jury to attend in Order to be lined.*

10. The Defendant was convicted of Perjury at a Trial at Bar, and upon a Motion for a new Trial, the Case was, the Jury, before they came into Court, agreed to find him guilty of *Perjury*, but not of *wilful and corrupt Perjury*; and that if the Court would not Record that Verdict, then to find him guilty of *Perjury generally*; now it was insisted, that these were two Verdicts which were inconsistent, and the later was given without any Consideration at all; they may vary from a privy Verdict, because in Strictness 'tis not a Verdict, 'tis a Favour allowed the Jury for their Ease; besides, it may be presumed they had some subsequent Consideration of the Evidence, after such Verdict given, but here they did not know but the Court might Record their first Verdict, so that when 'tis refused they gave the second Verdict at the Bar, without any Consideration; 'tis true, it

hath

hath been allowed a Jury to recal their Verdict as in * *Archer's Case*, who was indicted for Felony, and the Jury found him Not guilty; but before they went from the Bar, they immediately recalled it, and said they were mistaken, and found him guilty; and this last was recorded for their Verdict: A new Trial was granted after a Conviction of Perjury, for swearing that such a Person was at a Conventicle, when in Truth he was not; and it appearing that the Foreman of the Jury, who gave the Verdict, was the Owner of the Barn where the Conventicle was held; and being challenged for that Reason, and yet sworn afterwards of the Jury, the Court granted a new Trial; and this was in † *Cornelius's Case*: It hath been granted for the Misdemeanor in the Jury, in receiving a Paper from the Plaintiff after they were gone from the Bar. *Adjournatur*. 5 *Mod.* 348. *The King versus Milling*.

* *In Plow.*
Com. 211.
Sanders
v. Free-
man's
Case.

† *Sid.* 58.

11. In Ejectment after the Jury had heard the Evidence, and were gone from the Bar, to consider of their Verdict, they were divided in Opinion, and sent for one of the Witnesses who had given Evidence at Bar, who repeated the same Thing to them in their Chamber, and thereupon they found for the Plaintiff; and this Matter being moved to the Court, a *Venire facias de novo* was awarded.

(D)

They are to try the Issue, and not to raise Questions in Things where the Parties are agreed.

1. **I**N a Special Verdict in Replevin, the Jury found, that before the Taking the Cattle, the Manor of M. was an *antient Manor*, and that H. M. was seised thereof in Fee, and that there had been an antient Court there held, &c. and at last they find, that for twenty Years there had been but *one Freeholder* there, by which they seem to insinuate, that there was no such Manor at all, because two such Tenants are requisite to every Manor, and therefore it being contradictory to what they had found before, this subsequent Matter was not regarded. 2 *Lutw.* In the Case of *Tonkyn versus Crocker*, 2 *Rep.* 4. *B. S. P.* 1 *Leon.* 323. *S. P.* 3 *Leon.* 80. *S. P.* and 209. *S. P.* *Savill* 112. *S. P.* *Owen* 91. *S. P.* *Palm.* 19. *S. P.* 2 *Mod.* 4. *S. P.*

2. *Quare Impedit*, in which the Plaintiff declared that the Church was void by *Resignation of Dr. Playford*, &c. and upon Issue joined, the Plaintiff had a Verdict and Judgment, and made a Lease of his Glebe, and the Lessee brought an Ejectment; and the Jury found that the Church became void by the *Death of Dr. Playford*, and Lapse incurred to the Bishop, who collated *Murrell* the Lessor of the Plaintiff: Now the Parties in the *Quare Impedit* having confessed, and it being admitted in Pleading, that the Church was void by the *Resignation of Playford*; the Jury shall not find contrary to what they had admitted in Pleading, which they had done by finding, that it was void by the *Death of Playford*, and Judgment was given accordingly on a Writ of Error upon this Judgment in Ejectment. *Palm.* 19. *Sir Henry Wallop's Case*

3. Upon an *Habeas Corpus* directed to the Sheriffs of London, they return, that *Bubell* and eleven more were committed to them by an Order of the Court of Sessions at the *Old Bailey*, for that they being summoned to try Issues between the King and *Penn and Mead*, and others, for a Riot and certain Tumult, did, *contra plenam Evidentiam & contra directionem Curie in materia Legis*, openly given and declared to them in Court, acquit the Defendants; and thereupon they were fined forty Marks a-piece, and committed till they paid the Fine: It was objected against the first Part of this Return, (*viz.*) that *Bubell, &c.* did *contra plenam Evidentiam* acquit the Defendants, this was very uncertain, because the Court of C. B. could not tell what that Evidence was; it should have returned in a particular Manner, that the Court might judge whether it was full Evidence or not; 'tis true, it appears to be full and manifest, according to the Judgment of the Court of Sessions; but the Judgment of the Court of C. B. must be grounded upon their own Understanding, and not upon the Judgment of another inferior Court; if the Return had been, that the Court of Sessions did commit the Jury, because they did *contra Legem* acquit the Defendants, or *contra Sacramentum*, this had been as certain as *contra plenam Evidentiam*; but no one will affirm that to be a certain and sufficient Return; it had been more colourable to have returned, that they acquitted the Defendants, *corruptly knowing the Evidence to be plain and manifest*; for let it be never so plain, if 'tis not so to the Jury, 'tis not a Fault in them, and finable, because 'tis Common even for Men of Learning to deduce contrary Conclusions from the same Premises and Cases in Law, so that what is manifest to one may not be so to another: The other Part of the Return is, that the Jury did acquit the Defendants *contra directionem Curie in materia Legis, &c.* now this Part of the Return is not intelligible; in the first Place no Issue can be taken what is Matter in Law and what not; and if by this Paragraph 'tis meant, that the Judge having heard the Evidence, shall resolve what the Fact is, and thereupon direct the Jury in Matter of Law, and that they must find as he hath directed, or be fined and imprisoned, then the Jury themselves are of no Manner of Use in determining what is Right or Wrong; for it depends purely upon the Direction of the Judge, and if so, then there is an End of the magnified Trials by Juries: But the Law is plain, that the Jury is never fined for giving a Verdict *against Evidence* and the Direction of the Court, because an Attaint lies against them: Besides, the Judge cannot have the same Evidence of the Fact as the Jury may have, because he hath no Evidence but what is given in Court; but

1 *Mod.*
119, 284.
By the
Name of
Ham-
mond v.
Howell.
T. Jones
14.
2 *Mod.*
218.

the

the Law supposeth the Jury may have some other Evidence, and therefore they are to be returned *de Victincto*; and they may have Evidence from their personal Knowledge; to all which Evidence the Judge is a meer Stranger, so that if they follow his Direction they may be attained, and if they do not follow it, they may be fined and imprisoned, if this Return should be good in Law; and for these Reasons it was adjudged an ill Return. *Vaugh. 135. Bushe's Case per totum.*

4. *Leech* and five more of a Jury at the *Old Baily*, refused to find Quakers guilty according to Evidence, and upon this they were bound to appear in *B. R.* on the first Day of the following Term, where they appeared, and the Court directed an Information to be drawn against them, and they were thereupon convicted and fined. *Raym. 98. Leech's Case. 3 Leon. 147. S. P.*

Sid. 272.
Hardr.

409.

* By the
Record it
seems the
Jury had
committed
some Mis-

5. *Wagstaffe* and others of the Jury at the *Old Baily*, refused to find the Parties guilty, who were indicted for *Nonconformity*, the Evidence being plain against them; and upon this the Court * fined them 100 Marks a-piece, and committed them till they paid their Fines; they brought an *Habeas Corpus*, and all this Matter appearing upon the Return, they were remanded, for the Judge is entrusted with the Liberties of the People, and Jurors were punishable in the Star-Chamber, as in 12 Rep. 23. *Raym. 138. The King versus Wagstaffe. See Yelverton 23. Wharton's Case.*

besides going against Evidence, for they were unequally fined. See *Vaugh. 153.*

6. Information for an Offence in Nature of *Embracery*, setting forth, that an Issue in *Trespas* came to be tried at the Assises in *Cornwall* between such Parties, and that the Defendants, before the Trial, conspired and agreed amongst themselves, for Rewards and other unjust Ways and Means, to procure a Verdict for the Defendant; and to compass the same, they contrived, that *Dodge* and the other Defendants should procure themselves to be sworn of the *Tales* for trying the said Issue, and thereupon to give a Verdict for the Defendant; and by these undue Means they did procure themselves to be sworn of the *Tales*, &c. and they with others gave a Verdict for the Defendant, *ad grave damnum* of the Plaintiff in the Action; to this Information the Defendants plead Not guilty, and were all found guilty at the last Assises in *Cornwal*; and *Saunders* being prepared to offer some Exceptions in Arrest of Judgment, *Hale Ch. Just.* would not hear him, for he would not give the least Countenance to such Offence; therefore if the Defendants thought fit, they might bring a Writ of Error. 1 *Saund. 301. The King versus Opie and Dodge.*

7. The Jury, after they went from the Bar, sent for an Act of Common-Council given in Evidence; this is irregular, but shall not set aside the Verdict; 'tis not like the *Lady Ives's Case*, where the Jury took a Map of one Side, which was Evidence on neither Side; 'tis true, this Act of Common-Council was an Act of neither Side, but it was Evidence on both Sides; if a Jury eat at their own Charge, 'tis finable, but the Verdict shall stand; but if at the Charge of either Party, and the Verdict is found for him, it shall be set aside. 2 *Salk. 644. King versus Burdett.*

8. In *Assumpsit* against a Feme Covert, brought against her as a Feme Sole; upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict, and the Defendant moved for a new Trial upon good Evidence produced of her Coverture, but it was not granted, because she lived here as a Feme Sole; and it was unreasonable that she should set up Coverture against a just Debt. 2 *Salk. 646. Deerly versus Dutcheffs of Mazarine.*

9. The Foreman declared, that the Plaintiff should never have a Verdict, let him produce what Evidence he would; and upon *Affidavit* made of this Matter, a new Trial was granted. 2 *Salk. 645. Dent versus Hundred of Hertford.*

10. Where Issues are forfeited by a Juror, and returned upon him, his Feoffee, if the Estate is sold to him, is liable; so if the Juror were only Tenant for Life, he in Reversion is liable, because this being a Service for the Publick, the Inheritance it self is made Debtor. 1 *Salk. 395. In the Case of Britton versus Cole.*

* This is
never done
in a capital
Cause
by the Clerk
of the
Crown.
T. Jones
222.
Farring-
ton's Case.

11. Where a Rule is made for a Special Jury to be struck by the * Master of the Office out of the Freeholders Book, he must give Notice to the Attornies on both Sides to be present; and if one of them attends and the other doth not, he who appears shall strike out twelve of the Forty-eight, and the Master shall strike out twelve for him who doth not appear; but if the Rule is only for a Special Jury, and 'tis not expressed that the Master shall strike forty-eight, and that each of the Parties shall strike out Twelve, in such Case the Master shall strike twenty-four, and neither of the Parties shall strike out any. 1 *Salk. 405.*

Jus Patronatus.

(A)

1. **T**WO Patrons present two Clerks by different Titles, to one Church; the Ordinary awarded a *Jus Patronatus*, pending which Suit he admitted the Clerk of one of the Patrons; whereupon the other libelled in the Spiritual Court against the Ordinary; and upon a Prohibition it was adjudged, that the Awarding a *Jus Patronatus* was not of Necessity, but at the Will of the Ordinary, for his better Information who hath the Right of Patronage; for if he will at his Peril take Notice of the *Right*, he may admit the Clerk of either of them, without a *Jus Patronatus*; but in this Case, after it was awarded, and before any Verdict given in it, the Bishop was satisfied in the rightful Patron, and therefore he admitted his Clerk, and so the Prohibition stood. 2 *Leon. 168. Gerrard's Case.*

2. If two Patrons severally present one Clerk, the Bishop cannot admit him *generally*, but must admit him of the Presentation of one of them; but if they claim several Titles, then the Bishop is to direct his Writ of *Jus Patronatus*; but this must be at the Prayer of the Parties. *Danby versus Linsey. Mich. 8 Jac.*

3. Where a Parson is deprived by the Ordinary for not reading the 39 Articles, &c. he must give Notice of this Deprivation to the true Patron, otherwise a Lapse will not incur; but because he may not know who is the right Patron, therefore he may Award a *Jus Patronatus* with a solemn Premonition to all Persons, *Quorum Interest*, &c. and after Enquiry is made who is Patron, then to give him Notice; and if he doth not present within six Months, after such Notice, then he may collate, and tho' this doth not bind the very Patron, yet it shall excuse the Ordinary from being a Disturber. *See Hob. 318. Elwis versus Archbishop of York. Antea Avoidance. (B) 7. S. C.*

Justices of Peace.

See *Gun. Ways.*

(A)

1. **A** Justice, &c. made a Warrant to a Constable to bring the Wife of *G. D.* before any Justice of the same County, to find Sureties for her Good Behaviour; the Constable refused to go before any other Justice than him who made the Warrant, and thereupon the Husband and Wife, with Sureties, went before another Justice, and there they entered into a Recognizance, that the Wife should appear at the next Sessions which was not according to the Warrant, therefore the Constable brought her before the Justice, who granted the Warrant; where she refusing to find Sureties, was carried to Gaol by the Constable by Virtue of the Warrant; adjudged, that where the Warrant is general to bring the Person before any Justice of Peace, &c. there the Constable hath the Liberty to carry him before what Justice, &c. he thinks fit, for by Presumption of Law, he is more indifferent than the Delinquent; adjudged likewise, that in this Case the Constable might carry the Woman to Prison without a new Warrant, because the Words of the old Warrant were to find Sureties, and if she shall refuse, then to carry her to Gaol; it was likewise held, that a Justice of Peace might make a Warrant to bring the Person before himself, and such Warrant is good. 5th Rep. 60. *Foster's Case.*

2. A Justice of Peace upon View of a Force or a Forcible Detainer, may commit the Person presently; but then he must make a Record of it, otherwise his Commitment is illegal, and an Action of False Imprisonment lieth against the Person who arrested him and carried him to Prison. 7 Rep. 120. In *Dr. Bonham's Case.*

3. The Sheriff by the Common Law is *Conservator pacis*, and the general Commission of the Peace throughout England began Anno 1 Ed. 3. and it was to prevent Rebellions which might happen upon the deposing of his Predecessor Ed. 2. but before that Time there were particular Commissions of the Peace to certain Men, and in particular Places; and therefore in that Matter, by the Opinion of Justice *Doddridge*, Mr *Lambert* was mistaken. Trin. 21. Rep. annexed to *Benlo's* 130.

W Jones
355.

4. The Grandfather of a poor Child, born in the Parish of *St. Giles's in the Fields*, was ordered by a Justice of Peace of *Middlesex* to contribute towards the Maintenance of it, which he refusing, was committed; adjudged, that the Justice had Power to make such Order, and that the Commitment was good, tho' the Grandfather lived; in *Suffolk*; and he giving Security to appear at the next Sessions, was discharged. 2 *Bulst.* 344. *The King versus Reeves.*

5. A Town, which was a Parish in Reputation, was rated to the Relief of the Poor of another Parish, and the Rate was confirmed by two Justices, who made a Warrant to distrain and by Virtue thereof the Goods of the Plaintiff were distrained; adjudged, that the Warrant did not excuse the Defendants, because the Rate was unduly taxed upon the Plaintiff, who ought not to contribute to the Relief of the Poor of another Parish; and 'tis not like the Case where an Officer executes an erroneous Warrant, upon any Process out of the King's Courts, because they have a General Jurisdiction; but the Justices of Peace have only a particular Jurisdiction; limited by Statutes. *Cro. Car.* 286, 394. *Nicholls versus Walker.*

6. The Defendant was indicted at the Sessions for Barretry, and arraigned, and the same Sessions traversed the Indictment, and a *Venire facias* awarded to try it immediatly, which was done, and he convicted, fined and imprisoned; and upon a Writ of Error brought, the Error assigned was, that this Trial, and the Awarding the *Venire facias* in the same Sessions, when he was indicted, was not good, for it ought to be returnable at the next Sessions, and not the next Day; but adjudged well enough; for the Defendant being present, may as well be tried then as at another Time. *Trin.* 14 *Jac.* 2 *Cro.* 404. *Rice and the King's Case.*

7. In an Action of False Imprisonment, the Defendant justified, for that the Lord Mayor of *London* is a Justice of Peace, and the Defendant, a Serjeant at *Mace*, according to the Custom of *London*; and that *W. R.* the Lord Mayor, &c. commanded the Defendant to arrest the Plaintiff for Causes not known to the Defendant, but known to the Mayor; whereupon he arrested the Plaintiff, &c. and upon Demurrer to this Plea, it was adjudged ill, because it did not appear, whether he commanded him as Mayor, or as Justice of the Peace; besides, a Justice of Peace cannot command one to arrest another without a Warrant, where he is not present himself; neither is a Serjeant at Mace an Officer to the Lord Mayor, as he is a Justice of Peace, but the Constable. *Mich.* 3 *Jac.* 1 *Brownl.* 204. *Woody's Case.*

8. A Man entered into a Recognizance before a Justice of Peace, to keep the Peace, &c. especially towards *W. R.* &c. who afterwards complained to the Court of Common Pleas, that he was in Danger of the Cognisor, and of this he made Oath, and thereupon prayed Surety of the Peace against him, and had it; and thereupon a *Superfedeas* was sent to the Justice to discharge the Recognizance below; but if another Person had made such Oath in Court, he should have Surety of the Peace against him, and the Recognizance below should still stand. *Moor* 43.

9. A new Commission to Justices of Peace, out of which some of the Justices in the old Commission were omitted, yet what Acts they do as Justices are lawful till the next Sessions, at which the new Commission is published. *Moor* 187. See Sheriff. (A) 11.

10. In False Imprisonment, the Defendant justified, for that the now Plaintiff being before a Justice of Peace, and having not Leisure at that Time to examine him, commanded the Defendant to take him into his Custody till the next Day, which he did, being Constable, &c. and upon a Demurrer, this was adjudged a good Justification; and so it would have been for any other Person besides a Constable, and without alledging any Cause which the Justice had to commit him, or without any Warrant in Writing; because the Plaintiff himself was then before the Justice of the Peace. *Moor* 408. *Broughton versus Mulyhoe.*

11. A Justice of Peace was censured, for that he going to view a Riot, and the Offenders being gone, and he being required to go to the House where, he refused; and also the Peace being sworn against the Rioters, he took Bonds of them to keep the Peace against those who did not demand it, but discharged them the next Day. *Moor* 628. *Carew's Case.*

12. A Justice of Peace in going to remove a Force may take the *Posse Comitatus* with him; and that if several Men enter into an empty House with Arms, &c. this is a Forcible Entry; and so 'tis to put back a Lock or Bolt to enter, tho' no Body is in the House. *Moor* 656. *Pollard versus Moreton.*

13. Indictment against a Justice of Peace, for executing that Office, not having 20 *l. per Ann.* *contra formam Statuti*, quashed; for that an Indictment would not lie, because the Statute limits the Punishment to be by an Action of Debt at Common Law; besides Lawyers and Corporation-Men are excepted out of the Statute, and 'tis not shewn, that the Defendant was not a Lawyer, or a Corporation-Man; but the Chief Objection was, that this Indictment did not set forth the Time he acted as a Justice of Peace, for he might have 40 *l. per Ann.* then, tho' not afterwards. 2 *Roll. Rep.* 247.

14. He cannot use any coercive Power as to compel a Man to enter into a Recognizance, or to commit him for refusing, unless it be in the County where he hath a Jurisdiction; but he may take Informations against Offenders in any Place out of the County; and therefore where a Robbery was done in *Berks*, an Oath was made thereof before a Justice of Peace of the Hundred, who was then at his Chamber in the *Middle Temple*, and held good. *Cro. Car.* 153. *Halier versus Hundred of Benhurft.*

15. Two Justices made an Order upon one *Pridgeon* to keep a Bastard-Child, from which Order he appealed to the next Sessions, where the said Order was quashed, and the Party discharged; afterwards at another Quarter-Sessions, the Matter was re-examined, and thereupon a new Order was made, that he should keep the Bastard, and he refusing to obey that Order, was committed; adjudged, that his Appeal being regular according to the Statute 18 *Eliz.* and the first Order discharged, the second Sessions had no Power to alter it. *Cro. Car.* 248. *Pridgeon's Case.*

16. A Bailiff was indicted at the Sessions for Extortion; he pleaded and was convicted at the same Sessions, and was fined and committed; and upon Error brought, it was adjudged, that Justices of Peace ought not to try Civil Offences in one and the same Day, for the Party ought to have a convenient Time to provide for his Trial. *Cro. Car.* 317. *Bamsted.*

17. An Order was made by two Justices, &c. which the Defendant refusing to obey, appealed to the Sessions when the Order was confirmed; and thereupon the Defendant told the Court, that if he could not have Justice there, he would have Justice elsewhere; for which he was afterwards indicted at the Sessions, and fined 5 *l.* and committed till he paid; all which Matter being returned on an *Habeas Corpus*, and the Return filed, he moved to be discharged; the better Opinion was, that this was a Contempt, and finable, and that the Defendant being in Execution for the Fine, he could not be discharged without paying it into Court, which he did, and was discharged; but Justice *Twisden* was of Opinion, that tho' 'tis a Contempt to accuse the Court of Injustice, yet this was not so, for the Words were spoken by way of Appeal. *Sid.* 144. *The King versus Mayor.* See *The Queen versus Rogers.*

18. Information against the Defendant, for a Misdemeanor in his Office of a Justice of Peace, (*viz.*) for compounding and not returning Recognisances to the Sessions, and for taking 20 *s.* for an unlicensed Alehouse, and converting it to his own Use; he was tried at Bar, and convicted, and fined 1000 Marks, and committed during the King's Pleasure, and to be of the Good Behaviour for a Year, and to make a publick Acknowledgment of his Crime at the next Sessions for the County of *Surrey.* *Sid.* 192. *The King versus Sir Purbeck Temple.*

19. The Defendant was indicted at the Sessions for Barretry, and on the same Day a *Venire facias* was awarded to try it, which was done, and the Defendant found guilty; and upon a Writ of Error brought, the Error assigned was, that the Justices of Peace could not try a Cause the same Sessions, without the Consent of the Parties, unless in Capital Cases, where the Offender is in Custody; for which Reason the Judgment was reversed. *Sid.* 334. *The King versus Brown.*

20. The Defendant was indicted and found guilty of Barretry at the Assises; and upon a Writ of Error brought, the Errors assigned were, that the *Venire facias* was returnable on a certain Day, which happened to be the Day on which the Assises were held; but it ought to be returnable *ad prox.* Assises generally; besides the Defendant appeared one Day, and pleaded the next Day, and no Adjournment is entered; and that it was tried by the Justices of Oyer and Terminer at the next Assises, when it ought to be before the Justices of the Gaol-Delivery; the Judgment was reversed. *Sid.* 344. *The King versus Nurse.*

21. Upon a Motion for an Attachment against a Justice of Peace, who upon Complaint refused to view the Force; it was denied, for the Party may bring an Action of Debt for 100 *l.* being the Forfeiture given by the Statute. 1 *Vent.* 41.

22. The Defendants were indicted at the Sessions, &c. on the Statute 1 & 2 *Ph. & Mar. c. 7.* by which 'tis enacted, that no Person dwelling in the Countrey, and out of a Corporation or Market-Town, shall sell, or Cause to be sold by Retail, any Woollen or Linen Cloth, Haberdasher or Mercery Wares in any Corporation or Market-Town, &c. except in open Fairs, under the Penalty of 6 *s.* 8 *d.* for every Offence, and the Forfeiture of the Wares sold or exposed to Sale, one Moiety to the King, and the other to the Seisor or Prosecutor; the Indictment set forth, that the Defendant had sold, &c. Earthen Ware in London, *contra formam Statuti*; it was quashed, because the * Justices of Peace are not named in the Statute, and by Consequence they have no Jurisdiction. 5 *Mod.* 149. *The King versus Clough.*

23. A dissenting Preacher qualified himself in one County according to the Act of Toleration, and removed into another County, and preached in a Conventicle there, without any other Qualification, whereupon the Justices convicted him on the Statute against Conventicles; the Attorney General moved for an Attachment against the Justices, for a Contempt of the Toleration-Act, insisting, that a Qualification in one County, is so all over England; adjudged, that the Act against Conventicles is still in Force, and that the Toleration-Act only enjoins the Justices to acquit such who comply with it; so that the Justices being Judges, whether he is qualified or not, if they judge wrong, the Party grieved hath his Remedy by *Certiorari*, or Appeal to the Sessions, where the Fact may be examined, and where the Determination will be final; therefore 'tis unreasonable to grant an Attachment; then he moved for a *Procedendo* to the *Certiorari*, that he might appeal to the Sessions, which was granted. *Mod. Cases.* 228. *Peate's Case.*

24. Adjudged, that before the Statute 5 & 6 *Ed. 6. cap. 25.* any Person might keep an Alehouse without License; but if it was kept disorderly, it was indictable as a Nuisance; but now by that Statute none are to keep Ale-Houses without a License from the Sessions, or by two Justices, *Quorum unus,* &c. the Party entring into a Recognisance, with two Sureties, to keep good Rule and Order in his House; and if he keep an Alehouse, not being thus qualified, he

* 4 *Mod.*
379. *The*
King v.
Buggs. S.
P.

Mo. Ca.
310.
Manda-
mus. (A)
46.
2 *Salk.*
572, 673.
See Re-
cusancy,
the King
v. Peach.

may be committed for three Days, and must give a Recognizance, with two Sureties, &c. which must be certified to the next Sessions; but he is not * indictable for this Offence, because this Statute, by which 'tis made an Offence, appoints the Manner of Punishment as above-mentioned; neither doth this Statute extend to Inns, unless they degenerate into Alehouses; now where an Ale-house is *licensed*, and afterwards kept disorderly, the Justices to suppress it must either proceed upon the Recognizance, or by Indictment, and then such Disorders must be proved as amount to a Nuisance; but where 'tis unlicensed, the Justices may suppress it at Discretion, and commit the Owner. 1 Salk. 45. *Stepens versus Watson*.

25. Two were convicted for stealing Deer, and Judgment was given, that each of them should forfeit 30 *l.* and this being removed into *B. R.* it was objected, that there ought to be but one 30 *l.* forfeited; but adjudged, that this Forfeiture is not in Nature of a Satisfaction to the Party grieved, but a Punishment of the Offender; and the Words of the Statute are, that they shall *respectively forfeit*; and Crimes are several, tho' Debts are joint. 1 Salk. 182. *The Queen versus King*. See *Cro. Eliz.* 480. *Partridge versus Naylor*. Noy 62. *Moor* 453.

Mod. Ca. 41. 26. The Defendant was convicted by the Justices of the Peace, on the Statute 7 *Jac. cap.* 7. for imbeziling *Yarn* delivered to him to be woven, (*viz.*) *whereas Complaint hath been made to G. D. and R. L. &c. and whereas the Defendant was summoned to appear before them, and by Virtue thereof did appear On Tuesday the 17th Day of April 1702*, this Conviction being removed into *B. R.* it was objected, that the 17th Day of April was on Friday, and not on Tuesday; so that the Time of the Summons to appear being impossible, 'tis as if there had been no Summons at all; and a Sommons is necessary in these summary Convictions; adjudged, that upon Complaint made to the Justices, they ought to make a *Memorandum* of it, and issue out a Summons, and when one Day is set forth, his Appearance on another cannot be intended; the Conviction was quashed. 1 Salk. 181. *The Queen versus Dier*. See 2 *Bulst.* 48. *Plowd.* 31. *Dyer* 95. *Raym.* 192. 2 *Jones* 50.

27. The Defendant was convicted on the Statute 43 *Eliz. cap.* 7. (*viz.*) *Whereas Complaint hath been made unto us, &c. by G. D. of, &c. that T. S. of, &c. in the Night-Time cut down divers Lime-Trees of the said G. D. &c.* the Justices ordered, that he should pay so much for Damages; this Conviction being removed into *B. R.* it was objected, that the Defendant was not within this Statute, because he is called *Gentleman* in the Order, and that extends only to base People and Vagabonds, and inflicts the Punishment of *Whipping*, which the Law will never intend for a Gentleman; besides the Conviction is uncertain for not shewing *the Number of Trees*; but adjudged, if a Gentleman will do a base Thing, his Quality is an Aggravation of the Offence; but the Conviction was quashed, because *the Number, as well as the Nature of the Trees*, ought to be expressed; 'tis true, in this Case the Defendant pretended a Title to the Trees, and offered to plead it to the Conviction: But three of the Judges against the Opinion of *Holt Ch. Just.* would not admit him to plead it. 1 Salk. 181. *The Queen versus Barnaby*. See 3 *Cro.* 821. and 5 *Rep. St. John's Case*, the Authority whereof was questioned, and the Record could not be found.

1 And. 296. 2 Leon. 275. 28. Adjudged, that 'tis incident to the Office of a Justice of Peace to commit, as the Conservators of the Peace did at Common Law; for they have no Authority for that Purpose by any express Words in their Commission; that if a Justice of Peace directs his Warrant to a private Person, he may execute it; and this was the Opinion of *Ch. Just. Hale*. 1 Salk. 347. *In the Case of the King and Keddall*.

29. The Defendants were indicted for not producing the *Parish-Books* before Justices of Peace, who were appointed by the rest to examine and *make Orders* thereupon, and to commit for disobeying such *Orders*; but the Indictment was quashed, for tho' the Justices may refer the Examination of the Fact to a certain Number of Justices, yet they cannot delegate the Power of *making Orders*. *Mod. Cases* 87. *The Queen versus Glinn*.

Justification.

In Trespafs, good. (A)		rants, and by Servants, Bailiffs, &c.
In Trespafs, not good. (B)		on their Master's Commands. (C)
Justification under Grants, Writs, War-		By Process out of inferior Courts. (D)

(A)

In Trespafs, good. See *Assault*. (B) and (C) per totum. *False Imprisonment*.

1. **T**HE Defendant being seised of 100 Acres, made a Feoffment of fifty Acres, the Purchaser put in his Cattle into the fifty Acres, and for Want of *Enclosure* they strayed into the other fifty Acres, and were distrained Damage-feasant; adjudged, that the Defendant might justify the Distress for Want of the *Enclosure*. *Mich.*

23 *Eliz. Dyer* 372.

2. In Trespafs for Breaking his Close at *S.* and Fishing in his several Fishery, and assaulting and wounding the Plaintiff; as to the Assault, the Defendant pleaded Not guilty, and as to the rest, that he was seised of the Manors of *D. and S. &c.* and of a several Fishery in the River *A.* and so prescribed to have a several Fishery in the said River of *A. at S. aforesaid*, as appertaining to his Manors of *D. and S.* and to go upon the Close to draw his Nets when he fished; adjudged a good Justification. *Mich. 10 Eliz. Dyer* 267.

3. Trespafs for entering his House and cutting six Posts, &c. the Defendant, as to entering the House and *all the Trespafs*, except cutting *Three of the Posts*, pleaded Not guilty; and as to the cutting those *three Posts*, he justified, that it was the Freehold of *B. B.* and that he entered by his Command and cut those three Posts; it was objected, that this Plea was ill, because the Defendant had pleaded Not guilty as to *all the Trespafs*, and yet had justified the Cutting the three Posts; but adjudged, that having pleaded Not guilty generally as to all the Trespafs, except such a Part, he may justify as to that Part. *Cro. Eliz. 87. Higham versus Reynolds.*

4. Trover, &c. the Defendant justified the Taking, &c. as Under-Sheriff, by Process out of the Exchequer, to levy on the *Occupiers* of Lands of several Persons in a Schedule in the Writ named, the Debts therein specified, &c. and that he took the Cattle on the Lands of the Plaintiff, which were lately the Lands of *B. G.* who was Debtor to the King in 50 *s.* adjudged, that the Justification was good, for it was a good Warrant to levy Money on the *Occupiers of Lands.* 1 *Brownl.*

17. *Catford versus Osmond.*

5. Where a Justification is made for several Causes, and some of them are not good, yet that shall not make the whole Justification void, but for these only, and it shall be good for the rest. *Godb. 277. Webb versus Tuck.*

6. In Trespafs for Taking and Killing two Greyhounds; the Defendant justified, for that the Greyhounds chased a Deer in his Park, and there killed her, and thereupon to prevent farther Mischief, he took and killed them; the Plaintiff replied, that the Deer was out of the Park on his (the Plaintiff's) Land eating Grass, and that he set his Greyhounds on to chase her out, and that they followed the Deer into the Park and there killed her; and upon a Demurrer the Defendant had Judgment, for the Justification was held good. 3 *Lev. 28. Barrington versus Turner.* See *Wadburst versus Dam. S. P.*

7. Trespafs for Treading his Grass and Pulling down his Gate; the Defendant justified for a Passage by and thro' the Place where, &c. and that at the Time of the supposed Trespafs a Gate was set up on the Passage, so that he could not pass with his Cattle; whereupon he broke and pulled down the Gate, and in passing *aliquantulum* trod the Grass, *quæ est idem residuum*; the Plaintiff replied, that it is not the Residue whereof he complained; and upon Demurrer it was insisted for the Plaintiff, that the Defendant could not justify Pulling down a Gate, especially since he did not set forth, that it was locked or nailed, so that he could not pass: But adjudged, that having pleaded that the Gate was there, so that he could not pass, it shall be intended, that it was locked or nailed, or that the Passage was straitned. 3 *Lev. 92. Sprigg versus Neale.*

(B)

In Trespafs, not good. See *False Imprisonment. Prescription.* (B) 1.

1. **CASE** for calling the Plaintiff *Murderer and Thief*; the Defendant justified as to the Murder, because the Plaintiff was indicted of Murder at *Chester*; and as to the Thief, because there was a Robbery done, and the *common Fame* was, that the Plaintiff was guilty; adjudged not good; but in an Action of *False Imprisonment*, *common Fame* may be a good Justification for arresting the Plaintiff, and imprisoning him to answer the Law. *Mich. 7 Eliz. Dyer 236.*

2. In *Waste* for cutting down Oaks, &c. the Defendant, as to ten of them, pleaded he cut them down to repair the House which was then in Decay, and that he used them in Repairing accordingly; and as for the other ten, they grew on Lands which had been formerly arable, and that he felled them to manure and better the Land; adjudged, this Justification was ill, for tho' the Repairing the Lessor's House was for his Profit, yet because he had exceeded his Authority and took upon him the Authority of the Lessor himself, without his Leave, he shall be punished; like the Case 21 H. 7. where the Parson brought an Action of Trespafs for carrying away his Corn; the Defendant pleaded, that it was severed from the nine Parts, and in Danger to be destroyed and eaten by Cattle, therefore he took the Corn and carried it to the Plaintiff's own Barn and there left it; adjudged no good Plea, and yet the Plaintiff had no Damage, but a Benefit. *Trin. 29 H. 8. Dyer 36.*

3. Trespafs for Entering his House and Breaking up a Pack of Cloth, and *Taking one Cloth out of it*; the Defendant, as to Entering the House, pleaded Not guilty, and as to Breaking up the Pack of Cloth, he justified, for that the Queen granted the Office of Alnage, with the Profits, to B. B. who by this Deed, &c. made the Plaintiff his Deputy, and for that the Defendant did expose this Pack to Sale, not having the Alnage-Seal to it, he seized it as forfeited; adjudged, that this Justification was not good, because, tho' he answered as to the Taking the Pack, yet he said nothing as to the *Taking one Cloth out of it*; besides, he justified under a Deputation of B. B. but did not say, that the Office was granted to him to exercise by himself or Deputy, for otherwise this being an Office of Trust, he hath not the Power of making a Deputy. *Cro. Eliz. 187. Watkyns versus Johns.*

4. In Trespafs for an *Affault, Wounding, Taking and Imprisoning*; the Defendant pleaded as to the *Affault and Wounding*, Not guilty, and as to the *Taking and Imprisoning*, he justified by Virtue of a Warrant, &c. but left out the *Affault*, for he should have justified as to the *Affault in Taking and Imprisoning*; there being several Assaults laid in the Declaration, viz. the Assault in *Wounding* and the *Affault in Taking* and Imprisoning, and for this Reason the Plea was held ill upon a Demurrer. *Bulst. 335. Wilson versus Dodd.*

5. Case for saying the Plaintiff was perjured; the Defendant justified, that it was found by Verdict, that the Plaintiff was perjured, but no Judgment was entered upon the Verdict; adjudged for that Reason not good. 1 *Brownl. 11. Cruttal versus Hofener.*

6. Case for Assaulting and Wounding, &c. as to the Assault, &c. the Defendant pleaded Not guilty, and as to the rest, he pleaded, that he was possessed of an Horse at *Gravefend*, which he lent to the Plaintiff for *two Days*, to ride from that Place to N. and back again, who rode towards N. Part of the Way, but then, to deceive the Defendant, rode out of his Way to N. towards *London*; whereupon he came to the Plaintiff riding on the Horse, and desired him to deliver it to the Defendant, who refusing, he laid Hands on the Plaintiff to repossess himself of the said Horse, who thereupon assaulted the Defendant, and he defended the Possession of his Horse, and so pleaded *Son Assault Demesne*; and upon Demurrer the Plaintiff had Judgment, because he had a special Property in the Horse for *two Days*, and ought not to be disturbed within that Time, and if he did any Injury by Riding him contrary to his Agreement, he is punishable by Action on the Case. 1 *Brownl. 218. Lea versus Atkinson. Cro. Eliz. 236. S. C.*

7. Trespafs for Entering on and Digging his Land; the Defendant pleaded in Bar by Way of Justification, that the common Voice was, that *quadam melis* a noisome Vermin, called a Badger, was there, and had done much Harm, and therefore he came with his Dogs and hunted him, and in Pursuit thereof he followed his Dogs to kill the Badger, and did catch him in the Plaintiff's Ground, which he digged and killed him there, and filled up the Trench with Earth again; adjudged no good Plea, for there is a Difference where a Man enters on the Land of another without his Leave to find such Vermin, and where he enters in Pursuit of them when found; for in the first Case 'tis unlawful, but in the other justifiable; besides, the Plea here is ill, for he cannot justify the Digging, he might use other Means to kill him. 2 *Bulst. 60. Gedge versus Mimms. Poph. 161. Miller versus Cawdry. S. P.*

8. In Trespafs, &c. the Defendant justified by Virtue of a Process out of the *Marshallsea*, and that he being an Officer of the Court did arrest the Plaintiff to appear in a Plea of Trespafs in the Court of *Marshallsea* * *ad proximam Curiam ibidem tenet*? adjudged, this Justification was too general, for it ought to be shewed at what certain Court the Plaintiff was to appear, and when the same would be held. 2 *Bulst. 36. Johns versus Smith. 2 Cro. 314. S. C. Cro. Car. 254. contra Postea pl. 18. contra.*

9. Trespass for Assaulting and Wounding his Servant, *per quod servitium amisit*; the Defendant, as to the Wounding, pleaded Not guilty, and as to the Assault he justified, for he had an House to which there was a Light, Time out of Mind, and that the Plaintiff's Servant did *endeavour* to build another adjoining, and had set up Timber for that Purpose, which, if it had been built, would have stopped up his antient Light; thereupon he, being in his own House, did thrust away the Servant with a Stick and did throw down the Timber; and upon Demurrer this was adjudged no good Plea, because the Defendant, tho' he had justified as to the Battery, yet he did not answer the *Loss of the Service*, and where the Defendant doth not Answer all, 'tis no Answer at all; therefore he ought to have confessed, avoided, or denied the Loss of the Service; besides, it did not appear that the Defendant had either *damnum* or *injuria*, for the Servant only *endeavoured* to build the House; and he shall not be assaulted for endeavouring only. 2 Cro. 196. *Morris* versus *Baker*. 3 Bull. 196. S. C.

10. In Trespass for Breaking his Close and Assaulting his Servant, the Close being Parcel of a Manor and Copyhold, and granted by B. G. Lord thereof, to the Plaintiff and his Heirs; the Defendants confess, that the Close was Copyhold, but plead that it was Parcel of the Manor of D. and that long before the Trespass *W. R. and his Wife* was Lord of the Manor in Right of his Wife, for Life, Remainder in Tail to *W. W.* one of the Defendants, who made a Lease thereof to the other Defendant, by Virtue whereof he was possessed and so justified, and as to the Assault he pleaded Not guilty; adjudged, this was no good Justification, because the Defendants claiming under a derivative Estate for Years, *from a particular Estate of the Husband and Wife for Life*, ought to shew how they came by that Estate for Life. 3 Bull. 281. *Sanford* v. *Stevens*.

11. In Trespass for Breaking his Close and carrying away his Boards; the Defendant justified, for that a great Tree did grow between his and the Plaintiff's Close, Part of whose Roots did extend into the Defendant's Close, and that the Tree was nourished by his Soil, and that the Plaintiff cut the Tree down and carried it into his Close, and there sawed it out into Boards, and that the Defendant entered and took some, and carried them away *prout ei bene licuit*; and upon a Demurrer to this Plea it was objected, that it was ill, for tho' some of the Roots were in the Defendant's Soil, yet since the Body of the Tree was in the Plaintiff's Close, he had a Property in the Roots and the Defendant had none, for the Plaintiff could not direct how far they should grow and extend. 2 Roll. Rep. 141. *Masters* versus *Pollicie*. 2 Roll. Rep. 207.

12. Trespass for Entering a Close called *Cave-Close*, and cutting down four Ashes, &c. the Defendants pleaded, that before the Plaintiff had any Thing in the said Close, B. G. was seised thereof in Fee, and demised the same (*inter alia*) to *W. R.* excepting the Wood and Underwood there growing, for and during the Life of *A.* and covenanted, that the Lessee and his Assigns might take necessary Fire-boot and House-boot, &c. for Repairs, &c. that B. G. died, and that *A.* survived and married *N. R.* and that the Lessee assigned his Interest to *A.* and that the Defendants, as Servants to the said *A.* took the four Ashes for necessary Cart-boot, and averred the Life of *A.* it was adjudged, that this Plea was ill, for that the Servants justifying under the Title of their Master, ought to shew the Deed, and cannot justify without shewing it. 2 Cro. 291. *Purefoy* versus *Grimes*.

13. There is a Case where the Officer is punishable by an Action for executing a void Process, as in False Imprisonment; the Defendant justified, for that in the City of York there was a Court of Equity for all Causes in Equity arising within that City, and that the Mayor, &c. had used to direct Precepts, &c. for Men to appear and to commit them for Contempt of his Orders, and justifies by a Command *ore tenus* of the Mayor, to take and commit the Plaintiff for not obeying his Order; and upon Demurrer the Plaintiff had Judgment, because the Defendant had prescribed in the Mayor to direct Precepts, which must be intended in Writing, and then he alledged, that he took the Plaintiff by a Command from the Mayor *ore tenus*, which is void, because it doth not come within his Prescription; 'tis true, where a Person is taken by Command of an Officer *ore tenus*, the Arrest is void, unless the Prisoner is told on what Day the next Court will be held; but where he is taken by Process in Writing, returnable * *ad proximam Curiam*, 'tis no more than an erroneous Process, but not void. Hob. 63. *Martin* versus *Marshall*. 2 Roll. Rep. 109. S. C. 2 Cro. 571. S. P. *Dyer* 262. S. P. See Traverse. (A) 4, 12. * Pl. S.

14. Case, &c. for Stopping up Three Lights; the Defendant justified the Stopping two of them, and Part of the third Light; and upon Demurrer the Plaintiff had Judgment, because the Justification did not go to the whole Charge. *Yelv.* 235.

15. Trover for Taking his Cattle; the Defendant justified by a Warrant from Commissioners of Sewers for not paying a Tax set by them towards the Repair of the Sea-Walls; and upon Demurrer adjudged, that the Justification was not good, for it doth not set forth that there was any Notice given to the Plaintiff, that the Tax was set on him before they took his Cattle, nor that the Land for which he was taxed was within the Level, nor that they were the Cattle of the Plaintiff. *Style* 13. *Whitley* versus *Fawcett*, March 179. S. P.

16. So where the Defendant justified in Trespass for Taking a Mare, that the Taking was by Virtue of an Order of Commissioners of Sewers, for a Tax assessed on the Plaintiff, and did not shew that they had Power to set a Tax, for there ought to be six, and it appeared by the Plea that there were but four, neither did it appear that they were all of the Quorum, or that there was Default in the Plaintiff, or that the Land for which he was taxed did lie within the Jurisdiction of the Commissioners, or upon what Number of Acres the Tax was laid; all which were adjudged to be material Exceptions. *Style* 178. *Brangy* versus *Lee*.

17. In Trespass, the Defendant justified that he entered the Plaintiff's Close to search for Sheep stolen from him; and upon Demurrer the Plea was held ill, because the Defendant did not set forth that the Plaintiff had stolen his Sheep, or that he suspected him for Stealing them; and so the Entry to search without License of the Plaintiff, was not justifiable. *Styke 165. Toplady versus Staley.*

18. In Trespass, Assault, Battery and False Imprisonment; the Defendants justified under a Plea levied in an inferior Court against the now Plaintiff, for a Debt of 20 *l.* and a *Capias* thereon returnable * *ad proximam Curiam*, which was delivered to Jones the Defendant, who was Sergeant at Mace, by Virtue whereof the Plaintiff was arrested, &c. *quæ est eadem*, &c. and upon a Demurrer one of the Objections to this Plea was, that the *Capias* was void, and that the Officer was punishable by Action for executing a void Process; and to prove that it was void, it was insisted, that it being returnable *ad proximam Curiam*, that made it void, because the Imprisonment of the Defendant may be indefinite, (*viz.*) until the Steward is pleased to call a Court; but adjudged, 'tis not a void but an erroneous Process, and for executing such Process the Officer is excused. 2 *Lutw.* 935. *Gwinne versus Poole. Antea pl. 8. contra. Cro. Car. 254. S. P.*

19. Trespass, &c. for Entering his Close, &c. and for Breaking twenty Perch of Hedge; the Defendant pleaded in Bar, that *Antichell Grey* was seised in Fee of the Manor of *Dale*; then he sets forth a Prescription to dig any where for Coals in *Stanley*, as belonging to the said Manor, under which Prescription he justified the Entering, and the Digging and Carrying away the Coals, and because there was not a sufficient Passage to and from the Close, he opened a convenient and necessary Way, &c. and upon Demurrer it was objected, that the Declaration was for Breaking twenty Perch of Hedge, and the Plea was, that the Defendant opened a convenient and necessary Way, which he might very well do, without pulling down so much Hedge, therefore he hath not justified for Breaking down more Hedge than was necessary for opening a convenient Way, &c. so that this Justification did not go to the whole Charge, and for that Reason it was held ill. 2 *Lutw. Rep.* 1347. *Kilborne versus Vallenge.*

20. Trespass for Taking a Cow; the Defendant pleads in Bar a Lease for Years made to him of all *Estrays* happening in such a Manor, and so justifies the Taking *juvencam præd'* for an Estray; and upon Demurrer to this Plea it was held ill, because the Defendant had not answered the Taking a Cow; for the Justification was for Taking an Heifer. 2 *Lutw. Rep.* 1353. *Mellor versus Bocking.*

21. In Assault, &c. the Defendant justified by Virtue of a Warrant upon a *Capias*; the Plaintiff replied *de injuria sua propria absque tali Warranto*, and concluded to the Country; and upon Demurrer it was objected, that the Plaintiff ought to have traversed the Warrant, and to have concluded to the Country, without saying, *de injuria sua propria*; but this Exception was not allowed; and then the Plaintiff insisted that the Plea was ill, because the Defendant did not shew out of what Court the *Capias* issued, and for this Cause the Plaintiff had Judgment, *Nisi causa*, &c. 2 *Lutw.* 1458. *Gray versus Hart.*

22. Trespass for Breaking his Close, called the Fold in *Barnesby*; the Defendant pleaded in Bar, that *N. B.* was seised in Fee of a *Messuage* in *Barnesby*, and so prescribes for a Way from *W. thro'* the Close called the Fold, to a Court-yard of the said *N. B.* called the Fold adjoining to his House, then justifies, for that the said *N. B.* dimisit the said Messuage for twenty-one Years, &c. and upon Demurrer it was objected, that the Justification was ill, for it was under a pretended Lease, *habendum* from the Day of the Date of the *aforsaid* Lease, when there was no Lease mentioned before, for 'tis only that *N. B.* dimisit, and doth not say *per Indenturam*, &c. the Case was not adjudged. 2 *Lutw.* 1526. *Bird versus Dickinson.*

23. In Trespass and Battery, a Special Verdict was found, the Substance whereof was, that Complaint being made to a Justice of Peace against the Plaintiff, he made a Warrant directed to the Defendant, who was a Constable, to apprehend the Plaintiff, and to bring him before a Justice to find Sureties for his Good Behaviour, and the Defendant executed the Warrant on a Sunday; the Question was, whether this Warrant was well executed, because by the Statute 29 *Car. 2. cap. 7.* 'tis enacted, *That all Process executed upon a Sunday, other than for the Peace, shall be void*; and adjudged, that a Warrant for the Good Behaviour is a Warrant for the Peace, and more; and this Judgment was affirmed on a Writ of Error. *Raym.* 250. *Johnson versus Coltsen.*

24. In Trespass and False Imprisonment in *London*, the Defendant pleads, that *T. P.* sued a *Latitat* the last Day of *Trinity-Term*, directed to the Sheriff of *R.* who by Virtue thereof made a Warrant to the Defendant, who thereupon took the Plaintiff, which is the same Imprisonment, and traversed, that he is guilty in *London, vel aliter, vel alio modo*; the Plaintiff replied, that the said Writ was prosecuted after the Imprisonment, (*viz.*) 9 *August*; and upon Demurrer to this Replication the Plaintiff had Judgment; for tho' the *Tiste* of the Writ is on Record, and there cannot be an Averment against it, yet that is only to prevent a Fraud and not to justify a Wrong; therefore the Plaintiff shall be allowed to set forth the very Time when the Writ was sued forth. *Raym.* 102. *Bilton versus Johnson. Sid.* 271. *Baily versus Bunning. S. P.*

25. In Trespass and False Imprisonment, the Defendant justified the Taking the Plaintiff by Virtue of a Precept out of *Warwick-Court*, returnable * *ad proximam Curiam*; and upon Demurrer to this Plea, it was objected, that it was ill, because the Process ought to be returnable on a Day certain, and not *ad proximam Curiam*; for if the Court should not be held, the Party may always lie in Prison; and so is *Johns* and *Smith's* Case. *Adjournatur. Raym.* 104. *Gibbs versus Stratford.*

26. Trespass for taking his Goods, the Defendant justified, for that a *Plaint in Replevin* was entered in the Sheriff's Court of London, and he was a *Serjeant at Mace*, and a *Precept* issued to him to Replevy the Goods, which he did, &c. upon Demurrer to this Plea it was insisted, that it was ill, because the Defendant being a *principal Officer*, and the *Precept* being *returnable*, he doth not shew, that it was * returned; adjudged, that where-ever a *principal Officer* justifies under a *returnable Process*, he must shew, that the Writ was *returned*, because he is commanded to make a *Return*, and he shall not be protected by the Writ, without shewing a full Obedience to the Command; as for Instance, in the Case of a *Fi. fa.* or *Ca. fa.* the Sheriff cannot justify under either, without shewing a *Return*; for the one commands, that *habeat Denarios, &c. apud Westm'*, and the other, that *habeat Corpus, &c.* but any subordinate Officer, as a Bailiff, &c. may justify under a Writ, without shewing the *Return*: Now a *Plaint in Replevin*, and an *Alias Replevin* are not *returnable Writs*, they are only in Nature of a *Justicies*, to give Authority to the Sheriff to hold a Plea in his County-Court; but a *Precept* on a *Plaint in Replevin* is a *returnable Process*, and the Defendant is a *principal Officer*; Judgment for the Plaintiff. 1 *Salk.* 409. *Freeman versus Blewitt.* * Dyer. 189.

27. Adjudged, that in Trespass brought against the Sheriff, 'tis sufficient for his Justification to shew, that there was a Writ; and so it is in the Case of his Bailiff or inferior Officer; but the Sheriff must shew, that the Writ was *returned*, if 'tis *returnable*, which his Bailiff need not do, because 'tis not in his Power to *return* it; but in Trespass against any other Person, for taking Goods, 'tis not a good Justification for him to shew a Writ of Execution; but he must likewise shew a *Judgment in Force*, because it may be reversed, and then 'tis at his Peril to take out Execution; but if a Common Person comes in Aid of an Officer, he may justify in the same Manner as the Officer himself, (*viz.*) that he did it at the Command or Request of the Officer, and this is traversable; as in Trespass, if the Defendant justifies for Damage-feasant, or by a Distress for Rent, he must make himself *Bailiff* to the Person who had a Right, or that he did it by his Command; but 'tis otherwise in Replevin, where the Defendant makes Conufance on the Right. 1 *Salk.* 408. *In the Case of Britton and Cole.* See *Leat versus Jennings.* *Cro. Car.* 105. *Dyer* 262. 1 Leon. 150. 2 Leon. 115. 1 Roll. Rep. 46. pl. 33.

28. In Assault, &c. the Defendant justified under a Writ directed to the Sheriff, *returnable in C. B. &c.* and a Warrant to the Defendant to arrest the Plaintiff, &c. and upon a Demurrer to this Plea, it was adjudged ill, because the Defendant did not shew out of what Court the Writ issued; so if the Defendant justifies under a *Judgment*, he must shew in what Court obtained; for it would be endless to put the Plaintiff to search in every Court. 2 *Salk.* 517. *Grey versus Hart.*

(C)

Under Grants, Writs, Warrants, and by Servants, Bailiffs, &c. on their Masters Commands. See *Lect.* (B) 3.

1. **I**N Assault and Battery of the Wife; the Defendant as to the Battery pleaded Not guilty, and as to the Assault he justified, for that at a Court-Leet, &c. a Warrant was directed to the Defendant, being Constable, to apprehend the Daughter of the Plaintiffs, and to carry her to the Cucking-stool, for that she was presented in the Leet to be a *Scold*; whereupon he came to the Plaintiffs House to enquire for their Daughter, where the Plaintiff's Wife assaulted him, and he (the Constable) commanded the other Defendant *molliter manus imponere* on her, to preserve the Peace, which he did, which is the same Assault and Battery; and upon Demurrer to this Plea it was objected, that it was ill, because he pleaded a Warrant, without a *profert hic in Curia*, and because he did not shew, that the House where he came to enquire for the Daughter, was within the Jurisdiction of the Leet; and lastly, because it appeared in the Plea, that the Warrant to apprehend the Daughter, and the Taking her, where in the same Day that the Presentment was made, when she ought by Law to have all that Day to traverse it: *Sed per Curiam*, the Pleading this Warrant is only an Inducement to the Action, which was not brought for entering the House, but for an Assault, which was collateral to the Warrant, and if that had been out of the Case, the Justification had been good; for it was *molliter manus imposuit*, to preserve the Peace. 1 *Roll. Rep.* 327. *Curtis versus Dowrie.*

2. In Trespass the Defendant justified by Virtue of a Warrant upon a Writ to arrest the Plaintiff, 4 *Mait* 10 *fac.* and traversed, that he was guilty *before that Day*; and upon a Demurrer to this Plea, it was adjudged, that the Traverse was ill, for where the Justification goes to a *particular Time*, as it did in this Case to the 4th of May, the Traverse ought to be, that he was not guilty *before or after that Time*, and not only *before that Day*, as it was here pleaded. 1 *Roll. Rep.* 406. *Walcott versus Empson.* 3 *Bullst.* 209. See *Traverse.* (D) 124

3. In Trespass for taking his Goods, the Defendant pleaded, that the Earl of Southampton was seised in Fee, &c. and had a Court-Baron, &c. in which a *Plaint* was levied against one Britton, and thereupon an *Attachment* was awarded against him, directed to the Defendant, being a Bailiff) who by Virtue thereof attached the Goods in the Possession of the Plaintiff, to whom they were delivered by Britton, on Purpose to deceive his Creditors, &c. and upon a Demurrer to this Plea it was objected, that the Process was irregular, because in a Court-Baron a

Sum-

Summons, and not an Attachment, is the first Process: *Sed per Curiam*, that Court having an Original Jurisdiction of the Cause, the Misawarding the Process shall not make the Officer guilty.

2 *Roll. Rep.* 493. *Turbervill versus Trippet.*

Cr. Eliz.
329.
Dyer
225.

4. In Trespass, the Defendant justified, for that he had several Apple-Trees growing in his Orchard, and rooted up, and stolen and carried away by T.S. &c. and the common Voice and Fame was, that they were carried to the Plaintiff's House, whereupon he (the Defendant) came to the Plaintiff's House to search for them, and there he found two of his Apple-Trees, which he took and carried from thence; and upon a Demurrer to this Plea the Plaintiff had Judgment; for if a Man take my Horse, and put him on the Lands of T. S. 'tis not lawful for me to enter and retake him, unless he were stolen; 'tis true, in this Case the Defendant sets forth, that *furtiva fuerunt*, but that is idle, for 'tis not Felony, unless they were rooted up at one Time, and carried away at another Time; but admitting that it appeared by the Pleading to be Felony, yet the Defendant could not justify the Entering to search, &c. by common Voice and Fame. 2 *Roll. Rep.* 55. *Higgins versus Andrews.*

5. In Trespass, the Defendant justified under Letters Patents to particular Persons, for the sole Trading to the *Canaries*, but did not shew any Warrant or Authority from them; for it was only said, that *per mandatum eorum* he seized the Goods; and upon Demurrer this Plea was held ill. *Sid.* 441.

6. In Trespass for beating his Horses and Servants *per quod servitium amisit*; the Defendant pleaded in Bar, that the Mayor, &c. of B. were possessed of an Acre of Land, called the *Key*, and that the Plaintiff's Horses being loaded with Soap-Ashes, his Servants *voluissent & conabantur* to unload them on the said *Key*, without Leave of the Mayor, whereupon the Defendants, as his Servants, and by his Command, *molliter manus imposuerunt*; and upon Demurrer it was objected, that the Defendants had justified as Servants to a Corporation, without shewing, that they had Authority under the *Common Seal*; but adjudged, that where a Corporation hath an *Head*, as a Mayor is, there he may command personally; but where 'tis a Corporation aggregate, without any Head, there 'tis otherwise. 2 *Lutw.* 1496. *Randle versus Dean.* See Pleas. (V) 15. S. C.

1 Mod. 18.
Sid. 441,
472.

7. In Trespass the Defendant justified by a Command from the Governor and Society of Traders to the *Canaries*, who were incorporated by that Name, and had the sole Trade granted to them; the better Opinion was, that it was ill, because the Defendant did not alledge it was by Deed, it being a Corporation, who cannot licence but by Deed. 1 *Vent.* 47. *Horne versus Ivy.*

Lev. 173.

8. In a Special Verdict in Trover, the Case was, the Defendant being a Bailiff, took the Goods in Execution upon a *Fi. fa. Teste 4 Junii*, and two Days afterwards, (*viz.*) 6 *Junii*, the Owner of the Goods became a Bankrupt, and the Jury found this *Fi. fa.* was actually sued out the 11th Day of *June*, and not before, and that the Execution was executed on the 14th of *June*, and that the Commissioners of Bankrupts had assigned those Goods to the Plaintiff who brought this Action of Trover against the Bailiff, and the Question was, whether he was liable; it was insisted, that he was, for it would be absurd to excuse him by the *Teste* of the Writ, because it appears to be impossible, that the Goods could be taken in Execution by Virtue of a Writ which was not actually taken out; and when it was, then it was too late, because before that Time they were assigned to the Plaintiff by the Commissioners; but on the other Side it was argued, that tho' the Jury had found when the Writ was actually taken out, yet the Court will judge, that it was a Writ from the *Teste*, because that is Matter of Record, which cannot be altered by the Finding of a Jury; and so it was adjudged, that from that Time it shall be *emanatio Brevis*, and the Goods are then liable, tho' the Writ was actually taken out a Week afterwards. *Sid.* 271. *Baily versus Bunning.* See 2 *Lev.* 191. S. P. 3 *Mod.* 236. S. P.

9. In Trespass and False Imprisonment, the Defendant justified by a Warrant out of the Admiralty, which recites, that a Cause was depending there *de jure maritimo*, and so commanded the Defendant (who was an Officer of that Court) to take the Plaintiff, which he did; and upon a Demurrer to this Plea, it was objected, that it was ill, because the Plaintiff did not aver, that the Cause was *maritime*, so as it might be tried, whether it was so or not; for if not, then the Warrant will not justify the Taking; but adjudged, that 'tis sufficient for the Officer to plead the Warrant, which he is bound to obey, especially when it doth not appear but the Matter is within the Jurisdiction of that Court from whence it Issues; 'tis true, there are some Cases where 'tis held, that there must be an Averment, that the Cause is within their Jurisdiction; but in the Case of the *Marbalsea* it appeared, that it was not within their Jurisdiction. 2 *Lev.* 131. *Otto versus Selwin.* See *Martin versus Marshall.*

10. In Trespass and False Imprisonment, the Defendant justified, that a Quarter-Sessions held 9 *Octob.* &c. the Justices made a Warrant to him to bring the Defendant to the Sessions, and that he on the 10th *Octob.* *Virtute Warranti prae*, took him, &c. and detained him for a Quarter of an Hour, and then he rescued himself; upon a Demurrer to this Plea it was adjudged ill, for not averring, that the Sessions continued till the 10 of *October*, and his Saying, that he took him *Virtute Warranti*, will not supply it. 2 *Lev.* 229. *Doughty versus Mills.* See 3 *Rep.* 44. *B. Bayton's Case.*

11. Trespass against a Bailiff for entering his House, and taking his Goods; the Defendant justified under an *Habere facias possessionem*, and a Warrant thereon; and upon a Demurrer to this Plea it was objected, that it was ill, because the Defendant did not set out any Judgment on which the Writ was founded; but adjudged, that a Bailiff or Sheriff need not, because they are bound

bound to execute the Writ, without enquiring after the Judgment ; but if the Party himself (not being an Officer) had thus justified, it had been ill without shewing the Judgment. 3 Lev. 20. *Coats versus Michell.*

12. In Trespas for Battery and False Imprisonment, &c. the Defendant justified by a Bill of *Middlesex*, and a Warrant, and Arrest at D. and traversed all other Places and Times; the Plaintiff replied *de injuria sua propria absq; tali causa*; and upon a Demurrer to this Replication, it was adjudged, that the Plea was ill, because it put Matter of Record and Fact together, besides other Matters; as the Warrant and Arrest at once in Issue, which is naught. 3 Lev. 65. *Furfsden versus Weekes.*

13. In Trespas for Battery and False Imprisonment such a Day, &c. the Defendant pleaded, that on the 16th of *March* an Attachment issued out of Chancery, directed to the Sheriff, who after the Delivery of the Writ to him, (*viz.* 27 *March*) made a Warrant to the Defendant his Bailiff, by Virtue whereof he took the Plaintiff on the same Day, and traversed all other Times before the Warrant, or after the Return of the Writ; the Plaintiff maintained his Declaration, and traversed that the Writ was delivered to the Sheriff before the Trespas, &c. the Defendant rejoined, that before the Return of the Writ, (*viz.* 27 *May*) it was delivered to the Sheriff, and that before the Arrest he had no Notice, but that it was delivered to him; the Plaintiff sur-rejoined, that before the Arrest the Writ was not delivered to the Sheriff; the Defendant rebutted, that he had not any Notice, but that the Writ was delivered to the Sheriff before the Arrest; and concludes to the Countrey; and upon Demurrer the Defendant had Judgment; for there being actually a Writ to warrant the Arrest, 'tis not material, whether it was delivered to the Sheriff before the Arrest; and since the Defendant had rendered an Issue upon Notice, it will be hard to charge him in an Action for executing the Warrant, when he had no Notice whether the Writ was delivered to the Sheriff or not. 3 Lev. 93. *Osborne versus Brookhouse.*

14. *Battery*, &c. the Defendant pleaded a Judgment obtained by his Father against T. S. and an Execution thereon, by Virtue whereof the Goods of T. S. were taken, and that the Plaintiff assaulted the Bailiffs, and would have rescued the Goods; whereupon in Aid of the Bailiffs, and by their Command, he (the Defendant) *molliter manus imposuit* upon the Plaintiff, to prevent the Rescue of the Goods; the Plaintiff replied, *de injuria sua propria absque tali causa*, &c. and upon a Demurrer, this Plea was adjudged ill, for the Action was brought for a Battery at D. and the Defendant justified at S. in the same County, whereas he should have justified at the same Place of which the Plaintiff had declared; but here the Justification is at S. in the same County, when the Cause was not local but transitory, and the Bailiffs have Authority thro' the whole County. 3 Lev. 115. *Bridgwater versus Bythway.*

15. In Replevin for a Silver Cup, the Defendant justified by a Condemnation before the Justices of Peace, on the Statute of Excise for not entering Strong-Waters, and a Warrant thereon to levy 20 s. Fine set upon the Plaintiff, whereupon the Defendant took the Cup; there was a frivolous Replication; and upon Demurrer it was insisted for the Plaintiff, that the Defendant ought to have avowed, and not to have justified the Taking; besides the Defendant pleaded the Condemnation *prout patet per Recordum*, when in this Case the Justices are not a Court of Record; and he did not plead the Warrant with a *profert hic in Curia*, as he ought; but adjudged, that the Defendant might either justify or avow; the Difference is, if he had avowed, he might have a Return, &c. but he needs no Return in this Case, because he had the Cup, and therefore he justified; and as to the Justices, they are made Judges in this Matter; they may fine and imprison; no *Certiorari* shall go to remove their Proceedings; and these are Marks of a Court of Record; and lastly, that a *profert hic in Curia* is not necessary, because here was no Deed, but only a Writing, and the Statute doth not require, that the Warrant should be under Hand and Seal, but only in Writing. 3 Lev. 204. *Aylesbury versus Hurvey.*

16. In Trespas for an Assault and Imprisonment, the Defendant justified by a Process out of the Palace-Court, for that a Plaint was there entered against the Plaintiff, and that he was summoned to appear, but did not, and thereupon a *Capias* issued against him, by Virtue whereof he was taken, &c. and upon a Demurrer to this Plea it was adjudged ill, because this Plaint being in Nature of an Action on the Case, no *Capias* lies in such Action out of an Inferior Court; for that is given by the Statute 19 H. 7. cap. 9. and did not lie at Common Law, and that Statute gives it in Debt or Covenant, but extends only to the Courts at *Westminster*. *Sid.* 249. *Rogers versus Mascall*, 259. S. C. See 3 Rep. *Sir Wm. Herbert's Case*. and 1 Cro. 394.

17. Trespas for breaking and entering his House, and taking away a Gun; the Defendant justified by Virtue of the Statute 22 & 23 Car. 2. cap. 25. for preserving the Game, setting forth, that the Lords of Manors and other Royalties, may depute Game-Keepers, who by Virtue of such Deputation, may seize Guns, &c. and by Warrant from a Justice of Peace, may search the Houses, &c. of suspected Persons, &c. and seize them for the Use of the Lord of the Manor, &c. and so brings his Case within the Statute, and justifies the Seizing the Gun, &c. it was held, that there was no Occasion of setting forth all this Matter, because the Defendant acted under a Warrant from a Justice of Peace, and in such Case he might have pleaded the General Issue; but if he had acted as a Game-Keeper only, and without such Warrant, then he must have pleaded Specially. 2 Lutw. 1502. *Bowkley versus Williams.*

18. In Trespass for taking a Mare, the Defendant pleaded, that *Sir John Smith* was Lord of the Manor of *Redminster*, and so prescribes to have a Court, and to make By-Laws, and sets forth, that at such a Court a Law was made, that every Person, who had Right of Common, &c. should pay 40 s. for depasturing his Cattle, where any Corn was standing or growing; that the Plaintiff had Right of Common, and that a Place there, called *Knowles Knapp*, was sowed with Corn, and the Plaintiff permitted his Sheep to depasture there, by Reason whereof he had forfeited 40 s. that this Offence was presented at the next Court, and so the Defendant, * *tanquam Ballivus Domini Manerii præd'*, justified the Taking for the Forfeiture; and upon a Demurrer to this Plea, it was adjudged ill; for *per Holt*, Ch. Just. in Trespass (as this Case is) a particular Authority must be set forth, because the Bailiff cannot take for a Forfeiture *ex officio*, no nor *per mandatum Domini*, but there must be a Precept directed to him for that Purpose from the Steward, which must be set forth in Pleading, and that he *tanquam Ballivus*, &c. & *virtute Præcepti* did take, &c. 'tis true in *Replevin*, *tanquam Ballivus*, or *per mandatum*, had been good, but not in *Trespass*. 4 *Mod.* 377. *Lam versus Mills*.

19. In Trespass for an *Assault*, *Battery*, *Wounding* and *Imprisonment*; the Defendant as to the Force and *Wounding* pleads Not guilty; and as to the rest of the *Assault* and *Imprisonment* he justified, for that he had got Judgment against the Plaintiff in C. B. and upon a *Ca. sa.* directed to the Sheriff, he, at the Request of the Defendant, *mandavit executionem inde cuidam W. B.* Bailiff of the Liberty of the King of his *Dutchy of Lancaster*, &c. by Virtue whereof the said Bailiff *molliter manus imposuit* on the Plaintiff, and arrested him, &c. and upon Demurrer this was adjudged an ill Plea, for that the Defendant had not answered the *Battery*; besides he pleaded a *Mandate* from the Sheriff to the Bailiff, &c. and did not set forth, that it was under the *Hand and Seal of the Sheriff*. 2 *Vent.* 193. *Carr versus Donne*.

20. Trespass for Assault and Battery, 30 *Jan.* at the *Parish of St. Clements Danes*; the Defendant pleads in Bar, that before that Time, (*viz.*) 25 *Septemb.* &c. at the said *Parish of St. Clements Danes*, one *William Wood* prosecuted out of the Court of B. R. (*eadem Curia apud Westm. in Com. Middlesex tunc existen'*) a Bill of *Middlesex* against the Plaintiff, returnable on such a Day, &c. *per quod* the Sheriffs made and directed a Warrant to the Defendant to arrest the Plaintiff, who was taken before the Return, (*viz.*) on such a Day, &c. and that after he was taken, he assaulted the Defendant, who defended himself; and if Damage came to the Plaintiff, it was *de son assault demesne*, and traversed that he was guilty at any Time before or after 20 *die Octobris Anno supradicti*, which was the Day of the Return of the Writ; and upon a special Demurrer to this Plea, for that the Defendant did not alledge, that the *Bill of Middlesex* was delivered to the Sheriff before the Arrest, that Matter was insisted on by the Plaintiff's Counsel, for that it was traversable; because the Plaintiff might reply, that the Defendant made the Arrest *de son tort demesne*, and traverse, that any *Bill of Middlesex* was delivered to the Sheriff before the Arrest; but by this Plea the Plaintiff is excluded from such an Issue, for the Defendant hath offered nothing that is traversable, but only *per quod the Sheriff made a Warrant*, upon which no Issue can be taken. In *Dr. Bonham's Case*, *Co. Ent.* 42. a. 160. a. 'tis expressly alledged, that the Writ was delivered to the Sheriff; all which was admitted to be true by the Defendant's Counsel, but that the Plaintiff had lost the Benefit of it by his Demurrer, for he ought to have replied, that the Arrest was made before the *Bill of Middlesex* was delivered to the Sheriff, and then the Matter would have been put in Issue, whether it was delivered before, or not; but by his Demurrer he had admitted the Delivery of it before, and so it was adjudged. 1 *Saund.* 298. *Green versus Jones*. See Sheriff. (A) 18. S. C.

21. In Trespass for taking his Cattle, the Defendant pleads, that he was *possessed* of the Place where, &c. for several Years yet to come, &c. and justified the Taking Damage-feasant; and upon a Demurrer to this Plea it was objected, that the Defendant ought to have set forth the Commencement of his Term for Years, and that 'tis not sufficient for him to say, that he was *possessed* generally: *Sed per Curiam*, where the Plaintiff brings an Action for doing a Trespass on the Land, he is always supposed to be in Possession; but if he will justify by Virtue of any particular Estate, he must shew the Commencement of that Estate; but where the Matter is collateral to the Title of the Land, (*i. e.*) where the Title cannot come in Question, such a Justification as this is good. 2 *Mod.* 70. *Searle versus Bunion*.

22. In *Replevin*, the Defendant made Conusance as Bailiff to T. S. the Plaintiff replied, that he took the Cattle *de injuria sua propria*, and traversed that the Defendant was Bailiff to T. S. and upon Demurrer it was adjudged, that the Traverse was good; for tho' T. S. might have a Right to take the Cattle as a Distress, or for any other Cause, yet the Bailiff might not, for he is a Stranger, and might have no Authority from T. S. and therefore he is liable; but 'tis otherwise in an Action of *Trespass quare clausum fregit*; for there, if the Defendant justifies the Entry *by the Command*, or as Bailiff to T. S. and lays a Freehold in him, there the Plaintiff in his Replication shall not traverse the Command, because that would be to admit the Freehold to be in T. S. for whatever is not traversed, is admitted; and if so, then the Freehold is not in the Plaintiff, which would be sufficient to bar him of the Action, whether the Defendant was commanded by T. S. to enter, or not; for 'tis not material, if the Defendant hath done a Wrong to a Stranger, so as he hath done none to the Plaintiff. 1 *Sal.* 106. *Trevilian versus Pyne*. See *Yelv.* 148. 1 *Roll. Rep.* 46. *Cro. Eliz.* 14. 2 *Vent.* 196. 1 *Lev.* 50. 3 *Lev.* 20.

(D)

By Process out of Inferior Courts. See *Inferior Courts* per totum.

1. **E**RROR in *B. R.* to reverse a Judgment in an Inferior Court; this Difference was taken, (*viz.*) where an Officer of the Court pleads in Bar to the Action, he must entitle the Court to a Jurisdiction, either by Prescription or Patent; if the last, he must do it by a *Profert hic in Curia literas patentes*; but where a Stranger pleads in Bar, and justifies under such Process, he need not shew so much Certainty; tho' Justice *Twisden* was of a contrary Opinion, (*viz.*) every Defendant justifying by a Process out of an inferior Court, ought to do it either by Prescription or by a *Profert hic in Curia*, which Justice *Windham* denied, so that Letters Patents ought not to be produced but in *Quo Warranto's*; that a Justice of Peace may justify by Virtue of his Office, without shewing his Commission. *Sid.* 311. *Chute versus Alport*.

2. In Trespafs for Taking and Impounding his Cattle till he paid 3 *l.* 7 *s.* &c. The Defendant pleads as to all, except the Taking, till he paid 3 *l.* 2 *s.* Not guilty; and as to the rest, he pleads, that there was a Suit brought in the County Court by *T. S.* against the now Plaintiff, who pleaded *liberum Tenementum* of the Earl of *Arundel*, and justified the Taking Damage-feasant in the Freehold, &c. to which Conufance the Plaintiff then replied in Bar, that the Earl ought to make the Fences, and for Want of Repairs thereof his Beasts escaped, &c. upon which they were at Issue; and the Jury found, that the Fences were out of Repair, and assess *Damages*, (but did not say in what Sum) besides Cost and Charges, and for Costs, &c. 39 *s.* *Ideo consideratum est*, that the Plaintiff shall recover 1 *l.* 3 *s.* 2 *d.* *Damages, per Juratores, &c. in forma præd' assess. necnon promiss. & custagii*, (but did not say in what Sum) and yet conclude *quæ in toto se attingunt ad 3 l. 2 s.* whereupon there issued out of the same Court a Precept in the Nature of a *Fi. fa.* under the Seal of the Sheriff, whereby he commanded the Defendant, being Bailiff, *quod Levare faceret* the said 3 *l.* 2 *s.* who by Virtue of the said Precept took the Beasts, &c. and upon a Demurrer the chief Objection was, that the Judgment was *coram non iudice*, and by Consequence void, because after a Freehold pleaded the County-Court hath no Jurisdiction, for a Freehold cannot be tried without *Writ*; and tho' the Freehold was not tried, but did arise upon a collateral Point, (*viz.*) Whether the Fences were in Repair, or not, yet after *liberum Tenementum* pleaded, that Court hath no Power to proceed, either directly or collaterally. 3 *Lev.* 203. *Cannon versus Smalwood*.

3. In Trespafs for Taking his Goods, the Defendant justified, for that Time out of Mind there was a Court held in *Worcester*, *coram Ballivis, &c.* and that a *Plaint* was levied there in a Debt, and a Declaration thereon, that the Defendant being indebted to the Plaintiff *infra jurisdictionem, &c.* promised to pay, &c. whereupon *Taliter processum fuit*; that afterwards, (*viz.*) 2 *Octob.* &c. *consideratum fuit, &c.* and so justifies by a Warrant on the Judgment; the Plaintiff replied *de injuria sua propria a'sque, &c.* and upon Demurrer it was adjudged, that the Plea was ill, because the Defendant did not alledge that the Cause of Action did arise *infra jurisdictionem, &c.* 'tis true, the Declaration in the Inferior Court is recited in this Plea, wherein 'tis alledged to be *infra jurisdictionem*; but what is alledged in that Declaration is not traversable in this Action; therefore it ought to be particularly alledged in this Plea, that the Cause of Action did arise within the Jurisdiction, because that only which is alledged in the Plea is traversable. 3 *Lev.* 243. *Adney versus Vernon*.

4. In Trespafs for Assaulting, Beating, Wounding and Imprisoning, &c. The Defendant, as to the Force and Wounding pleads Not guilty, and *quoad residuum transgressionis*, the Assault and Imprisonment, (but did not mention the Beating) he justifies, for that the Plaintiff was indebted to him *infra jurisdictionem*, and for the Recovery thereof *implacitasset eum* in the said Court, and found Pledges to prosecute his Suit, and thereupon *Taliter processum fuit in eadem Curia*; that he had Judgment and Execution, which he delivered to the other Defendant, being a Bailiff, who at *D. infra jurisdictionem, &c. molliter manus imposuerunt* upon him, and arrested him and detained him in Prison, *quod est idem residuum transgressionis præd'*; the Plaintiff demanded *Oyer* of the Execution, which appeared to be sued out above a Year after the Judgment, and then replied, that no Execution issued within the Year; and upon Demurrer the Defendant had Judgment, because suing out the Execution after the Year is not void, but only voidable by Writ of Error, so that till 'tis reversed 'tis a good Justification; and that this short Way of Pleading the Judgment and Execution was good, (*viz.*) By an *Implacitasset*, and that *Taliter processum fuit*; 'tis true, there are some Cases where the Plea hath been ill, without reciting a *Plaint* levied; but the *Implacitasset* and Pledges found, supply that Matter; there was an Objection against the Defendant, that his Plea was ill, because in the *Quoad residuum transgressionis* he had omitted the Beating, which at first seemed to be a material Objection, because he had recited the Assault and Imprisonment; but if he had only pleaded *quoad residuum transgressionis*, without reciting any of the Particulars, it had been good, because the Word *Transgressio* comprehends all the Trempasses; however, the Court held the Plea good as to this Matter likewise. 3 *Lev.* 403. *Patrick versus Johnson*.

5. In False Imprisonment, the Defendant justified, for that there was an ancient Court held before the Sheriff of the County of *Durham*, vocat. the County-Court, &c. from fifteen Days to fifteen Days, and that there was a Custom, that on a *Questus est nobis* issuing out of the County Pa-

latine of *Durham*, and delivered to the Sheriff; and upon the Plaintiff's affirming *quandam querelam* against such Person against whom the *Questus est nobis* issued, the Sheriff used to make out a Precept in the Nature of a *Ca. su.* against him, &c. that a *Questus est nobis* issued *ex Curia Cantuariæ* *Durham*, which was delivered to the Sheriff, who thereupon made out a Precept to his Bailiffs to take the Plaintiff, by Virtue whereof he was arrested, which is the same Imprisonment; and upon Demurrer to this Plea it was objected, that this Court is ill pleaded to be held *coram Vicecomite*, for the *Suitors* are Judges in the County-Court; besides, 'tis absurd to say, that upon a *Questus est nobis*, the Plaintiff may affirm *quandam Querelam*, because a *Questus est nobis* is an Action on the Case, and *quandam querela* may be any other Action: But adjudged, this is not a County-Court, but only a Court *vocat.* a County-Court, and 'tis within a County Palatine; and for both these Reasons not like other County-Courts; but admitting it to be a County-Court, it may be held by Prescription *coram Vicecomite*; besides, the County Palatine of *Durham* is immemorial, and a Custom there is of great Authority, and therefore a Custom upon a *Questus est nobis* to affirm *quandam querelam*, may be good, as 'tis to arrest a Man in the Court of C. B. and to declare against him in any Action; but if there is a Defect in the Proceedings, yet since that Court can issue out a *Capias*, that will excuse the Officer in this Action. 1 *Mod.* 170.

6. In Trespass for Breaking his House, and Entering and Taking and carrying away such Goods to such a Value; the Defendant, as to the Breaking the House, pleads Not guilty, and as to the rest he justifies, for that K. is an antient Borough, in which there is an antient Court held by Virtue of Letters Patents & *consuetud' Cur' præd'*, and that a Plea was levied against the now Plaintiff, and Process directed to the Defendant to seise his Goods and Chattels, in order to bring him to appear, that by Virtue thereof he did attach him by his Goods and Chattels in the Declaration mentioned, &c. upon Demurrer to this Plea it was objected, that 'tis repugnant to alledge a Court to be held by Virtue of Letters Patents and Custom, which might be true, if it had been a *tempore cuius*, &c. for that would have implied a Prescription, but here 'tis only *secundum consuetudinem*, which is an Usage, and no more: But the material Objection was, that the Defendant was charged in the Declaration for Taking and Carrying away the Goods, and he justifies only the Taking; and for this Reason the Court inclined for the Plaintiff. *Mod. Cases* 70. *Briggs versus Collison*.

7. In Trespass for Taking his Horse, the Defendant justified under a Judgment obtained in a Court-Baron, and a *Levari facias* thereon, by Virtue whereof he took the Horse, and upon a Demurrer it was objected against the Plea, that the Defendant did not set forth when the *Levari facias* was taken out, and that the Court was alledged to be held *coram* * *seneschallo*: *Sed per Curiam*, 'tis true, 'tis not pleaded when the *Levari facias* was returnable, and therefore it may be intended to be immediate; and in Fact the Court is held before the Steward, tho' the Suitors are Judges. *T. Jones* 22. *Eures versus Wells*.

8. In False Imprisonment, the Defendant justified by a Process out of an inferior Court; and upon a Demurrer to the Plea, it was objected, that it was ill, because the Defendant set forth a Precept directed *servienti ad Clavem*, but did not say *ministro Curia*; and it was, that he should have the Plaintiff *ad proximam Curiam*, when it should have been on a * *Day certain*; besides, 'tis not said *ad respondendum* to any Person, nor that the Action did arise *infra jurisdictionem*, neither is the Precept returned by the Officer: *Sed per Curiam*, the Plea is good, for the inferior Court had a Jurisdiction to issue out Process, and the Officer is excusable, tho' the Cause of Action did not arise *infra jurisdictionem*, &c. for if it was so, it ought to be shewn on the other Side. 2 *Mod.* 58. *Crowder versus Goodwin*.

9. In Trespass for Taking his Cattle, the Defendant justified by Virtue of an Execution in an Action of Trespass in the Hundred-Court; and upon a Demurrer to this Plea it was objected, that the Defendant, reciting the Proceedings below, sets forth, that *taliter processum fuit*, when he ought to shew all that was done, because, not being in a Court of Record, the Proceedings may be denied and tried by a Jury: *Sed per Curiam*, 'tis well enough, and the safest Way to prevent Mistakes; but if the Plaintiff had replied *de injuria sua propria absque tali causa*, that had traversed all the Proceedings. 2 *Mod.* 102. *Lane versus Robinson*.

10. In Trespass for Taking a Horse, the Defendant justified, for that a Plea was levied against the Plaintiff in a Court-Baron of, &c. *coram* T. S. *Hundredario & sectatoribus Curia præd' secundum consuetudinem Curia*, in a Plea of Debt under 40 s. upon a *Mutuuus*, &c. *infra jurisdictionem Curia*, and that *taliter processum fuit in eadem Curia*, that the then Plaintiff recovered, and that thereupon a Precept issued for the Debt and Costs, by Virtue whereof the now Defendant being *Minister Curia*, &c. took the Gelding and sold it, *Quæ est eadem captio*, &c. and traversed any other Taking, &c. and upon a Demurrer to this Plea it was adjudged ill, because it was *coram sectatoribus Curia*, without naming them, and that * *Taliter processum* was too concise a Way of Pleading, for all the Proceedings of an inferior Court should be set out, because they are traversable, that Court being no Court of Record. *T. Jones* 129. *Garrett versus Highy*.

11. In Trespass, Assault, Battery, and False Imprisonment, the Defendant justified under a Warrant, upon a Plea levied in a Court of Record in *Weymouth*, and a *Capias* issuing, &c. and upon Demurrer it was objected, that the Plea was ill, because the Defendant did not shew, whether the Court was held by Charter or Prescription; besides, a *Capias* was the first Process; the Plaintiff had Judgment upon the first Exception. *T. Jones* 165. *Sirode versus Dcering*.

* See *Armin v. Appleoft*.
See *Antea*
pl. 5.

* See *Adams v. Fryth*.

* Pl. 12.
S. P.

12. In Trespafs for Taking his Mare, the Defendant justified under an Execution in a Hundred-Court, which he pleaded by * *Taliter processum fuit*, and that after Judgment the Mare was taken by Virtue of a Precept, &c. *quæ est eadem captio: Per Curiam* the Proceedings in the Hundred-Court ought to be set out at large, and not by a *Taliter processum*, because, being no Court of Record, the Whole is traversable. *T. Jones 185. Butland versus Michell.*

Kindred.

In the right Line descending. (A)
In the right Line ascending. (B)

| In the collateral Line. (C)

(A)

In the right Line descending. See *Descent per totum. Marriage.* (D)

1. **T**HERE are three Degrees of Kindred in our Law, one in the right Line, descending as from Father to Son; another in the right Line ascending, as from Father to Grandfather; and the Third is a collateral Line, as to Uncles and Aunts, &c.

2. The Kindred of the Male Line descending are called *Agnati*, and the most remote of them shall be preferred before the nearest in the Female Line, which are called *Cognati*; now the right Line descending is thus: From the Father to the Son, and so on to his Children in the Male and Female Line; and if no Son, then to the Daughter, and so on to her Children in the Male and Female Line.

3. If neither Son nor Daughter, nor any of their Children, then to the Nephew and his Children; and if none of them, then to the Niece and her Children.

4. If neither Nephew nor Niece, nor any of their Children, then to the Grandson or Granddaughter of the Nephew; and if neither of them, then to the Grandson or Granddaughter of the Niece.

5. And if none of them, then to the Great Grandson or Great Granddaughter of the Nephew; and if none of them, then to the Great Grandson or Great Granddaughter of the Niece, & *sic in infinitum*, &c.

6. If there are no Kindred in this Line, then the Inheritance of Lands goes to the collateral Line, but never ascends in the right Line upwards if there are any of the collateral Line, tho' it may ascend in that Line.

7. There is a Difference to be observed in the right Line descending, between a *Purchase*, (*i. e.*) where the Son purchases Lands and where the Father likewise purchases; for if the Purchase is made by the Son, and he dies without Issue, it shall descend to the Heirs of the Part of his Father; and if there are none, then to the Heirs of the Part of his Mother, because the Blood both of Father and Mother was in the Son, and those who are *Consanguinei* of the Mother are *Consanguinei cognati* of the Son.

8. But if the Father purchases Lands of Inheritance, and afterwards dies, and those Lands descend to his Son, and then he dies without Issue; and if it happen that there are no Heirs of the Part of his Father, it shall never descend to the Heirs of the Part of his Mother, but rather escheat, because, tho' the *Consanguinei* of the Mother are *Consanguinei cognati* of the Son, as is before-mentioned, yet they are not so to the Father, who was the Purchaser.

9. In this Line the Children always succeed, in the first Place exclusive to the Grandchildren; if their Parents are living, but if they are dead, then the Grandchildren have a Share of the Goods with the living Uncle or Aunt, not *per capita*, but *jure representationis* of their dead Parents; and the Reason is, because they are entitled to it in the Right of their Ancestors, and not in their own Right, therefore they are to have their respective Shares *per Stirpes*, as proceeding from their respective common Roots:

As for Instance, the Father died Intestate, leaving one Son living, and three Grandchildren living by another Son who was dead; in this Case the personal Estate of the Father shall be divided into two Parts, and the living Son shall have one Moiety thereof, and the other Moiety shall be equally divided amongst the three Grandchildren.

10. And 'tis to be observed, that this Right of Representation in the right Line descending, reaches beyond the Great Grandchildren of the same Parents; but in the collateral Line it doth not reach beyond Brothers and Sisters Children.

And

And if a Woman hath Children by two Husbands, those Children shall respectively succeed to the personal Estate of their respective Fathers, but they shall equally succeed to the personal Estate of their Mother; but if a Man hath Children by two Wives, and then dies Intestate living one Wife, all his Children shall equally succeed with her by the Civil Law.

11. There were three Brothers, the middle Brother purchased Lands, and devised them to his Son in Tail; and if he died without Issue, that it should remain to the next of Kin of the Lineage of the Testator; the elder Brother died, leaving Issue a Son, then the middle Brother died, and so did his Son without Issue; adjudged, that the Son of the eldest Brother shall have the Lands, for he is the next of Kin of the Lineage of the Testator, (*i. e.*) in the lineal Descent. 19 *Eliz. Dyer* 333.

12. In a Special Verdict in Ejectment, the Case was, *T. S.* being seised of Lands in Fee by Descent * on the Mother's Side, makes a Feoffment of Part of them to the Use of himself for Life, Remainder in Tail, Remainder to his own right Heirs, and of the other Part to the Use of himself for ninety-nine Years, Remainder in Tail, &c. Remainder to him and his Heirs, he died without Issue; the Question was, whether the Heir of his Father's Side or of his Mother's Side should have these Lands; it was insisted for the Heir on the Father's Side, that where a Man seised a *parte materna*, makes a Feoffment, or levies and declares the Uses thereof to him and his Heirs, this Use shall be to the Heirs on the Father's Side; but if no Uses had been declared, * there the Use shall remain without any Alteration; however, if that Part of the Estate which was limited to him for Life, Remainder to his right Heirs, shall go to the Heirs a *parte Materna*, yet the other Part which was limited to him for ninety-nine Years, Remainder to his right Heirs shall not, because this is a new Estate, and the antient Reversion is out of him: But adjudged, that the Heir a *parte Materna* shall have the Whole, for the Court made no Difference where the Use was expressly declared by the Deed, and where it was implied by Law; nor where the Estate was limited to the Ancestor for Life, or for Years, Remainder to his right Heirs; for in both Cases the Fee is the old Reversion, which neither merged the Estate for Life or for Years; but that both are preserved by the intermediate Remainders which come between these Estates and the old Reversion. 3 *Lev.* 406. *Godbolt* versus *Freeftone*. See *The Earl of Bedford's Case*, and *Plunkett* versus *Holms* and *Abbot* versus *Burton*.

(B)

In the right Line ascending.

1. THIS Line is likewise direct, as from the Son to the Father or Mother. If neither Father or Mother, then to the Grandfather or Grandmother.

If neither Grandfather nor Grandmother, then to Great Grandfather or Great Grandmother.

If neither Great Grandfather or Great Grandmother, then to the Father of the Great Grandfather or to the Mother of the Great Grandmother.

If neither of them, then to the Great Grandfather's Grandfather, or to the Great Grandmother's Grandmother.

If neither of them, then to the Great Grandfather's Great Grandfather, or Great Grandmother's Great Grandmother & *sic in infinitum*.

2. In this Line the Father or Mother are always in the first Degree of Kindred; so it is by the Civil Law, and so it was in our Law after the Conquest; for if the Son died without Issue, his Father or Mother succeeded; and if they were dead, then his Brother or Sister; and if none of them, then his Uncle or Aunt by the Father's or Mother's Side, and so on to the fifth Generation; but *Glanvill* tells us that it was otherwise in *Purchases*; for if the Son purchased Lands, and died without Issue, his Father or Mother could not inherit, but his Brother or Sisters; and if none of them, then his Uncles or Aunts; but if an Uncle or Aunt enter after the Death of the Nephew, and then die without Issue, in such Case the Father shall inherit; by which it appears, that the Father cannot succeed the Son immediately, tho' he is the next of Kin.

3. And in this Line the Succession may likewise be *per Stirpes* and not *per Capita*, as for Instance, if there are several Parents of a distinct Line, and are equally of Kin in Degree, but not in Number; as if there is a Grandfather by the Father's Side, and likewise a Grandfather and Grandmother by the Mother's Side, they shall succeed *per Stirpes* and not *per Capita*, (*i. e.*) the the Grandfather by the Father's Side shall have one Moiety of the personal Estate, and the Grandfather and Grandmother on the Mother's Side shall have the other Moiety.

4. Administration was granted to the Aunt of the Intestate, and the Grandmother having commenced a Suit in the Spiritual Court to repeal that Administration, the Aunt suggested for a Prohibition the Statute 21 *H. 8. cap. 5.* by which 'tis enacted, that the Ordinary is to grant Administration to the next of Kin; then sets forth, that *M. S.* died Intestate, and that Administration was committed to the Aunt, who was next of Kin to her, &c. but a Consultation was granted. 2 *Lutw. Rep.* 1055. *Burton* & *Ux'* versus *Sharpe*.

(C)

In the collateral Line.

1. **T**HE collateral Line is either descending by the Brother and his Children downwards, or by the Uncle upwards; and in this Line 'tis a constant Rule, that they who are of the whole Blood are first to be admitted; as where the Father had Issue *William* and *Charles* by one Venter, and *David* by another Venter, *William* succeeded his Father, and died without Issue, in such Case *Charles* the Brother of *William* by the whole Blood, shall succeed; and not *David*, who was of his half Blood.
2. The Father had Issue *Thomas* by one Venter, and *William* by another, and died, then his Widow married a second Husband, by whom she had Issue *Francis*; then *William* died without Issue; adjudged, that *Thomas*, who was of the half Blood by the Father's Side, and *Francis* who was of the half Blood by the Mother's Side, shall equally succeed to their Brother *William*, they being equal in Degree and Blood to him; but 'tis otherwise in the Civil Law.
3. *Edward* and *Francis* were Brothers of the whole Blood; *Edward* had Issue *George* by one Venter, and *Henry* by another Venter; *Edward* died, and *George* succeeded him, and died without Issue; in such Case *Francis* shall succeed, and not *Henry*, because the one was the Uncle by the whole Blood, and the other was only the Brother by the half Blood; but if *Francis* the Uncle had died without Issue, then *Henry* should succeed, because he is of Kin both Ways, as well to the Uncle as to the Father.
4. This Rule extends no farther than Brothers and Sisters Children, for after them, there is no Representation amongst Collaterals; but the nearest in Degree is to be considered, and not whether they are of the Whole or Half Blood; as for Instance, there were two Brothers of the whole Blood, and one of the half Blood; those of the whole Blood died, each of them leaving Issue a Son, then one of the Sons died without Issue; in this Case his Uncle of the half Blood shall be admitted, before the other surviving Son of his Brother by the whole Blood.
5. There were three Brothers of the whole Blood, the eldest had Issue *Thomas*, and died; the next Brother had Issue *William*, and died, and *William* had Issue *Robert*; then *William* died, and afterwards *Thomas* his Nephew, and Son of his eldest Brother died without Issue; in this Case the third Brother, who was his surviving Uncle, shall be admitted before *Robert*, who was the Grandson of the second Brother, tho' that Brother was of the whole Blood of the Father of *Thomas* the Nephew deceased.
6. The Son of the Brother shall always exclude the Brother of the half Blood; but the Children of the Brothers and Sisters of the half Blood shall exclude all other Collateral Ascendants, as Uncles and Aunts, and all Remoter Kindred of the whole Blood in this Line; but then the Brothers of the half Blood, and their Children, shall succeed equally *per Stirpes*, and not *per Capita*, according to the distinct Number of their several Persons.
7. Likewise in this Line there is some Difference between a Purchase and Descent; for if a Man purchases Lands, and dies without Issue, it shall never go to the half Blood; but 'tis otherwise in Case of a Descent from a Common Ancestor; as where the Father had Issue a Son and Daughter by one Venter, and a Son only by another Venter, then the Son by the first Venter purchased Lands, and died without Issue, it shall descend to his Sister; so if Lands had descended from the Father to his eldest Son by the Venter, and then he had entered, and died without Issue, it should descend in like Manner to his Sister; but if he had survived his Father, and died before Entry, in such Case the Son by the second Venter should succeed, and not the Sister by the first Venter, because he is Heir to the Father, who was last actually seised.

King.

Where he shall not be disseised, and of other Cases concerning the King. (A)	His Prerogative in Wrecks and other Things. (F)
His Prerogative to have Debts due to him, to be first satisfied. (B)	His Prerogative to create Dignities, Bishopps, &c. (G)
His Prerogative to make Constitutions for the Government of the Clergy. (C)	Of Discontinuances and Determinations by the Demise of the King. (H)
His Prerogative in Point of Pleading, and of Petitions to him. (D)	His Prerogative to present by <i>Cession</i> . (I)
His Prerogative in Coining Money. (E)	Of his Grants and Dispensations by <i>non Obstante</i> . (K)

(A)

Where he shall not be disseised, and other Cases concerning the King.
See *The Case of the Company of Sadlers*.

1. **T**HE King was seised in Fee of a Manor in the Right of his Crown; a Stranger built a Shop upon a void Place of the said Manor, and received the Rents, without paying any Thing to the King; and afterwards the Queen granted the Manor to the Earl of *Leicester*, who never entered into the Shop, nor took any Rent; and afterwards he who built it died in Possession, and the same descended to his Heir; but adjudged, that this Descent was no Bar to the Grantee, because it was no Disseisin to the King. *Mch. 10 Eliz. Dyer 266.*

2. If one wrongfully taketh the Rents and Profits of the King's Lands, yet they cannot be said to be detained from him, for he may charge him who received the Rents as Bailiff, because in the King's Case the Law maketh a Privy to charge the Party in Account. 10 *Rep. 109.* In *Legat's Case*.

3. In Ejectment of Land Parcel of the Manor of *Winfarthing*; the Parties were at Issue, and the Jury being at Bar, and ready to give their Verdict, a Writ was delivered into Court, reciting the Attainder of the Duke of *Norfolk* for Treason, and also on Office found, that the said Duke was seised of the said Manor, made a Feoffment thereof to the Use of himself for Life, Remainder to several in Tail, Remainder to his own Right Heirs; and another Office by which it was found, that *Philip* Earl of *Arundell*, at the Time of the Attainder, was seised of the Remainder, to him and the Heirs Males of his Body at that Time; and that this Ejectment was brought, and Issue joined, &c. commanding the Judges not to proceed *Regina inconsulta*; it was insisted, that the Court was not to delay the Trial, because this was in a personal Action, wherein the Queen could receive no Prejudice, as she might, if it had been in a Real Action: *Sed per Curiam*, as to this Matter there is no Difference in Reason between a Real and a Personal Action; for if the Queen is seised in Fee upon an Attainder of Treason, and makes a Lease for Life, and a *Formedon* is brought against the Lessee, the Plaintiff shall not proceed, because his Remedy is by Petition; but in such Case, if the Plaintiff should proceed to Trial against the Tenant for Life, and Evidence should be given to the Jury, which concerns the Queen's Title, and a Verdict should be found against the Tenant for Life; this might be very prejudicial to the Queen in another Trial between her and the Party upon the same Title, tho' the Land it self shall not be recovered against the Queen in a Suit against the Tenant for Life; in the principal Case the Court did not proceed to take the Verdict, but stay'd the Trial. 1 *And. 280.* *Blofield versus Havers.*

Bonds for Performance of Covenants, tho' some of them are broken, shall not be assigned to the Queen, nor any Bonds but such which were made for Payment of Money. 4 *Leon. 9.* *Sir John Hawkins versus Chapman.*

4. One *Chillenden* was decreed to pay 32 *l.* to a new Corporation made by the *Protector*, for Propagation of the Gospel in Foreign Parts, (*viz.*) in *New England*, and was committed for not performing the Decree; this Corporation had Power to collect Money, and several Sums being collected, those Persons, in whose Hands it was, moved to be discharged, because the Corporation was now dissolved, and that they did not know to whom to pay the Money, and by the *General Pardon* all Contempts were pardoned; but adjudged, that this Collection being for a Publick Use, the Money belonged to the King; and so it was ruled, where Money was collected for buying in Impropriations. *Hardr. 192.* *Chillenden's Case.*

5. In a Special Verdict in Ejectment, the Question was, whether a Judgment in an Information of Intrusion for the King binds a *Stranger*; and adjudged, that it did; for *per Hale Ch. Baron*, true it is, that if the King be in Possession by a Title, he cannot be put out; but the Judgment for him in an Information for Intrusion is only *quod committantur & capiantur pro fine*, and thereupon goes an Injunction for the Possession; there is no Judgment *quod recuperet seisinam*, nor doth an *Habere facias possessionem* issue; and it would be hard to bind Persons in Possession who have a * Title, and were no Parties to the Information. *Hardr. 460. Friend versus Duke of Richmond.*

(B)

His Prerogative to have Debts due to him to be first satisfied.

1. **A** Man was taken in Execution upon a *Capias Utlagatum* at the Suit of a Common Person for 312 *l.* and before the Day of the Return of the Writ, there came a Prerogative Writ out of the Exchequer, for a Debt due to the Queen; and upon an *Habeas Corpus* directed to the Sheriff of *London*, he was brought to the Exchequer-Bar, and not denying the Debt to the Queen, he was committed to the *Fleet* in Execution for both the Debts; but it was ordered, that to the Queen should be first satisfied. *Pasch. 3 Eliz. Dyer 179, 197. Luffell's Case. See 4 Leon. 32. The Queen versus Painter.*

2. For the better Understanding the following Cases, it may be necessary to know, that by the Common Law the King hath a Prerogative to have the *Body, Lands and Goods* of his Debtor in Execution, and that a Common Person could not have the *Body* of his Debtor in Execution till the Statute 25 *Ed. 3.* gave him that Privilege, as may be seen in *Sir Wm. Herbert's Case. 3 Rep. 12.*

3. And by the Common Law the King might grant a Protection to his Debtor, that no other Person might sue him before the King's Debt was satisfied: There were several Sorts of Protections, but that with a *clausula nolumus* was the proper Protection for the Debtor, (*viz.*) *Et quia nolumus solutionem debitorum nostrorum ceteris omnibus prout ratione prerogative nostre totis temporibus retroactis usitata, &c.* but this Part of the Prerogative being a Grievance to the Subject in some ill Reigns, it was taken away by a Statute 25 *Ed. 3.* and ever since a Common Person may sue his Debtor, and recover Judgment against him, tho' he is indebted to the King, but he cannot have Execution, unless he give Security to pay the King's Debt. *Godb. 290.*

4. If a Common Person make a Lease, reserving Rent, with a Clause of Re-entry for Non-Payment; in such Case he must demand the Rent, if he will take any Advantage of the Condition; but if the King make such Lease, it doth not consist with the Dignity of his Person to Demand the Rent; therefore the Lessee must do the first Act, (*viz.*) either tender or pay the Rent; but this is a Personal Prerogative, and therefore if the King grant over the Reversion, the Grantee shall not take any Advantage of the Condition, without an actual Demand of the Rent. *4 Rep. 72. Borough's Case.*

5. A Debt came to the Queen by the Attainder of the Creditor; and afterwards an Extent issued against one of his Tertenants liable to the Debt, and against him alone, tho' there were several more; adjudged, that this Debt is not within the Statute 33 *H. 8.* so that an Extent must be taken out against all; for tho' an Attainder is by Judgment, yet it cannot be properly said a Debt by Judgment, or a Debt recovered by Judgment. *Mich. 31 Eliz. 2 Leon. 33. Lord Cromwell's Case.*

6. *Sure facias* in the Name of the Queen, brought by her Patentee, to shew Cause why Execution of a Debt should not be had, which came to her by the Attainder of *H. R.* the Defendant pleaded, that the Queen had granted over this Debt by the Name of a Debt when it came to her by Attainder, together with all Actions and Demands for the same; upon which the Plaintiff demurred, and the Question was, whether the Grantee might sue for it in the Name of the Queen, without special Words in the Grant to give him that Power; and Precedents were shewn, that he might; but in this Patent, upon Refusal thereof, the Patentee had express Words to sue in the Name of the Queen. *Pasch. 26 Eliz. Owen 2.*

7. Adjudged, that a Note under Hand, and without a Seal, may be assigned to the King, tho' in such Case before the Assignment, the Debtor might have waged his Law against the Creditor; for by such Notes the Certainty of the Debt appeareth, and where a * Bond is assigned to the King, the Obligor cannot plead *Nil debet*, because by the Assignment, 'tis become Matter of Record. *4 Leon. 9, 80.*

8. In Debt against the Executrix of *Sir Tho. Gresham*, she pleaded, that her Husband in his Life-Time, and on such a Day and Year became indebted to the Queen in a Bond, conditioned for the Payment of 200 Marks, when thereunto required, which is not yet paid, *ultra quod* she had not Assets; and upon a Demurrer to this Plea, the Question was, whether this Bond not being enrolled in any Court, shall be good at Common Law, or by Virtue of the Statute 33 *H. 8.* or whether it being a Debt, and not of Record, whether the Queen shall have the Preference to be first paid; and upon this last Point it was held, that she shall be paid before any Subject. *1 And. Sroges versus Gresham.*

* Or a Bond made to the King shall be paid first. *1 And. 129.*

9. The Plaintiff in an Action recovered Damages, and before Execution he assigned Part of the Debt to the Queen, who thereupon brought a *Scire facias*, &c. adjudged, that Part of the Debt could not be assigned to her. *Pasch. 26 Eliz. Owen 2. The Queen versus Allen.*

10. In Trespass, the Case was, that the Queen having obtained a Judgment against her Debtor, a *Fieri facias* issued out of the Exchequer, and by Virtue thereof the Sheriff took the Cattle of the Plaintiff in Execution, which were levant and couchant upon the Lands of the said Debtor, and sold them to satisfy the Debt due to the Queen; 'tis true, it was adjudged an unlawful Sale; and the Reason was, because they were not sold as the Cattle of the Debtor, for he had no Property in them; but the Court agreed, that they might have been *distrained* for the Queen's Debt; and in such Case, if the Owner had brought a Replevin, the Queen might have justified the Taking. *Mich. 38 Eliz. Stafford versus Bateman. Cro. Eliz. 431.*

11. 'Tis a Rule in Law, that the Executors of a Common Person cannot be charged in an Action of Account; but 'tis otherwise in the Case of the King, for if his Steward receiveth the King's Money, and converts it to his own Use, and dies, his Executors shall be charged in such an Action. *11 Rep. 89. In the Earl of Devonshire's Case.*

12. There was a Judgment against the Defendant for 500 *l.* who afterwards became joint Purchaser with *W.* of Lands in Fee, and both of them joined in a Conveyance of those Lands to another; then the Plaintiff, who had obtained the Judgment for 500 *l.* was outlawed, so that the King was entitled to that Money; and it was adjudged, that the entire Moiety of the joint purchased Lands shall be subject to an Execution for this Debt to the King, and not a Moiety only of the Moiety of the first Purchaser. *2 Cro. 513. The King versus Death.*

13. At Common Law, the King might grant a Protection to his Debtor, not to be sued before his Debt was satisfied; the Form of which Protection was thus: *Et quia volumus solutionem debitorum nostrorum ceteris omnibus prout ratione prærogativæ nostræ totis temporibus retroactis*, &c. but this was a Grievance which was remedied by the Statute 25 *Ed. 3. cap. 19.* and now a Common Person may proceed to Judgment, but he cannot take out Execution, unless he will give Security to pay the King's Debt first; for if he should take out Execution, and levy the Money, the same may be seized on to satisfy the King's Debt. *See 2 Cro. 477. Travers versus Malins.*

14. *Sir William Fleetwood* became indebted to the King, and being seized of the Manor of *C.* in *Middlesex*, he conveyed the same to *Sir Roger Aston* in Fee, who conveyed it to the King, his Heirs and Successors, and the King immediately regranted it back again to him and his Heirs, rendering yearly 34 *s.* for all Services and Demands; afterwards *Sir William Fleetwood* became farther indebted to the King; the Question was, whether the Manor was extendable and liable to any of the said Debts; and adjudged, that it was not, for the King cannot charge the Land against his own Conveyance, altho' the Debt be of such a Nature, that it gives a Right to the Land it self. *Pasch. 13 Jac. Sir William Fleetwood and Sir Roger Aston.*

15. The Cognisee of a Statute of 1000 *l.* fled beyond Sea, and afterwards, but before any Office found, he returned into *England*, and released the Statute; adjudged, that this Release should not bar the King, because he was entitled to the Statute by the Hight, and before any Office found; and having granted it to another, the Grant is good, and the Grantee shall sue out Process in the King's Name to recover the Money. *2 Cro. 82. The King versus Sir Richard Werdman.*

16. A Man was in Execution at the Suit of the King, and a Common Person having obtained Judgment against him, the Debtor was brought to the Bar by *Habeas Corpus*, and the Creditor prayed, that he might be in Execution for both Debts; but adjudged, that he could not, for by the Statute 25 *Ed. 3. cap. 22.* a Common Person shall not have Execution against the King's Debtor, until he make Agreement for the King's Debt; but because this Debtor had not a *Writ of Protection*, it was adjudged, that he was out of the Statute, and that he should be in Execution as well for the Party as for the King. *Cro. Car. 283. Steevenfon's Case.*

17. The Debtor of the King conveyed his Lands to *B.* in Fee, who reconveyed the same Lands to the King in Fee; afterwards the King regranted those Lands to the said *B.* in Fee, and then he became farther indebted to the King; adjudged, that these Lands were not liable to any Debt due to the King, but were discharged in Law, because they were once in his Possession. *Lea 50. Sir John Molin's Case.*

18. Two Men were possessed of a Parcel of Trees by Virtue of a Grant to them by the Owner of the Land; and afterwards one being indebted to the Queen, granted to her all the Trees in Satisfaction of the Debt; and upon an Information brought by her for cutting down the Trees, it was objected against her, that where she hath an entire Thing by Act of Law, there she shall have the Whole by her Prerogative; but where she hath Part of a Chattel by the Grant of a Common Person, (as in this Case) there she shall not have the Whole by her Prerogative; to which Opinion the Court inclined. *Cro. Eliz. 265. The Queen versus Fairclough.*

19. *Sir Christopher Hatton* being seized in Fee of several Lands, &c. covenanted to stand seized to the Use of his Son in Tail, with Remainders over, with a Power of Revocation during his Life; and afterwards he became indebted to the Queen, who assigned the said Debt to *Sir Edw. Coke*, and the Lands were extended for it; adjudged, that any Lands either in Use, or upon Trust, or under a Power of Revocation, shall be liable to an Extent for a Debt due to the King. *Coke Sir Edw. Case. Godb. 292.*

20. *Sir John Harrison* acknowledged two Judgments in Debt upon Bond to *Andrews*, and he owed Money to one *Feilder* upon Bond, dated before the said Judgments, which Debt *Feilder* assigned to the King; and about a Year afterwards *Andrews* sued out two *Elegits*, and by one of them he extended one Moiety of *Harrison's* Lands, and by the other of them he extended the other Moiety; then Process issued out of the Exchequer for the Debt thus assigned to the King: The Question was, whether the King's Debt shall be preferred, and if it shall, then whether any of the Lands extended shall be liable, because the Whole were extended, when by the second *Elegit* he ought to have extended only a Moiety of a Moiety; adjudged, that tho' the King hath this Prerogative by the Common Law, to have his Debt first satisfied, yet that must be where 'tis in equal Degree with the Debt of his Subject; but in this Case 'tis not in equal Degree; besides, 'tis abridged by the Statute 33 H. 8. cap. 39. sect. 35. by which 'tis enacted, that the King's Debt shall be preferred, so as there is no Judgment, &c. which Statute, tho' 'tis in the Affirmative, yet it implies a Negative; for these Words *So as*, &c. make a Limitation and a Condition precedent; and as to the Extents, they are both well executed, because both Judgments were in the same Term. *Hardres* 23. *The Attorney General* versus *Andrews*. See *Stringfellow's* Case.

21. Upon a Bill in the Exchequer, the Case was, that *Sir George Binion* being the King's Receiver, and the *Lord St. John* being Debtor to him, and one *Pemberton* being Debtor to the *Lord St. John*, he the said *Sir George Binion* assigned his Debt to the King; and the Question upon a Plea to this Bill was, whether the Debt due from *Pemberton* to the Debtor of the Assignor might be seised to satisfy the King's Debt; and * adjudged that it might, but not a Debt in a more remote Degree than what is owing by a third Debtor. *Hardres* 403. *Attorney General* versus *Poulney*. * Latch 112.

(C)

His Prerogative to make Constitutions for the Government of the Clergy.

1. SEVERAL Puritan Ministers were deprived by the High Commissioners, for refusing to conform themselves to the Ceremonies appointed by the Canons of King *James*; adjudged, that such Deprivation was lawful, because the King hath the supreme Ecclesiastical Power, which he had delegated to those Commissioners, and that the Statute 1 *Eliz.* doth not confer any new Power, but explain and declare the Old; and that the King, without the Parliament, may, by his Prerogative, make Constitutions for the Government of the Clergy, and deprive them if they disobey. 2 *Cro.* 37. Moor 755. S. C.

(D)

Of his Prerogative in Point of Pleading, and of Petitions to him.

See *Quo Warranto*. (C) 4.

1. IN the Case of a common Person, if the Plaintiff give in Evidence any Writing or Record, &c. upon which a Question in Law doth arise, and the Defendant offereth to demur in Law, the Plaintiff must join in Demurrer, or waive his Evidence; but if Evidence is given for the King, and the Defendant offereth to demur, the King is not bound to join, but the Court may direct the Jury to find the Matter specially; and if he demur, he may afterwards, by his Prerogative, waive the Demurrer and take Issue at his Pleasure. 5 *Rep.* 104. *Baker's* Case.

2. In all Originals brought by a Subject, wherein Pledges *de prosequendo* are to be found, the Writ is thus: ff. *Rex vi' M. salutem, si A. fecerit te securum, &c. tunc summonneas, &c.* but at the King's suit the Writ is, *Rex, &c. Vicecomit' M. salutem, summonneas per bonos summonitores*, omitting these Words, *Si Rex fecerit te securum*, because the King shall not be bound to prosecute; for if he was, then he might be amerced, which he cannot be, neither can he be nonsuited, because he is always present in Court. 1 *Inst.* 127.

3. The Case was, one *Cox* died seised in Fee of a Messuage which he held of the Queen, and without Heir; afterwards the Company of *Sadlers* in *London*, pretending a Title, exhibited a Bill in the Exchequer, suggesting, that they were seised in Fee till disseised by the said *Cox*, who being seised by Disseisin, died so seised without Heir; and so prayed an *Ameoas manus*; the Case was argued before the Lord Chancellor, whether the Plaintiffs ought to sue by Petition, or by a *Monstrans de droit*; and the Attorney General insisted, that it ought to be by Petition, because when the Tenant of the Queen dies without Heir, the Freehold is immediately vested in her without Office found, and therefore no Man shall enter by Virtue of any former Right, unless by Petition he prove his Right; but adjudged, that the proper Remedy is by *Monstrans de droit*, and that by Virtue of Statute 36 *Ed.* 3. which see 1 *And.* 180.

4. One who held Lands of the Queen was outlawed in *Ireland* for Murder; the Queen seised the Lands and granted them to *T. S.* afterwards, upon a Writ of Error brought, the Outlawry was reversed, and the Party restored; but the Question was, whether he might enter, or should sue by

Petition to the Queen; and adjudged, that he might enter upon the Grantee, because after the Reversal, &c. there was no Record of the Attainder to enforce the Petition, for 'tis altogether defeated. 1 *And.* 188.

5. A Writ of Error was brought to reverse a Fine levied to the Queen of Lands, which he gave afterwards to *Bowes* the Treasurer of *Berwick*, and Infancy was assigned for Error; the Defendant in Error pleaded in Bar the Statute 18 *Eliz.* by which all Grants made to the Queen were confirmed; and upon Demurrer it was adjudged, that the Statute never intended to make the Grants good of such Persons who were disabled by the Common Law to grant, as Infants, &c. but only of those who were prohibited by former Statutes to make Grants, such as Deans and Chapters, Bishops, Tenants in Tail; but yet the Defendant had Judgment, because the Plaintiff ought to have petitioned the Queen for a Writ of Error, which he had not done, and therefore the Writ of Error doth not lie. *Moor* 338. *Isabel Mordant's Case*.

6. In a *Quo Warranto* against the Defendant, for Usurping several Liberties, he pleaded a Special Plea, and the King replied, and the Defendant rejoined; and in another Term the Attorney General altered the Replication, and tendered a new Issue; and it was moved, that since the King had altered his Replication, that the Defendant might change his Plea, it being all in Paper: *Sed per Curiam*, the King may alter his Replication *jure Prærogativæ*; and tho' 'tis in Paper, yet being of another Term, the Defendant cannot alter his Plea without Leave of the Attorney General. 2 *Roll. R.p.* 41. *The King versus Glimmon*.

7. *Sci. fa.* setting forth, that *Sir Geo. Binion*, the King's Receiver, was indebted to him in several Sums, &c. by Reason of his Office, and that *R. L.* was indebted to the said *Binion* in 400 *l.* by Bond, which he assigned to the King towards Satisfaction of the Debt; that *R. L.* died, and upon a *Scire facias* against his Heir, &c. and Tertenants at the Time of the Assignment, the Sheriff returned, the Defendant *Meller* warned, and that he was Tenant of a Messuage and of forty Acres of Land in *Silly*, of which the said *R. L.* was seised in Fee at the Time of the Assignment; and because they were not seised into the King's Hands, the Sheriff was commanded by this Writ of *Sci. fa.* to do it, and to make Inquisition, &c. and Return the Value; and thereupon he did seise the Lands, &c. and return the Value, &c. To this *Sci. fa.* the Defendant pleaded, that *E. K.* was seised in Fee long since of those Lands; and by Indenture, &c. demised the same to *Sir John Isham* for 1000 Years, by Virtue whereof he entered and was possessed; that afterwards the said *E. K.* by Bargain and Sale enrolled, conveyed the same, for a valuable Consideration in Money to the said *R. L.* and his Heirs, who afterwards released all his Right, Title and Demand to the said *Sir John Isham*, and his Heirs, who died; and that *Sir Justinian Ipsam*, as Son and Heir, entered, and was possessed, whose Estate the Defendant hath; and traversed the Seisin of *R. L.* at the Time of the Assignment of the Bond, or at any Time since: To this Plea the Attorney General demurred; the Question was, whether the Defendant could derive to himself a Title by a *Que Estate* in Pleading against the King; it was insisted, that he could not, but that he ought to set forth his whole * Title in particular, because 'tis the Prerogative of the King to traverse which Part of it he will, or he may maintain his own Title; and if the Law should be otherwise, this Inconvenience would ensue, (*viz.*) no subject would set forth more of his Title than he needs must, and then the Prerogative of Traversing any Part of it would be of little or no Advantage; for by this Means all Pleading would be reduced into this concise Form, (*viz.*) that *B.* was seised in Fee, and made a Feoffment to *D.* whose Estate *E.* hath; 'tis true, this is good in the Case of a Subject, but not against the King, because he would lose his Prerogative of Traversing any Part of the Title, and be in the same Case with the Subject; for he must, like the Subject, traverse either the Feoffment or the *Que Estate*, because there is nothing else to traverse; but the Law hath given the King this Prerogative to a better Purpose, (*viz.*) That where the Subject claims a Title so, that a *Que Estate* may be pleaded to such Title by the Defendant, especially when that very Title is bound by some Special Matter before alledged in the Plea, as it was here by the Lease and Release; besides, this Plea is not for the Recovering, but for the Discharging the Lands of a Claim made on them, and so is * *Courtney's Case* in Point. *Hindr.* 451. *Attorney General versus Meller*.

8. On a Bill in the Exchequer to redeem a Mortgage, the Case was, The Plaintiff borrowed 3000 *l.* of one *Ludlow*, and for securing the Repayment thereof, he mortgaged his Lands to the said *Ludlow* in Fee; Proviso to be void upon Payment of the Principal and Interest on such a Day; the Money was not paid, so that the Mortgage became forfeited; then *Ludlow* devised all his Goods, Money, Debts and personal Estate to his Executor, and died, leaving Issue *Edmund Ludlow*, his Son and Heir, who was afterwards attainted of Treason, and the King seised his Lands; but the Mortgagor having entered into a Statute to perform the Covenants in the Mortgage, the Executor sued out an Extent, and thereupon the Mortgagor exhibits his Bill against the King and the Executor, to redeem against the King, in such Case he ought to set it forth more full, direct and certain, than when he claims it against another Subject: But adjudged, that a *Que Estate* may be pleaded of any Estate of Freehold, even of an Estate for Life, with an Averment, that it is for the Life of him from whom 'tis claimed; it may likewise be pleaded by a Plaintiff who is a Stranger to the Estate, as where the Lessor brings an Action of Debt for Rent arrear against a third or fourth Assignee of a Lessee for Years, he may declare upon the Lease made to the Assignee, *Que Estate* the Defendant hath, because he cannot know by what mesne Assignments or Conveyances the Defendant came by it, not being privy to them: Now, in the principal Case, the *Que Estate* is but

* Dyer
238.

* Co. Ent.
667.

a Conveyance to the Freehold; and he who hath a Freehold, tho' it be by Disseisin, may plead it; besides, it may be impossible for the Defendant to set forth all the mesne Conveyances, for they may be lost or detained from him, and the King can be at no Inconvenience, because his Title is traversed, and so an Issue tendered; besides such Strictness is required in Pleading where a *Debt is assigned to the King*, as if it had been an original Debt due to him; because, if it should, that would be to make his Prerogative subservient to the Interest of a Subject: The King's Title here being only, that such a Person was seised, and became indebted to his Debtor upon Payment of the Principal and Interest; and the Attorney General demurred; so that the Question was, whether the Plaintiff could have any *Relief of Redemption against the King*; it was insisted that he could not, because a Mortgage is in Nature of a *Trust* between the Mortgagor and Mortgagee; and as the King cannot be seised of an Use or a Trust, so as the Party may have any Remedy against him for it; so there can be no Remedy against him to redeem an Estate mortgaged, because he cannot be compelled to execute any Conveyance for that Purpose: But *Hale Ch. Baron* held, that a Mortgage is not merely a *Trust* between the Parties; for the Right of Redemption is an equitable Right inherent in the Land, and binds all Persons who come in the *Post*; whereas a *Trust* is created by the Contract and Agreement of the Parties, and all are bound by it who come in *Privy of Estate*, but not those who come in the *Post*; as Tenant in Dower is bound by it, because she is in the *Per*, but Tenant by the Curtesy is not, because he is in by the *Post*; besides, a Power of Redemption is of such Consideration in the Eye of the Law, that 'tis assignable, or may be devised to another; besides, the King is the Fountain of Justice and Equity, and cannot be presumed to be defective in either; but it would derogate from his Honour to imagine, that what is Equity against a common Person should not be Equity against him; for which Reasons it was held, that the Mortgagor might redeem; but then the Question was, who should have the Money, either the King, or the Heir or Executor; and the Chief Baron held, that in this Case the Executor would be relieved against the Heir, because in common Estimation the Money on a Mortgage, tho' *in Fee*, and forfeited, is but a personal Estate; and if so, then the Statute 33 *H. 8. cap. 39.* must be considered, which gives Relief in Equity against the King; for he cannot in Equity be removed by an *Anoveas manum*, as he may at Law, therefore it must be considered, whether the Plaintiff should prefer his Petition of Grace and Favour. *Hardres 465. Pawlett versus Attorney General.*

9. In an Action brought by him against the Defendant, for imbeziling the King's Goods, which *Sid. 412.* was laid in *London*; the Court, upon a Motion, may charge the County; so he may waive a Demurrer and join Issue. 1 *Vent. 17. The King versus Webb.*

(E)

His Prerogative in coining Money.

1. **A** Certain Standard of Money is necessary in every Government, because there cannot be any Equality in Contracts without it, and therefore Money is defined thus, (*viz.*) *Moneta est justum medium & mensura rerum commutabilium*, and 'tis the King's Prerogative to coin it, and no other can do it without his License; if he doth, he is guilty of High Treason; and by his Proclamation he may make any Money current, and he may change his Money in Substance, or abase the Value of it, without the Parliament; all which was adjudged in the Case of *mix'd Money*, in *Davis's Reports 3.* in the 43d Year of *Queen Elizabeth*, who coined *mix'd Monies* in *London*, and sent it over into *Ireland*, with a Proclamation, that it should be current there, and no other Money. 5 *Rep. 114. Wade's Case. S. P. Hill. 7 Ed. 6. Dyer 82. S. P.*

(F)

His Prerogative in Wrecks, &c. and other Chattels.

1. **T**HE Common Law gives to the King all such Things which are *nullius in Bonis*, as *Wrecks*, (*i. e.*) when Goods by Shipwreck are cast on the Land, *Flotsam*, (*i. e.*) when a Ship perisheth in a Tempest, or otherwise, and the Goods float on the Sea, *Jetsam*, (*i. e.*) when the Ship is in Danger of Perishing, and the Mariners throw the Goods into the Sea to make the Ship lighter, and yet she perisheth; *Ligan*, (*i. e.*) when the Goods so cast out would sink to the Bottom, unless the Seamen tie them to a Buoy or Cork, to the Intent they may find them, all these Goods belong to the King *jure Prærogativæ*, and so do all other Goods and Chattels, wherein no Person can claim any Property. 5 *Rep. 106. in Sir Henry Constable's Case.*

(G)

Of his Prerogative to create Dignities, Bishops, &c.

1. **T**HE King may create a Name of Dignity which was not before, as a Dignity by the Name of a Baronet; and that if he doth not create him of some Place, he cannot have an Estate-tail, but a Fee conditional, which shall be forfeited by committing Felony. 12 Rep. 84.

2 Cro.
534.
2 Roll.
Rep. 101,
130. S. C.

2. King Ed. 6. by Letters Patents directed to the Lord Deputy of Ireland, and to the Chancellor and his Counsel there, certified his Pleasure, that he had appointed John Bale to be Bishop of Ossory, and therefore commanded them to take such Order for making him a Bishop, as by the Laws of that Kingdom were required: The Lord Deputy was removed before any Thing done and a new one appointed; and the Lord Chancellor and Counsel, by a Commission directed to the Archbishop of Dublin, and others, commanded, that they should forthwith consecrate the said Bale, which was accordingly done, without any Conge d'Eslier or previous Election; and he was afterwards installed, and the Temporalities were restored to him; and all other Ceremonies, except the Conge de Eslier were observed; upon the Death of that King Bishop Bale fled beyond Sea, and Queen Mary made one Tenneroy Bishop of Ossory by Conge de Eslier, and all other requisite Ceremonies, and he continued Bishop all the Reign of Queen Mary; after her Death Bale returned and lived three Years, and then Tenneroy made a Lease of Lands which he held in Right of his Bishoprick; and one Wheeler was created Bishop, and brought his Action in B. R. in Ireland to avoid this Lease, and had Judgment there; upon which Tenneroy's Lessee brought a Writ of Error, and that Judgment was affirmed; the chief Question was, whether Bale was lawfully a Bishop without the Conge de Eslier, for if he was, then Tenneroy could not be Bishop whilst Bale lived; and adjudged, that the King might make a Bishop without the Election of the Dean and Chapter, and that he had a Prerogative so to do, for that the Kings of England always disposed of Bishopricks as supreme Founders and Patrons thereof. Palm. 22. The Bishop of Ossory's Case.

(H)

Of Discontinuances and Determinations by the Demise of the King.

1. **B**Y the Statute 1 Ed. 6. cap. 7. of Discontinuance of Procefs upon the Demise of the King, it was adjudged, that where a judicial Writ, or any other Procefs in a Court of Record is awarded in the Reign of the Predecessor, the same may be executed in the Reign of the Successor; but in Courts which are not Courts of Record, as the County-Court, or the like, it remaineth as it was at Common Law; for the Words of the Statute are in any of the King's Courts, or any other Courts of Record. 7 Rep. 30. In the Case of Discontinuance of Procefs by the Death of the Queen.

2. In Account, the first Judgment was quod computet, and a Capias ad computandum was awarded against him; then the Defendant came in by Capi Corpus, and Auditors were assigned; then he pleaded Payment by the Command of the Plaintiff, who traversed the Command, and thereupon they were at Issue, and then the Defendant was bailed; and the King died after Issue joined; adjudged, that by the Demise of the King the Bail were discharged, and the Issue was discontinued. 11 Rep. 38. In Metcalf's Case.

3. The Judges being assembled to consider the Statute 1 Ed. 6. resolved, that the Successor of every King began his Reign on the very Day that the former King died, and that all the Patents of the Judges, Sheriffs, Commissions of Oyer and Terminer, Gaol-Delivery, of the Peace, and of the King's Attorney General, are determined by the Death of that King in whose Name they were granted.

That all original Writs not returned are abated by the Death of the King, and cannot be returned in the Reign of the Successor; that all Executions and judicial Procefs founded upon Originals, commenced in the Reign of the dead King, and prosecuted afterwards, shall be prosecuted in the Name of the Successor. 1 And. 44.

4. When a Prohibition issueth out of the King's Bench, if there is no other Procefs depending there, 'tis discontinued by the Demise of the King; but if an Attachment issueth from thence, and is returned, or if the Party appeareth and puts in Bail, then 'tis become the Suit of the Plaintiff, and not discontinued by the Demise of the King. Latch 114. Watkyns's Case.

5. In Trespass for Taking his Cattle 15 March, 1 Car. the Defendant avowed by Authority and Warrant from the Commissioners of Sewers in the Time of King James; adjudged, that the Avowry was not good, because their Commission determined by the Death of that King. Mich. 2 Car. Thursby versus March. See Bendl. 193.

6. King Charles granted for himself and his Heirs, that H. R. and his Assigns should sell Wine in such a Vill; the Question was, whether this License determined by the Death of the King, it being granted to H. R. for Life; and adjudged, that it was not, because H. R. had not only a bare Authority,

Authority, but it was coupled with an Interest, for he had Profit by selling Wine; that at Common Law any Person might sell Wine, but this was restrained by the Statute * 5 Ed. 6. 'tis true, *See (K)* this is a Penal Law, but the King may dispense with it, tho' he cannot dispense with Penal Laws *pl. 4.* in general; besides, by this Statute the King hath an Inheritance fixed in the Crown, and therefore his Grant is good after his Demise; 'tis true, there was a Doubt in 1 Mar. Dyer 92. a. but that was, the Crown was entailed, and so probably the Grant might not be good against the Successor; so in 10 Eliz. Dyer 270. a. there was another Doubt, because there was no Estate expressed in the Grant; but there were no such Causes in the principal Case. *Sid. 6. Young versus Wright.*

(I)

Of his Prerogative to present by Cession.

1. **W**HEN the King makes a Parson a Bishop, his Benefice is void by Cession, and the King by his Prerogative may present to it; the Cases concerning this Matter, are as follow.

2. *Quare Impedit*, supposing that his Ancestor was seised of the Advowson in Fee, and presented, and afterwards granted the next Avoidance to *W. R.* that the Church became void, and that *W. R.* presented *H. M.* and that the Church became void again by the Death of the said *H. M.* so it belonged to him to present; the Defendant pleaded, that *H. M.* was created a Bishop of Ireland, so that it appertained to the Queen to present, who accordingly presented the Defendant; upon Demurrer to this Plea, it was adjudged ill, because the Defendant did not traverse the Avoidance of Death; it was admitted, that the creating the Incumbent a Bishop in Ireland made an Avoidance, and that the Queen in such Case had a Prerogative to present; but if she doth not take the Benefit of that Avoidance, but suffers another to present, and the Presentee dies Incumbent; in such Case she loses her Prerogative, and shall not present to the second Avoidance. *Mich. 42 Eliz. Cro. Eliz. 790. Bassett versus Gee.*

3. An Incumbent of a Church was created Bishop of *St. Asaph*, the Queen presented to that Moor Church, and the Patron brought a *Quare impedit*; the Question was, whether the Queen or he 399. had a Right to present; it was insisted for the Patron, that the Queen hath not a Prerogative in this Case to present, and that it was so expressly adjudged, 6 Eliz. Dyer 228. which is an Authority in Point; to which it was answered, that in that Case the Plaintiff did not demur upon the Queen's Prerogative, but took Issue, that the Church was void by Resignation before the Incumbent was made a Bishop; 'tis true, there are not many Cases where this Prerogative hath been adjudged in the Queen; but the Law vests her with several Prerogatives, for which a Reason cannot be given, as to have Tithes of extraparochial Lands, to have *primer Seisin* of all Lands, as well as of those which were held of her *in Capite*; to have the Temporalties of all Bishops during the Vacancy; but yet there may be several Reasons for this Prerogative to present by Cession; first, because the Queen hath advanced the Incumbent to a greater Dignity in the Church, and by his Advancement she hath parted with the Temporalties, which were in her before; besides, she is the Cause of this Avoidance, and the Patron can have no Prejudice, for his Presentee is still living; and 'tis usual for the Crown in creating a Bishop, to grant that he may hold his Benefice *in Commendum* for a certain Time, which could not be done, if the Right of Presentation was not in the Crown; the Case was not resolved. *Mich. 39. Eliz. Cro. Eliz. 527. Wentworth versus Wright. Moor 399. S. C. by the Name of Wright's Case.* Adjudged, that the Queen shall have the Presentation.

4. *Quare Impedit* to present to the Vicarage of *St. Martin in the Fields*, in which the Plaintiff declared, that *H. Bishop of London* was seised in Fee of the Advowson in Gross, and collated *T. Lamplugh*, who was made Bishop of *Excester*, by Reason whereof it belonged to the King to present, who presented *W. Loyd*, and he was afterwards made Bishop of *St. Asaph*; and then the King presented *Dr. Tennison*, who was made Bishop of *Lincoln*, and so it belonged to the King to present by his Prerogative; and that the Defendants disturbed him, &c. The Bishop of *London* demurred, and the other Defendant *Dr. Lancafter*, pleaded in Bar, and confessed the Seisin, &c. and Collation of *Lamplugh*, and all the Presentations alledged in the Declaration; and then pleads the Statute 25 H. 8. of Dispensations, and that *Dr. Tennison* was elected Bishop of *Lincoln* on the 20th of December 1693, and that two Days afterwards the Archbishop of *Canterbury* granted him a Dispensation to hold *St. Martin's in Commendum* till the first of July, then next following, (which is more than six Months) that this Dispensation was confirmed by the King on the 23 Decemb. and that *Dr. Tennison* was consecrated on the 25th of Decemb. and averred, that this Dispensation was not contrary to the Word of God, &c. and that *Dr. Tennison* held the Vicarage till the said first Day of July; that the Dispensation was then void, whereupon the Bishop of *London* collated *Dr. Lancafter*; and a Demurrer by the Attorney General to this Plea, the Points argued were, whether the King had a Prerogative to present to a Church of any of his Subjects on the Promotion of their Clerks to a Bishopricks; if he hath, then whether he hath it *toties quoties* a Clerk is made a Bishop, as he had it here three Times successively; then admitting he hath such a Prerogative, whether 'tis not satisfied by his Dispensation to *Dr. Tennison*: It was argued for the Prerogative, that it was very ancient, and justified by several Cases adjudged in

4 Mod.
200. S. C.
Ca. Adj.
164. S. C.

in Point; as *pl. 2. antea*, and *Armiger versus Hilland*, and *Wright versus Bishop of Norwich*, and *Woodley versus Bishop of Exon*, and *Eder versus Bishop of Oxford*: 'Tis true the old Books are not so clear in this Point; but the Reason is, because before the Reign of *H. 8.* our Bishops were confirmed by the *Pope*, but since that Reign the Usage hath been for the King; and admitting that the King hath this Prerogative, then it extends *toties quoties* a Clerk is made a Bishop; and that this Dispensation hath not served his Turn; 'tis true a Dispensation *retinere in Commendam* is *quasi* a Presentation; but the Dispensation in this Case being *Dr. Tennison* was consecrated Bishop of *Lincoln*, the Vicarage of *St. Martin's* was never void till that Dispensation was determined, and that was not till 1 *July* following; besides, all the Books agree, that a *Commendam retinere per tempus semestre* is good; and the *Commendam* in this Case doth not exceed *tempus semestre*, but only for four or five Days: To all which it was answered, that the King had not such a Prerogative; that the King's Prerogatives are Part of the Common Law, and by Consequence very antient; therefore tho' some late Opinions have been for this Prerogative, yet if it hath not been Time out of Mind, 'tis an Encroachment upon the Liberty of the Subject: Now 'tis plain, that it hath not been an antient Prerogative, because 'tis no where to be found where the King or the Pope had it; 'tis not mentioned in the Statute *De Prærogativa Regis*, made in the Reign of *Ed. 2.* nor by *Stamford*, who treats on that Statute; nor in *Bracton*, or any of the old Books; nor in the Year-Books till 11 *H. 4.* but even in that Case the Temporalities were in the King's Hands, and when they are, then the King is Patron, and as such he may present, but not by Virtue of any Prerogative; and so he may likewise, where the true Patron was in Ward. Authorities against this Prerogative are *Dyer* 228. *b. Eliz.* *Sidney's Case*, and *Owen* 144. Then as to his Prerogative to present *toties quoties*, if that is admitted, the Patron hath for ever lost the Presentation; for 'tis but the Incumbent a Bishop, and then the King presents, and so for ever. And lastly, admitting that he hath such a Prerogative, 'tis satisfied by this *Commendam* to *Dr. Tennison*; and this appears upon Consideration had of *Commendams*, of which there are * three Sorts; the *Commenda semelitis*, which is grounded upon a natural Equity, because the true Patron hath so long Time allowed by Law to present; the *Commendam* for Life, and the *Commenda limitata*, which is for Years, or any certain Time; the first is allowed by the Canon Law; the other two were allowed to the Pope, *ex plenitudine potestatis*, before the Statute 25 *H. 8.* and since that Time, to the King *ex plenitudine potestatis suæ prærogativæ*: Now in the principal Case, the King when he granted a *Commendam* to *Dr. Tennison*, it was not according to the Canon Law, because it was for a longer Time than the *Tempus semestre*; and if it was not according to the Canon Law, then it must be by Virtue of his Prerogative, and therefore that serves for his Turn; but Judgment was given for the King in all three Points. 3 *Lev.* 377. *The King versus Bishop of London* and *Dr. Lancaster*.

* Hob.
144.

(K)

Of his Grants and Dispensations by Non Obstante. See Grants of the King, (C) per totum.

1. **I**N Covenant, &c. the Plaintiff declared on the Statute 5 *Eliz.* that Mariners may take Apprentices, and they shall be bound by their Covenants as Apprentices in *London* are by Custom there, their Indentures being enrolled in the next Town Corporate; that King *Cha. 2.* incorporated all Mariners by the Name of the *Trinity Company of Deptford Strond*, and that they might take Apprentices according to the Statute, and that their Indentures should be enrolled by the Corporation of the *Trinity Company*, and that such Enrollments shall be good, non Obstante the Statute 5 *Eliz.* that the Defendant was bound Apprentice to the Plaintiff, being a Mariner, that the Indenture was enrolled before the *Trinity Company*, and that the Defendant departed, &c. And upon a Demurrer to this Declaration, for that the Indenture was not enrolled in the next Town Corporate; it was insisted for the Plaintiff, that the Letters Patents of Incorporation made no Alteration of the Statute, but in the Place of Enrollment of the Indentures, and that was dispensed withal by the Non Obstante; but adjudged, that the King cannot alter the Place of Enrollment, but that it must be according to the Statute; for if he could dispense with the Place, &c. then the Covenants in the Indenture would be according to the Common Law; and if so, then Apprentices are not bound by them. 3 *Lev.* 389. *Poulson versus*

2. The Lord *Brudnell* being a Recusant convict, the Earl of *Westmorland* took a Lease of the King of two Parts of his Estate, in Trust for the Recusant, Non obstante the Act 3 *Jac.* it was objected, that the King could not dispense with an Act made *pro bono publico*, as this was to prevent Recusants maintaining Enemies to the Government; the Court was of Opinion, that since the Trust did not appear by Matter of Record, they would not take Notice of it; but if it had, then the King could not dispense, and the rather, because he was disabled by the Act to grant. *Hard.* 110. *Attorney General versus Earl of Westmorland*.

3. In an Information in the Exchequer-Chamber for the Manor of *Sherborne* in *Yorkshire*; the Point was, *King H. 8.* granted the said Manor, with the Appurtenances, &c. then follow these Words, (*viz.*) *All which are of such a yearly Value as expressed in such a Schedule, Non obstante* any Miscalculation of the true Value, when in Truth they were not of that yearly Value as expressed in the Schedule; adjudged, that the Grant is good; the Reason why a Mistake in the Consideration, or in the King's Title, or the Non-recital of an Estate or Lease in Being, will make his Grant void, is, because by his Prerogative he ought to be truly informed of his Case: but here the *Non obstante* helps those Defects, for 'tis its proper * Office so to do; and if there had been a *Non obstante* in *Arthur Legue's* Case, after the Words *Quia quidem omnia sunt concealata, non obstante* that they are not concealed, all would have passed that was comprised in that Patent. *Hardr. 231. Attorney General versus Hungate.*

4. Information against the Defendant for selling Wine in *Stepney*, contrary to the Statute 12 Car. 2. *¶* 5. upon *Nil dicit* pleaded, the Jury find the Statute 5 Ed. 6 cap. 5. for retailing Wines; they find, that King *James* the first, Anno 9 of his Reign, by Letters Patents incorporated the Company of Vinters in *London*, by the Name of Master, Warden and Freeman, &c. and granted to them and to their Heirs and Successors, that they might always in the said City, and within three Miles of the Walls and Gates thereof, sell Wines by Retail, *non obstante* the Statute * 5 Ed. 6. They find the Statute † 12 Car. 2. by which 'tis prohibited to sell Wine by Retail without License, upon Forfeiture of 5 *l.* for every Offence; and a Proviso therein, that it shall not extend to the Vintners Company; then they find the Fact for which this Information was brought, and make a general Conclusion: The Chief Question insisted on was, whether this Patent was void in its Creation; those who argued against the Patent, held, that it was void in its Creation; for that the Statute 5 Ed. 6. was a Law made for the Publick Good, and therefore the King could not dispense with it by a *Non obstante*; but admitting he might to particular Persons, yet he could not to the whole Company of Vintners, whose Number or Persons he could not know; that the old Rule is, the King cannot dispense with what is *malum in se*; but he may dispense with *mala prohibita*; but this is not so, for there are many *mala prohibita* by Statutes, with which he cannot dispense; as Obstructing the Highway; Diverting a Water-Course, Breaking down a Bridge, Breaking the Assize of Bread and Ale; which is very true, but the Reason is, because as to those Nuisances the Parties who are particularly damaged, may have an Action to recover Damages; but certainly he may dispense with his own Wrong, when 'tis *absque injuria aliorum*: Now where a Forfeiture is incurred for the Breach of a Penal Law, and where no particular Man is injured by the Breach of that Law; in such Case the Forfeiture is the King's Inheritance, equally, as if it had been given to him by Way of Duty, and in all such Cases the King may dispense, (*i. e.*) he makes the Action lawful, which, without such Dispensation had been unlawful: Now in the principal Case no Man had a particular Injury by the Defendant's selling a Pint of Wine without License, and if one Man might bring an Action for the Forfeiture, every Man might, which the Law will not permit; therefore the Forfeiture must be to the King, and if so he may dispense with it; and accordingly Judgment was given for the Defendant in the Exchequer-Chamber. *Vaugh. 330. per totum. Thomas versus Sorrell.*

* in *Bozoun's* Case.

1 Lev. 217.
Hardr. 443.

* See (H) pl. 6.
† 12 Car. 2. cap. 25.

Lapse.

Of the King's Title to present by Lapse. (A) | Of the Title of a Common Person to present by Lapse. (B)

(A)

Of the King's Title to present by Lapse.

- * Or the Incumbent is deprived.*
4 Leon. 217. The Queen v. Bishop of Norwich.
1. **W**HERE the King hath a Title to present by Lapse, and suffers the Patron to present, * who dieth, the King hath lost his Presentation, because he had the first Presentation and not the second; otherwise he may suffer one or more Strangers to present and take his Turn when he pleaseth; and the Statute *De prerogativa Regis*, which enacts, that *nullum Tempus occurrit Regi* must be intended when the King hath a permanent and not a temporary Title, of which Time only is the Substantance. 7. Rep. *Baskerville's Case*. But 'tis otherwise where the King hath an Inheritance in the Advowson; for in such Case an Usurpation for six Months, and *Plenary*, shall be no Bar against his Title, because *nullum Tempus occurrit Regi*. 18 Eliz. Dyer 351.
2. The King had a Title to present by Lapse, by Reason of a Plurality, and he suffered the Patron to present, whose Presentee was inducted, and afterwards he refused to pay his *First Fruits*, by Reason whereof the Church became void *ipso facto*; yet if the Patron present again, his Presentation shall be no Bar to the King, because the Church became void by the Act of the Incumbent, in not paying the *First Fruits*, which may be done by Collusion to deprive the King of his Title; but if the Church became void by the Death of the Incumbent, then otherwise. Mich. 30. Eliz. Owen 5, 89, 90. *The Queen versus Bishop of Lincoln*.
3. The Incumbent on the Church of *Somerby* accepted the second Benefice of *Rapley* without any Dispensation, and held both for twelve Years; *Teverly*, who was the Patron of *Somerby*, and for that it was void by the Incumbent's Acceptance of a second Benefice, presented one *Berry*, who was instituted and inducted, and held it many Years, and died Incumbent; the Queen supposing her Title by Lapse ought to be served upon the Avoidance of *Somerby*, by this Acceptance of a second Benefice, presented one *Cornwall*; but adjudged, that her Presentation was void, because she was entitled to the next Turn only, and that was served by the Patron's Presentation of *Berry*; 'tis true, the Queen might have presented at any Time during the Life of *Berry*; but he dying Incumbent, a new Title is given to the Patron, and by Consequence the Queen hath none. Moor 244, 251, 269. *Beverly versus Cornwall*.
4. If the King hath a Title to present by Lapse, and suffers the Patron to present before him yet the King may present at any Time as long as that Presentee is Incumbent; but if he dies or resigns before the King hath presented, if the Resignation is Real and not by Covin, he hath lost his Presentation. for Lapse is but *pro unica & proxima Vice*. 2 Cro. 216. *Cumber versus Bishop of Chichester*. Mich 17 Eliz. Dyer 339. and *Williams versus Bishop of Bangor*. Godb. S. P.
5. Where there is an Avoidance *de facto*, and the King supposing he hath a Title to present by Lapse, doth accordingly present, when in Truth he hath no such Title, yet the Presentee is an Incumbent as to several Ecclesiastical Things, (*viz.*) to Offering, Tithes, &c. tho' he is not such a perfect Incumbent as the Law requires. Hutt. 66. Hob. 302. S. P.

(B)

Of the Title of Common Persons to present by a Lapse. See Plurality. (B) 5.

1. IF the Ordinary refuse to admit a Clerk for any sufficient Cause, he must give the Patron Notice of his Refusal, for otherwise, tho' the six Months pass after the last Avoidance, the Bishop shall not collate by Lapse, because he shall not take Advantage of his own Wrong, in not giving Notice to the Patron as he ought to do by Law. 12 Eliz. Dyer 293. 16 Eliz. 327. S. P.

2. If the Church become void by the Death of the Incumbent, or by *Cession*, that is by making his Clerk a Bishop, the Patron must take Notice of such Avoidances at his Peril, and must present within six Months; but if the Avoidance is by Resignation, which must necessarily be to the Bishop by the Act of the Party, or by Deprivation, which is by Act of Law, in such Cases Lapse shall not incur to the Bishop till six Months after Notice given by him to the Patron. 18 H. 7. 49. *Kelloway* 16 Eliz. Dyer 327. 12 Eliz. Dyer 293.

3. In *Quare Impedit*, &c. the Bishop entitled himself to present by Lapse upon a Deprivation, for not reading the thirty-nine Articles; and Issue being taken, whether Notice was given by the Ordinary to the Patron; adjudged, that a particular Notice must be given to the Patron himself; that the Incumbent did not read the Articles, and that a general Notice, that the Clerk was not capable of the Benefice, is not sufficient, nor Intimation thereof given in the Church. Hill. 18 Eliz. Dyer 346. *Bacon's Case*. 1 And. 62. *The Queen versus Bishop of Lincoln and Cock*. S. P.

4. The Law hath given the Patron six Months to present after the Church is void, and if he neglects then the Bishop must collate within the next six Months; and if he neglects, then the Metropolitan must collate in the next six Months; and if he neglects, then the King is to present. 4 Rep. 17. 5 Rep. 58. *Specott's Case*; the six Months must be computed, according to the Calendar. 6 Rep. *Catesby's Case*.

5. Adjudged, that before the Statute 21 H. 8. If a Man had a Benefice with Cure, &c. and accepted another with Cure, &c. that in such Case the first was void; but that was by the Ecclesiastical Law, and not by the Common Law, and therefore no Lapse should incur to the Patron, unless he had Notice of this Avoidance; but now by that Statute, if the first Benefice be of the Value of 8 l. and the Incumbent accepts another, the Patron ought to take Notice of it at his Peril, and to present within six Months, because the Avoidance is by Virtue of an Act of Parliament, to which every one is virtually a Party, and therefore every one ought to take Notice of such Avoidance at his Peril. 4 Rep. 75. *Holland's Case*.

6. If a Church continues void several Years by Lapse, the Successor of the King may present: Cro. Car. 258. *The King and Bishop of Canterbury versus Prist*.

7. Tho' a Title by Lapse accrues to the Bishop, to the Metropolitan, or to the King as supreme Ordinary; yet if after such Title the rightful Patron presents, the Bishop ought to admit his Clerk. Hutt. 24. *Booton versus Bishop of Rochester*.

8. The Distinction mentioned in * *Holland's Case*, between an Avoidance by the Canon Law and an Avoidance by the Statute hath ever since been allowed to be Law, therefore Anno 2 Will. 3. in B. R. in Ejectment, the Case was, (viz.) The Bishop of Oxford, supposing he had a Title to present by Lapse to the Rectory of H. in that County, for that Dr. Sambre, who was the Rector thereof, had accepted another Benefice, which Acceptance made the first void by the Canon Law, for that is, that he who takes a Benefice with Cure, &c. (but doth not say of what Value) if he had another before then, he is ipso jure deprived of the first; the said Bishop collated Dr. Hascard to the said Rectory, who brought the Ejectment; but because he could not prove that the rightful Patron had Notice, that Dr. Sambre had accepted a second Benefice, therefore this Collation was held void; for this Avoidance was upon the Canon and not upon the Statute. 2 Will. 3. B. R. *Hascard versus Sambre*.

* Pl. 5.
Cro. Eliz.
811. S. P.
Owen
131. S. C.

Leases.

Of Leases and Grants made by Bishops. (A)	Pleading Leases for Life, and for Years, not good. (I)
Of Leases made by Deans and Chapters. (B)	Of Powers to make Leases. (K)
Of Leases made by Colleges, and upon the Statute 18 <i>Eliz. cap. 6.</i> (C)	Of Leases by Tenants in Tail. (L)
Of Leases made by Chancellors, Prebendaries, and other Ecclesiasticks. (D)	Of Leases for Years, where good, and by what Words; and what passes, and what not. (M)
Of Leases drowned in the Inheritance. (E)	Of Misrecitals and Misnomers in Leases. (N)
Of Endorsements on Leases. (F)	By what Acts surrendered and extinguished, and not. (O)
Leases for Life, good, and by what Words created. (G)	Of the Dates, Commencements and Determinations of Leases. (P)
Leases for Life, not good. (H)	Of Leases at Will. (Q)

(A)

Of Leases and Grants by Bishops. See *Offices.* (A) 7.

Every Archbishop, &c. and other Ecclesiastical Person might, by the Common Law, make Leases of the Lands which they had in Right of the Church, either for Lives or Years, without any Limitation; but they are now restrained by the Statutes 32 *H. 8. cap. 28.* and by 1 and 13 *Eliz. cap. 10.* to make any Leases, but according to these Limitations.

ff. A Bishop, without the Dean and Chapter, may make a Lease in Writing. (2.) It must begin at the Day of the Date. (3.) The old Lease must be absolutely surrendered or ended within one Year after the Making the Second. (4.) There must not be a double Lease in Being at one and the same Time. (5.) The Lease must not exceed twenty-one Years, or three Lives, from the Making. (6.) It must be made of Lands and Tenements manurable, out of which a Rent may be reserved. (7.) And it must be of Lands or Tenements which have been commonly let by the greater Space of twenty Years next before the Lease made. (8.) The usual Rent, or more, must be reserved, which hath been paid for the greater Part of twenty Years before the Lease made. (9.) It must not be made without Impeachment of Waste: All this is required by the Statute 32 *H. 8.* which is commonly called the enabling Statute, because it giveth the Bishop Power to lease for twenty-one Years, or three Lives, with Confirmation.

1. **K**ING *Ed. 6.* granted to a Bishop, and his Successors, the Advowson of the Church of *L.* to hold to his and their proper Use, *after the Death of the Incumbent*; the Bishop made a Lease of the Advowson, to commence after the Death of the said Incumbent, which Lease was confirmed by the Dean and Chapter, and afterwards the Bishop died, and so did the Incumbent; adjudged, that the Lessee had no Title, for the Lease was void against the succeeding Bishop, because his Predecessor had nothing during the Life of the Incumbent, and therefore the Confirmation could not make it good. *Mch. 8 Eliz. Dyer 244.*

2. *Dr. Horne*, Bishop of *Winchester*, granted to *Dr. Dale*, during his Life, a Rent out of the Manor of *Waltham*, *pro consilio impendendo*; the Bishop died, the Rent was arrear, and the Grantee brought an Action of Debt against his Executors; adjudged, that the Grant was void by the Death of the Bishop. 23 *Eliz. Dyer 370. Dr. Dale's Case.*

Moor 253. S. C. 3. A Bishop made a Lease for Years, and then he turned out the Lessee, and made a Lease for three Lives; adjudged, that this Lease is voidable by the Successor, for the Statute 1 *Eliz.* giveth him Power to make a Lease for *twenty-one Years or three Lives*, and therefore he cannot make both. 5 *Rep. 3. Elmer's Case. Pasch. 29 Eliz. 1 Leon. 59*, same Case reported by the Name of *Bunny versus Wright.*

4. A Bishop after the Statute 1 *Eliz.* made a Lease of a *Fair* for three Lives, rendering the ancient Rent, which was confirmed by the Dean and Chapter; adjudged, that the Successor shall avoid the Lease, because a *Fair* is but a Franchise or Liberty not manurable, out of which a Rent cannot be reserved. 5 *Rep. Jewell's Case.*

5. The Bishop of Salisbury granted the Office of Surveyor of a Manor to Two, for their Lives, with the Fee of 6 *l.* 13 *s.* yearly, whereas the Office was usually granted to one, and no more; the Bishop and one of the Grantees died, and the Survivor distrained for the Rent arrear; adjudged, that the Grant of this Office was void by the Act 1 *Eliz.* which restrains Bishops, &c. from making *unusual Grants*; and that this Grant being void, could not be good by any subsequent Act to bind the Successor; adjudged, that by the Common Law such a Grant for two Lives, with the Assent of the Chapter, had been good, tho' it had not been usually granted for two Lives before; adjudged, that the Grant of an antient Office by a Bishop, shall not bind his Successor, unless 'tis confirmed by the Dean and Chapter; and if the Bishop who made the Grant be translated, or deposed or removed, 'tis void against the Successor, tho' he is living who made it. 9 *Rep.* 51. *Bishop of Salisbury's Case*

6. A Bishop, &c. made a Lease for twenty-one Years, and afterwards, there being ten Years of Cro. Eliz. that Lease unexpired, he made a Lease of the same Rectory for three Lives; the Lessee for Years 141. S. G. attorned, then that Lease expired; and the Question was, whether the Lease for Lives was good, or not; and adjudged, that it was void by the Statute 1 *Eliz.* by which 'tis enacted, that the Rent shall be paid yearly during the Term, (*i. e.*) either by Distress or Action, if the Lessee refuses to pay it; but this Rent could not be recovered of the Lessee for Life, during the Continuance of the ten Years, and therefore the Lease for Lives is void by that Statute. 1 *And.* 193. 5 *Rep.* 2. Moor 253.

7. A Bishop made a Lease of Tithes to Three for their Lives *successive*, reserving the antient Rent; his Successor accepted it for several Years, and afterwards made a Lease of those Tithes for * twenty-one Years; adjudged, that the first Lease was void, for tho' the antient Rent was reserved, yet it being upon a Lease of Tithes for Life, there is no Remedy to recover it, either by Distress or Assize; and because 'tis not payable yearly, as the Law appoints, 'tis therefore void, and the Acceptance of the Rent upon a void Lease shall not bind the Successor. 2 *Cro.* 173. *Rickman versus Garth.* Moor 778. *Talentine versus Denton.* S. P. * 1 *And.* 193. S. P.

8. Error of a Judgment in Ejectment in *B. R.* in Ireland; the Case was, the Lands in Question were Parcel of the Temporalities of the Bishoprick of *Offory*, and King *Ed. 6.* in the sixth Year of his Reign, by his Letters Patents under his Privy Signet, directed to the Lord Deputy of Ireland, to the Chancellor, and others of his Counsel, signified, that he had elected and appointed *W. R.* to be Bishop of *Offory*, requiring them to take such Orders for installing him, as were necessary by the Laws of Ireland; the Deputy was removed, and the Chancellor and two others were made Lords Justices, who awarded a Commission under the Great Seal of Ireland to the Archbishop of Dublin, to consecrate the new elected Bishop, which was done accordingly, and the King accepted his Fealty, and the Temporalities were delivered to him; the King died, and his Successor Queen *Mary* signified to the Dean and Chapter, &c. under the Great Seal of Ireland, that she had appointed and elected *N. N.* to the Bishoprick of *Offory*, and this was whilst the former Bishop was still living, and accordingly he was elected and consecrated; and afterwards in the Life-time of *W. R.* entered into the Lands and made a Lease thereof for 101 Years to *R. B.* which was confirmed by the Dean and Chapter; both these Bishops died, then *C. D.* was elected Bishop, who entered upon the Lease, who re-entered, and thereupon the Bishop, who was the Lessor of the Plaintiff, brought the Ejectment, and Judgment was given for him; and now, upon a Writ of Error brought, the first Question was, whether *W. R.* was well created Bishop; and then, whether the Lease made by the second Bishop was good, since the first was still living, and never deprived, so that the second was only Bishop *de facto* but not *de jure*; as to the first Point it was objected, that *W. R.* was never well created Bishop, because the Letters Patents of his Creation were directed to the Lord Deputy and others, but never executed by the Deputy, for he being the principal Person, and removed, all was determined; then, as to the Letters Patents themselves, it was directed, that Order should be taken for his Creation, according to the Laws of Ireland, which must be by *Conge de Eslier*, which was never done; but adjudged, that before the Statute 2 *Eliz.* the King might create a Bishop by his Letters Patents, without any Writ of *Conge de Eslier*, which is only a Form or Ceremony now required by that Statute; adjudged likewise, that the Bishop elected by Queen *Mary*, being never Bishop *de jure*, the Lease made by him to charge the Possessions of the Bishoprick, was void; tho' all judicial Acts, as Admissions, Institutions, Certificates, &c. made by him whilst Bishop *de facto*, were good; so the Judgment was affirmed. *Mich.* 17 *Jac.* *Kevan. O Brian versus Kinton.* 2 *Cro.* 353.

9. By the Statute 1 *Eliz.* cap. 19. 'tis enacted, that all Leases made by Bishops, other than for 1 *And.* the Term of twenty-one Years, or three Lives, from such Time as any such Lease or Grant shall be- 65. gin, &c. shall be void; and by the 13 *Eliz.* cap. 10. The Words are, other than for the Term of twenty-one Years, or three Lives, from the Time as any such Lease or Grant shall be made, &c. shall be void. In Ejectment, the Case was, Archbishop *Grindal* made a Lease for twenty-one Years, &c. to the Plaintiff, dated 6 *Novemb.* 18 *Eliz.* *habendum a datu Indentura*, which Lease was confirmed by the Dean and Chapter, there being at that Time to come four Years of an old Lease then in Being; the Question was, whether this was a good Lease, or whether it was void by the Statute 1 *Eliz.* because it was made for twenty-one Years, to commence *a datu Indentura*, when there were four Years to come of an old Lease, or whether the Confirmation had made it good; and adjudged in the Exchequer-Chamber to be good Lease; but it had been void if it had not been confirmed, and 'tis likewise void against the Successor by the Statute 32 *H. 8.* but not by

by the Statute 1 *Eliz.* because it commenced only by *Estoppel* presently, but not in *Interest* till after the Expiration of the four Years; and it cannot be prejudicial to the Successor, because he will now have two Rents instead of one, for he will have one Rent in *Estoppel* and another in *Interest*. *Moor* 109. *Fox* versus *Collier*.

10. A Lease was made by a Bishop for three Lives, (*viz.*) to one for Life, Remainder to another for Life, and so to a third Person for Life, reserving the antient Rent; the Successor *accepts* the Rent; adjudged, that this *Acceptance* of the Rent shall bind him for his Time, so that he shall not avoid this Lease, which otherwise was voidable. *Cro. Car.* 67. *Owen* versus *Thomas*, and *Wheeler* versus *Danby*. *S. P.*

11. A Bishop granted the Office of Keeper of a Park to one for Life, and the Fee of five Marks yearly for Keeping the same, which was the antient Fee, and also *Pasture for two Horses*, which was never granted before; the better Opinion was, that this Encrease of the Fee, by adding the Pasture for two Horses, being several *in Specie* from the five Marks, did not make the Grant void in the Whole, but *quoad* to that only. *Bridgman* 29. *Chichester* versus *Freeland*. *Lea* 71. *S. C.*

W. Jones 158. 2 Roll. Rep. 450. Palm. 457. Noy 75. *S. C.* 12. If a *Dean* of one Cathedral be elected Bishop of another *See*, with a Dispensation *Retinere* his Deanery *in Commendam*; if afterwards the Bishop of that *See* whereof the new elected Bishop was formerly Dean, doth make a Lease, in such Case the Confirmation by the Commendatory Dean is good. *Evans* versus *Afcue*. *Latch* 233. *S. C.*

13. The Bishop of *Fernes* made a Lease of a Manor, Parcel of his Bishoprick, the Dean having made a *Layman* his Substitute, to give his Assent to all Grants and Leases; the said Substitute, together with three Prebends, confirmed the Lease by fixing the Chapter-Seal to it; afterwards three other Prebends, at three several Times, subscribed their Names to this Confirmation; the Bishop died; adjudged, that the Confirmation was void for several Reasons; first, because it was made by a Substitute who was a Stranger to the Chapter, and it was not made by the major Part of the Chapter; for the Whole consisted of a Dean and eleven Prebends, and the Confirmation was only by three of them; 'tis true, three more afterwards subscribed their Names, but that was at several Times, when they ought to put the Chapter-Seal and give their Assent *capitulariter Congregati*, at one and the same Time, in the Chapter-House. *Davis's Rep.* 43. *Dean and Chapter of Fernes's Case*. 4 *Mich. Dyer* 145. *S. P.*

14. In *Trover*, &c. the Case was, that the Manor, &c. belonged to the *Abbey of Osney*, and that the Lands in Question were thirty Acres of Meadow, Parcel thereof, and that the Abbot used to have *primam vesturam* thereof, from *Lady-day* to *Lammas*, and that one *B.* had the After-grass, &c. that this Manor and Vulture came to the King by Surrender of the Abbey, who granted to the Bishop of *Oxford*, and his Successors, *primam Vesturam* of this thirty Acres, and afterwards the Bishop leased it to the Plaintiff for three Lives, rendering Rent, and died; and whether this was a good Lease to bind the Successor, was the Question; and adjudged that it was not, because *prima Vestura Terræ* is only the first cut of Grass; the Grantee cannot feed it; therefore 'tis not such an *Hereditament* of which a Lease may be made to bind the Successor. *Palm.* 174. *Bishop of Oxford's Case*. See *Dyer* 271.

15. In a Special Verdict, the Case was, the Rectory of *Cherry* in *Montgomeryshire* being in Lease for Years, a concurrent Lease was made thereof *Anno* 11 *Car.* which was confirmed by the Dean and Chapter; afterwards, *Anno* 16 *Car.* *Dr. Mauwaring* being made Bishop of *St. Asaph*, made another concurrent Lease to the Defendant, of this Rectory, rendering the antient Rent, which last Lease was not confirmed by the Dean and Chapter; the Question was, whether this last Lease not confirmed, was void, or only voidable; and it was insisted, that it was voidable only, because the Statutes 32 *H. 8.* and 1 *Eliz.* were made for the Benefit of the Successors; and Leases not warranted by those Statutes are Leases at * Common Law, which in such Case makes them voidable, but not void; the Case was not adjudged. *Hudr.* 154. *Thorowgood* versus *Herbert*.

* *Cro. Car.* 95. Sid. 416. 1 *Lev.* 212. Sid. 416. *S. C.* 16. In a Special Verdict in Ejectment, the Case was, the Lands in Question were Parcel of the Inheritance of the Archbishops of *York*; that a Lease was made thereof in 1604, reserving the antient Rent; that *Anno* 1630, the Lessee surrendered it to Archbishop *Harsenett*, and that ever since it was kept by him and the succeeding Archbishops in Demesne, till the Year 1660, and then *Fruyn* Archbishop of *York* made a Lease of it for twenty-one Years to the Plaintiff; and the Question was, whether this was a good Lease within the Statute 32 *H. 8.* by which Bishops have Power to make Leases for twenty-one Years of such Things which have for the greater Part of twenty Years last past, before the Making thereof, been commonly demised, and in this Case the Lands had not been demised for thirty Years last past before the Making this Lease; two Judges were of Opinion, that this Lease was not good, but may be avoided by the Successor, because the Statute being an enabling Law, ought strictly to be pursued; all enabling Laws imply a Negative, that it shall be so and no otherwise; two Judges of another Opinion, (*viz.*) that the Meaning of this Statute was to restrain Bishops from making Leases of their antient Palaces and Demesne Lands which were never demised before, and that it did not extend to such Lands which had been demised, and had gained an accustomed Rent; for if it should be construed literally, these Inconveniencies might happen, that if a Bishop should keep the Lands in his Hands for the Space of eleven Years, he can never make a good Lease of them afterwards for twenty-one Years; so if he should be dis-

seised

seised, and kept out of Possession for eleven Years, he would be in the same Case. *Raym.* 106. *Pemle versus Sterne.*

17. *Case, &c.* for disturbing him in the Office of Register of the Bishop's Court at *Bristoll*: Upon Not guilty pleaded, the Case was found specially thus, (*viz.*) that *Bristoll* is a new Bishoprick founded in the Reign of *H. 8.* and taken out of the Bishoprick of *Salisbury*; that this is a necessary Office, and hath been granted *separabilibus temporibus*, since the Bishoprick was founded, to Grantees and their Assigns, for three Lives; that this Office was granted to one *Hap.* that *Robert*, late Bishop of *Bristoll* in the Year 1639. in Consideration of the Surrender of that Grant, did grant this Office to *Israel Pownell* and his Assigns, for the Lives of *Nathaniel*, *Edward* and *Israel Pownell*, and that Livery and Seisin was made, &c. which Grant was confirmed by the Dean and Chapter, and that the Bishop is dead, but *Edward* was still living; that the present Bishop granted it to the Plaintiff for Life, and Livery and Seisin was made; that this Grant was likewise confirmed by the Dean and Chapter; they found the Statute 1 *Eliz.* (*viz.*) that all Grants made by Bishops of Lands or Tenements, &c. to their Bishopricks belonging, other than for 21 Years, or 3 Lives, shall be void and so make a general Conclusion; it was argued for the Plaintiff, that this Lease for 3 Lives could not bind the Successor, because the Statute enjoins, that such Leases must be made of the Lands usually granted; which Words import, that they have been granted Time out of Mind, which cannot be in this Case, because this Bishoprick was founded within Time of Memory; and tho' it was taken out of the Bishoprick of *Salisbury* yet the Prescription in that old Bishoprick will not extend to this new one, but remains there still; to which it was answered, and so adjudged, that as to the granting Offices, there was no Difference between an old and a new Bishoprick; for they do not make such Grants by Virtue of any Prescription, but as they are Owners of the Estate, and seised thereof; besides Offices of Necessity, are not restrained by any Statute; and this is such an Office, and it cannot be a Prejudice to the Successor to have an able and skilful Officer in his Court, as soon as he is Consecrated: It was for this Reason that the Grant of the Register's Office in Reversion was held good in *Young and Fowler's Case*; and 'tis a Sign that this is an Office of Necessity, because it was so granted before the Statute 1 *Eliz.* for the Jury have found, that it hath been so granted *separabilibus temporibus* since the Bishoprick was founded in the Reign of *H. 8.* 'tis true, in *Lamb and Walker's Case*, the Grant was held void, but it was, because it had not been so granted before the Year 1609. which was long after 1 *Eliz.* Now the Jury should have found, that this Office was usually granted for three Lives before 1 *Eliz.* for the Finding that it was so granted *separabilibus temporibus* after the Bishoprick was founded, is defective, because that may be true, and yet not till after 1 *Eliz.* for which Reason the Parties agreed to take a *Venire facias de novo.* 2 *Lev.* 136. *Ridley versus Pownell.*

18. In a Special Verdict, the Case was, that the Bishop of *Excester* was seised of the Manor 2 *Mod.* of *Burniell*, in which there was another Manor called *Treccar*; they find the Statute 1 *Eliz.* in 57-*hac verba*, and that the old accustomed yearly Rent reserved upon a Demise of both these Manors was 67 *l.* 1 *s.* 5 *d.* that *Joseph Hall*, Bishop of *Excester*, demised both these Manors to one *Prowse* for 99 Years, determinable upon three Lives, reserving the old Rent yearly of 67 *l.* 1 *s.* 5 *d.* that *Prowse* assigned to *Nosworthy*, excepting the Demesnes of *Treccar*; that *Nosworthy* surrendered both the Manors to the Bishop, who redemised the same to him, excepting the Demesnes of *Treccar*, and excepting one Farm, Parcel of the Manor of *Burniell*, and this for three Lives, reserving the old Rent of 67 *l.* 1 *s.* 5 *d.* yearly; the Question was, whether this second Lease was good, and that depended upon another Question, (*viz.*) whether this was the old accustomed yearly Rent within the Intention of that Statute; the Court was divided, for *Vaughan Ch. Just.* and *Ellis* were against the Lease, and *Windham* and *Atkins* for it; but *Vaughan* dying, and *North Ch. Just.* succeeding him, Judgment was given, that the Lease was good. 1 *Mod.* 203 *Thred-needle versus Lynham.*

19. In *Covenant* the Plaintiff declared, that the Bishop of *Salisbury*, who was Predecessor to the Defendant, being seised in Fee, demised to the Plaintiff for 21 Years, reserving the antient Rent, and covenanted for himself and his Successors, to discharge all Publick Taxes; and that since the Defendant was made Bishop, a Tax was assessed on the Land by Act of Parliament, which the Plaintiff paid, and the Defendant refused to discharge it; and upon Demurrer to this Declaration, the first Objection was to the Form of it, for that he declared, that the Predecessor Bishop was seised, and did not say, *in jure Ecclesiæ*, for he might be seised in his Natural Capacity; therefore the Declaration was held ill; as to the Matter in Law, the Question was, whether this was such a Covenant as is incident to a Lease, which a Bishop hath Power to make by the Statute 32 *H. 8.* it was said by *Ch. Just. Hale*, that if this had been an antient Covenant in former Leases, it might have been good to bind the Successor, so as to discharge the Lessee from Payment of *Pensions*, *Tiths*, &c. but then it must have been averred to be an antient Covenant, which this could not, because this Way of Taxing lately came in; but that this Covenant (be it as it will,) would not avoid the Lease 1 *Vent.* 223. *Davenant versus Bishop of Salisbury.* 2 *Lev.* 68.

(B)

By Deans and Chapters.

1. **I**F the Patron and Ordinary had by Deed granted to the Parson, that he might grant a Rent-Charge out of the Glebe, such Grant of the Parson would have bound his Successor's at Common Law, before the restraining Statutes, tho' it had not been confirmed by the Dean and Chapter, for in such Case the Ordinary alone might have agreed to the Grant made by the Parson, either by his License precedent, or by his Confirmation subsequent, without the Confirmation of the *Dean and Chapter*, because they could not intermeddle in any Thing which the Bishop did as Ordinary; but yet in such Case the License or Confirmation had not been good to have made the Charge perpetual, unless the Patron had a Fee simple in the Patronage. 9 *Eliz. Dyer* 252.

2. If a Bishop hath two Chapters, both must confirm his Leases. 11 *Eliz. Dyer* 282.

3. The *Antient Rent* of twenty Quarters of Corn, reserved to a *Priory*, came to the Crown by the Statute of *Dissolutions*; adjudged, that a Lease made thereof was good by the Statute 27 *H. 8. cap. 21.* by the Word *Hereditament*, for it may descend or escheat. 7 *Eliz. Owen*. 32.

4. The Deanery of *W.* was dissolved by Act of Parliament, and a new Dean made of a new erected Deanery, to which the Possessions of the Prebend of *C.* were annexed; this new Dean having taken upon him to be a Prebendary in the same Church where he was Dean, was deprived by the Bishop in his Visitation, for taking two Dignities in one Church; and another Dean was made; but upon an Appeal the first Dean was restored, and then some Leases which he had made before his Deprivation, were confirmed by the Bishop and Chapter; afterwards, upon another Appeal this Dean was removed, and the other was restored again, who would have avoided those Leases; but adjudged he could not, for by the Confirmation of the Chapter those Leases were made good, and there was no Occasion to have them confirmed by the Bishop, or by the King, as was pretended, because a Deanery is a Spiritual Promotion, and not a Donative. *Pasch. 10 Eliz. Dyer* 273.

5. The Dean and Chapter of *Worcester* made a Lease of Lands which they had in Right of the Church, to *L. E.* for the Life of three other Men, reserving the antient Rent half yearly; adjudged, that this is not void by the Statute 13 *Eliz. cap. 10.* for tho' the Lands were heriotable, and the Heriot was omitted in the Lease, yet because the annual Rent was reserved, and the Heriot was not a Thing annual, or any ways depending on the Rent, the Lease was good; and tho' the antient Rent was payable quarterly, and by this Lease it was to be paid only half-yearly, yet the Statute is sufficiently satisfied by the Payment of the Rent *yearly*, which Word was omitted in my *Lord Montjoy's Case*, which see *Postea* Lease by Tenant in Tail. 6 *Rep.* 37. *Dean and Chapter of Worcester's Case.*

6. The Warden and Fellows of *All-Souls College* in *Oxon*, made a Lease for 20 Years; it was objected, that the Lease was void, and not warranted by the Statute 13 *Eliz. cap. 10.* which makes all Leases void, *other than for twenty-one Years*; but adjudged, that the Statute was made to abridge the long Leases heretofore made by Colleges, and to limit them to to a shorter Measure of Time, (*viz.*) to twenty-one Years, or three Lives; but not to restrain them punctually to that Time, so that they could not make them for any shorter Term; and tho' it was not found that any Rent was reserved on this Lease, 'tis not void for that Reason, because, if the other Side will take Advantage of it, he ought to plead the Statute, and shew it; besides, 'tis not void against * Warden who made it, but against his Successor, tho' no Rent is reserved. 1 *Leon.* 306, 314. *Carter versus Cleypole.*

* Hardr.
326.

7. A Prebend made a Lease of Lands, Parcel of his Prebendary, with an Exception of Oaks, Ashes, &c. and this Lease was confirmed by the Archbishop, who was Patron, but not by the Dean and Chapter; adjudged, that the Confirmation was good, but this Prebend having made a second Lease, without any Exception in it, that Lease was held void upon the Statute 13 *Eliz. cap. 10.* 3 *Bulst.* 290. *Smith versus Bowles.*

2 Cro.
458. S. C.

8. If the Parson and Ordinary make a Lease for Years of the Glebe to the Patron himself, and afterwards the Patron assigns this Lease to another, such Assignment is good, and the Confirmation of the first Lease made to himself, and his Deed, doth enure to a double Intent, (*viz.*) to make the Assignment of the Lease good, and to a Confirmation of that Lease to the Assignee. 5 *Rep.* 15.

9. A Parson made a Lease for forty Years, the Bishop of *London* being Patron and Ordinary confirmed it under his Hand and Seal, without the *Dean and Chapter*; the Parson died, and the Bishop collated another, and he made a new Lease, which was well confirmed; adjudged, that the first Lease was good. 19 *Eliz.* 359.

10. In Ejectment there was a special Verdict, in which the Case was, The Dean and Chapter of *E.* made a Lease of Lands to *W. R.* rendering Rent to be paid at the Chapter-House in *E.* and in Default thereof on the Days on which it was reserved to be paid, that the Lease should be void; the Rent was not paid, tho' demanded at the Chapter-House; then the Dean and Chapter made another Lease to *R. R.* for forty Years, &c. to which they fixed their Common Seal, and a Letter

Cro. Eliz.
167. S. C.

of Attorney to *D. D.* to make Livery, &c. which was done accordingly; it was objected, that this Lease was not good, because *W. R.* the first Lessee, was then in Possession; but adjudged, that the Lease was good before any Livery made by the Attorney, and before any Entry made by the Dean and Chapter; for a Deed of a Corporation is a perfect Deed by the Date and Seal, before any Delivery; for as to such Deeds a Delivery is not necessary, neither is any Entry requisite by a Corporation to avoid a Deed. *Hill. 31 Eliz. 2 Leon. 97. Willis versus Jermin. Possess. Verdict. (1) 2. S. C.*

11. By the Statutes 1 & 13 *Eliz.* Bishops and other Ecclesiastical Persons are restrained to alienate or discontinue any of their Livings, &c. The Master and Fellows of Magdalen College after the Statute 13 *Eliz.* conveyed a House, Parcel of their Possessions, to the Queen in Fee, upon Condition, that she should convey the same to *L. E.* in Fee; the Queen accordingly granted it unto him; adjudged, that the Queen is not exempted out of the general Words of Statutes made either for the Advancement of Religion or Learning, or for the Relief of the Poor, or to suppress Wrongs; and the Statute 13 *Eliz.* was made to suppress Dilapidations, &c. and that the Master and Fellows are within the said Act, and disabled to grant in Fee; and then the Queen could not take from them who were so disabled, tho' 'tis not a Disability *simpliciter*, but *secundum quid*; for the Master and Fellows shall not avoid this Grant, but his Successor shall do it. *Magdalen College's Case. 6 Rep. 60.*

12. The Plaintiff declared, that the Abbot and Convent had made a Lease for Years, and this was held good, tho' it had been better if the Declaration had been, that the Abbot, with the Assent of the Convent, had leased, because the Convent being dead Persons in Law, cannot properly be said to make a Lease; but the Dean and Chapter must of Necessity join in making one, for they are able Persons. *Godb. 211. Ireland versus Barker.*

13. In a *Quare Impedit*, the Case upon a Demurrer was, The Chapter of the Collegiate Church of Southwell, was seised of the Advowson of *H. in Gross*, in the Right of their Church, and having presented one *Esco*, they granted the next Avoidance to *Ed. King*, from whom by mesne Assignments it came to *E. Bligh*, who after the Death of *Esco* presented the Defendant; the Points were, whether the Grant of the next Avoidance was restrained by the Statute 13 *Eliz. cap. 10.* and whether that Statute is a general Law, for it was not pleaded; adjudged, that tho' the Statute mentions *Deans and Chapters*, and tho' in this Case there is a Chapter, and no Dean, yet the Grantors are within the Statute; for the Words *Deans and Chapters* shall be taken disjunctively, because if they are to be taken jointly, then a Dean alone could not be within this Law, in respect of those Possessions which he holds in Right of his Deanery: Now this Statute restraining all Grants, Gifts, &c. other than such on which the old Rent is reserved, this Grant of the next Advowson must be void *ab initio*; and three of the Judges against one held this was a general Law, because it concerned all the Clergy. *1 Mod. 204. The Chapter of Southwell versus Bishop of Lincoln.*

(C)

By Colleges, &c. upon the Statute 18 *Eliz. cap. 6.*

1. THE Statute 18 *Eliz.* prohibits the Master and Fellows of Colleges, &c. to make any Leases for Life or Years, unless a third Part of the antient Rent at least, be reserved and paid in Corn, for the Use of the College, otherwise the Lease to be void; a Lease was made by a College of the Rectory of *St. Lawrence's Church* in London; adjudged, that tho' the Tithes in London do not consist in Corn, but in Money, and tho' in such Case there must be a Defect of this Special Reservation in Corn, yet the Lease is good; because the Profits of this Rectory did not consist in Tithes, which renew yearly, and are of Common Right, but of Tithes which are customary in London, and against Common Right. *1 Leon. 19. Kemp versus Hollingbroke.*

2. The Dean and Canons of *Windfor* agreed, to cast Lots for certain Leases of Lands of the Church, and to have Assurances made of the same, that after the Lots were cast every one might know what Lands he should have, and to have Assurances made accordingly; and in order thereunto the Body Corporate entered into a Bond of 500 *l.* to every Canon, that he should have a Lease, and the Canon on the same Day entered into another Bond to the Corporation to pay them 510 *l.* if they made the Lease to him, &c. and it was proved, that they agreed amongst themselves, that one 500 *l.* should be stopped for the other, and that the Corporation was only to have 10 *l.* for the new Lease; adjudged, that the Bond by the Corporation of 500 *l.* to each Canon, was void by the Statute 18 *Eliz.* it being executed for making a Lease contrary to the Statute 13 *Eliz.* See *Stat 43 Eliz. Moor 789. Dean and Canons of Windfor versus Penrin.*

(D)

By Chancellors, Prebendaries, and other Ecclesiasticks. See *Leases*.
(A) 4.

1. A Prebendary made a Lease for Years of Part of his Prebend, and this was confirmed by the Dean and Chapter; but because it was not confirmed likewise by the Bishop, the Lease was adjudged void, and the Reason is, because the Bishop is Patron and Ordinary of every Prebend. *Pasch. 33 H. 8. Dyer 60.*

The Question was, whether a Lease made by a Prebendary was within the Statute 32 H. 8. cap. 28. because that Statute mentions a Seisin in Right of the Church, and a Prebendary is seised in Right of his Prebend; but adjudged he is within the Equity of the Statute 4 Leon. 51. *Aſton verſus Pitcher.*

2. A Prebendary, who was seised of a Rectory in Right of his Prebend, made a Lease thereof for seventy Years; the Bishop, who was Patron of the Prebend, granted the next Avoidance thereof to G. D. which Grant was confirmed by the Dean and Chapter; then G. D. the Grantee of the next Avoidance confirmed the aforesaid Lease to the Lessee; then the next Avoidance of the Prebend came to G. D. who presented N. W. and he was installed, and afterwards died, and then the Bishop collated K. to the Prebend, who was instituted and inducted into the Rectory, and made a Lease to the Plaintiff; and the Defendant claimed under the first Lease made by the then Prebendary, and confirmed by the Grantee of the next Avoidance; but adjudged, that his Confirmation was of no Effect, because N. W. came in by a Grant of the next Avoidance, confirmed by the Dean and Chapter before the Grantee confirmed the Lease, and by Consequence that Grant being compleat, could not be subject to his Confirmation; and therefore when K. entered on the Rectory in Right of his Prebend, he was seised in his Demesne as of Fee, and did thereby totally defeat the Lease, so as it could never take effect against any Successor. *Hob. 7. Spendlos verſus Birckett.*

3 Bullf.
201.

* 13 Eliz.
cap. 20.
14 Eliz.
cap. 11.

3. In Covenant, the Plaintiff declared, that T. T. the Defendant was Parson of D. and covenanted with the Plaintiff, that he should have the Tithes of certain Lands in the Parish for three Years; that afterwards he (the Defendant) resigned, and another Parson was inducted, by Reason whereof he (the Plaintiff) could not have the Tithes; the Defendant pleaded the Statute * 13 and 14 Eliz. and upon a Demurrer to the Plea, it was adjudged ill, because the Defendant did not plead, that he was absent from his Parsonage for eighty Days, &c. for otherwise his Covenant is not made void by these Statutes. 1 Roll. Rep. 403. *Rudge verſus Thomas.*

4. A Parson made a Lease of his Rectory for sixty Years, which was confirmed by the succeeding Bishop and Patron, and neither of them Bishop or Patron at the Time when the Lease was made; yet adjudged, that the Lease thus confirmed was good. *Cro. Car. 27 Sir Rob. Bamſter's Caſe.*

5. In an Action on the Case upon an Issue directed out of the Exchequer-Chamber, to try whether a Lease made by the Petty Canons of St. Paul's, of the Rectory of St. Gregory for 21 Years, was good, or not: The Case upon the Evidence appeared to be thus, (viz.) Anno 13 Car. 2. the said Petty Canons made a Lease to the Plaintiff and his Wife of the Rectory of St. Gregory's for twenty-one Years, rendering Rent of 40 l. per Annum, and the Plaintiff covenanted to pay yearly a Couple of Capons, or 6 s. 8 d. in Money; and it appeared, that former Leases had been made of this Rectory, reserving several Rents under 40 l. per Annum; but in the last Lease, that was made before the Lease now in Question, there was 40 l. per Annum Rent reserved, and a Couple of Capons; adjudged by Hale Ch. Baron and the Court, that the last Rent reserved upon the last Lease shall be taken to be the accustomed Rent within the Statutes 32 H. 8. cap. 28. and 13 Eliz. cap. 10. because the first Rent reserved upon the first Lease made after these Statutes hath been altered since that Time; but that the Rent reserved upon this last Lease now in Question, was not the accustomed Rent, because that was 40 l. per Annum and a Couple of Capons; so that the Capons being reserved they were Parcel of the Rent: 'Tis true the Lessee covenanted to pay them yearly, but that Covenant will not amount to a Reservation, because it will not bind the Wife, if she survive her Husband; they held likewise, that a Lease of Tithes for twenty-one Years, is good within these Statutes; but not for three Lives, because Debt will not lie for the Rent. *Hudr. 325. Morris verſus Antrobus.*

6. Upon a Trial at Bar by a Devonshire Jury, the Case was, a Prebendary of Salisbury, Anno 4 Ed. 6. made a Lease for 99 Years of the Rectories of Kinsanton and Telamton in Devon, to commence after a Lease then in Being, which Lease was confirmed by the Bishop and Dean and Chapter of Salisbury, and accordingly enjoyed by the Lessee, which at this Time was one Pollexfen; and it was adjudged, this was a good Lease, tho' it was not confirmed by the Bishop of Exeter, in whose Diocese these Rectories were; 'tis true, they are not within the Diocese of Salisbury, but because they were granted by H. 2. and the Bishop of Exeter then being, and annexed to a Prebend of Salisbury, they were now Parcel of the Prebend there; and therefore tho' they are inducted by the Bishop of Exeter, yet they are instituted by the Bishop of Salisbury, and take an Oath of canonical Obedience to him; and a Lease thereof shall not incur to the Bishop of Exeter: 'Tis true, the Lessee had employed some Friends to take a Lease of some

ſuc-

succeeding Prebendaries; but that shall not be a Surrender of the old Lease; for a Lease in Trust made to a Friend *in majorem cautelam*, shall not be taken to be a Surrender of the old Lease. *Sid. 75. Gie versus Rider.*

7. In a Prohibition, the Case was, A Prebendary, who had a peculiar Jurisdiction, made a Raym. Lease for Years of his Prebend *with all Profits, Commodities and Advantages thereunto belonging*; ^{89.} the Question was, whether the Ecclesiastical Jurisdiction passed by these Words to the Lessee, so as he could make a Commissary to hold Courts; the Court was divided, two Judges being of Opinion, that the appointing a Commissary was annexed to the Spiritual Person, and not to the Lay Body of the Prebend; and two of another Opinion; therefore they ordered, that the Plaintiff should declare on his Suggestion, and that the Defendant should demur to it, that it might come judicially before the Court. *1 Lev. 125. Sherrock versus Boucher.*

8. In a Special Verdict in Ejectment brought by the Successor of a Prebendary, the Case was; ^{2 Salk. 413.} The former Prebendary made a Lease, &c. *for Life, habendum a datu*; the Question was, whether this should bind his Successor; and it was insisted, that it should not, because, by the Statute 13 Eliz. cap. 10. those Leases by Ecclesiastical Persons are only good, which are to commence from the *Time of the Making*, but here the *Time of the Making* is excluded, so that 'tis a Lease in Reversion, and therefore void, for 'tis not to commence in Interest till the Day after the Day of the Date or the Making, for *habendum after the Date* is the same as *habendum after the Day of the Date*: But this was denied on the other Side; for the Word *Date* is equivocal, 'tis often taken for the *Day* on which the Indenture was dated; and if it should be so taken in this Case, then, 'tis true, this Deed would be void; but in Propriety of Speech, the *Date* of a Deed is the *Delivery* thereof, for *Datus* in *Latin*, taken either as a Participle or Substantive, signifies *delivered* or *Delivery*, so that this Lease commenced from the *Delivery*, and then 'tis good; and this would be a more reasonable Exposition than to make all void: Serjeant *Levinz.* tells us, that the Judges were not settled in their Opinions; but at last, upon Consideration of *Cleyton's Case*, of *Osborne and Rider's Case*, of *Mellow and May's Case*, of *Fox and Collier's Case*, of *Bacon and Williams's Case*, of *Berwick's Case*, and of *Dyer 286, 288. b. Moor 40, and Latch 54*, they held the Lease was good. *3 Lev. 438. Hatter versus Ash.*

9. Ejectment for the Rectory of *Kingsbury*; at a Trial at Bar it appeared, that it belonged to *Lev. 112.* the Chancellor of *Wells*, which he and all his Predecessors had as *Chancellors of that Church*; and by Consequence the Lease which he made to the Plaintiff is not good, because not confirmed by the *Dean and Chapter*; but adjudged, that tho' he had this Rectory as *Chancellor*, yet his Lease is good against the Successor, tho' not confirmed, &c. for he is not *inter minores ordines*; no more is the *Præcentor of Sarum*, who is the first of the *Choir* all over *England*. *Sid. 158. Bisse versus Holt. 3 Cro 350. Watkinson versus Man. S. P. of a Prebendary.*

10. In a Special Verdict in Ejectment, the Case was, A Vicar being seised of an House, &c. ^{2 Lev. 61.} Parcel of the Endowment of his Vicarage, and situate in a *Market-Town*, made a Lease thereof for three Years; and after *one Year was expired*, he made another Lease thereof, dated 12 Sept. for twenty-one Years, to commence *from Michaelmas following*, rendring Rent *during the Term*, and payable at the usual Feasts, or *within ten Days after*, which Lease was confirmed by the Archbishop, Patron of the Vicarage, and by the Dean and Chapter of *Canterbury*; the Question was, whether this Lease should bind the Successor; it was objected, that it was void, because the Rent was reserved on the usual Feasts, or *within ten Days after*, so that the Term ending at *Michaelmas* would be expired before the last Payment was due, for that was not until ten Days after; but adjudged, that because the Reservation of Rent was *during the Term*, the Lessee shall not have ten Days after *Michaelmas* in the last Year; but adjudged, that this was a *Lease in Reversion*, and so not warranted by the Statute 14 Eliz. which excepts Leases in Reversion, and this was such a Lease, because it was to commence at a Day to come, (*viz.*) at *Michaelmas next after the Date*; but if it had been to commence presently, the Court seemed to incline that it had been void, because there was another Lease in Being, and for so many Years as were to come of that Lease, it would be a Lease in Reversion; and the Statute 18 Eliz. which allows a concurrent Lease, so that there be not above three Years of a former Lease in Being, extends only to the 13 Eliz. for 'tis recited therein, and makes no Alteration of the Statute 14 Eliz. and this was the Opinion of *Hob.* in *Crane and Taylour's Case*, fo. 269; but *Hale* was of another Opinion, (*viz.*) If the Lease had been to commence presently, it had been good and a concurrent Lease, because there was less than three Years in Being of the former Lease, and that the Statute 18 Eliz. qualifies Leases made upon the 14 Eliz. as well as those made on the 13 Eliz. because the 14 Eliz. doth not repeal the 13 Eliz. but is an Appendix to it, and enlarges it as to Houses in *Market-Towns*; and therefore the 18 Eliz. reciting the 13 Eliz. doth by Consequence recite the 14th Eliz. and there is such a Connexion between all the Statutes concerning those Leases by Ecclesiastical Persons, that they are to have Construction by one another. *1 Vent. 244. Baily versus Murin.*

(E)

Drowned in the Inheritance, and where not drowned.

1. **I**N Replevin, &c. the Case was, *T. Smith* was a Copyholder, and the Lord of the Manor made a Lease of the Copyhold Lands to *W. W.* and granted the Reversion to *I. M.* and his Heirs; the Lessee assigned his Interest to the Copyholder himself, who accepted the Assignment; adjudged, that by the Acceptance of this Assignment the Copyhold Estate is determined, because an Estate at Common Law, and by the Custom, cannot subsist in one Person at the same Time; and because an Estate at Common Law cannot merge in a customary Estate, therefore the Estate at Common Law, (*viz.*) *The Term for Years* shall take Place before the customary Estate. 1 *And.* 191. *Smith versus Lane.*

2. Lease of 100 Years to *N.* the Lessor granted the same Lands, and in the same Year, to *C. B.* in Fee, who leased it to *R. W.* for twenty-one Years; afterwards the Lessee for 100 Years assigned that Term to *C. B.* who had the Inheritance, and then the said *C. B.* granted a Rent-charge of 20 *l. per Annum* to *L. E.* and died; adjudged, that the Term for 100 Years was drowned in the Inheritance, for otherwise it would avoid the second Lease for twenty-one Years, and that Term being in *C. B.* the Grantor is now Subject to the Rent. 2 *Cro.* 619. *Salmon versus Swane.*

3. Lease for Years to *R. H.* who entered into a Bond to the Lessor, with a Condition to pay an Annuity for a certain Term of Years to *B. G.* if she so long live, and the Lessee shall enjoy the Lands; afterwards the Lessee surrendered his Term to the Obligee, so that it was drowned in the Inheritance, yet it shall have Continuance as to the Payment of the Annuity. *Poph.* 39. *Forth versus Holborough.*

4. The Lessor made a Lease for 100 Years, the Reversion was afterwards granted to *T. S.* for Life, afterwards the Lessee assigned his Estate to him who had the Reversion in Fee; and it was adjudged, that tho' the Term for Years and the Fee-simple met in one Person, yet it was not destroyed, because by Possibility the intervening Estate, (*viz.*) the Estate for Life, might out-last the Term; and this was Alderman *Garraway's* Case. See *Hardres* 417.

5. In a Special Verdict in Ejectment, the Case was, *Cook* being seised in Fee, made a Lease to *Fountaine* for ninety-nine Years, and not long after he by Lease and Release conveyed the Reversion and Inheritance to the same *Fountaine* and *T. S.* to the Use of *Cook* and the Heirs of his Body, Remainder over; the Question was, whether by this Conveyance all or any Part of this Lease was drowned in the Inheritance; and for the Plaintiff it was argued, that if any Part of it is merged, it can be only a Moiety in *Fountaine*, for the other Moiety was conveyed to a Stranger; that the true Reason of Merger is not the Admitting that the Lessor hath a Power to convey, but 'tis because two such different Estates cannot stand together in the same Person; but here is no Merger at all, because the Statute 27 *H. 8.* of Uses, saves the Right of him who is seised to the Use of another; to which it was answered, that the Reason of Merger is, because the Lessee hath admitted a Power in the Lessor to convey the Whole, tho' a Moiety was only in himself; 'tis true, the Statute saves the Right of him who is seised to the Use of another; but here being a Conveyance by Lease and Release, the Lease for ninety-nine Years is merged by his Accepting the Lease for a Year before he became seised by the Release to any Use at all, and so not within the Statute; it was not adjudged. 2 *Lev.* 126. *How versus Stile.*

(F)

Of Endorsements on Leases.

1. **A** Lease may be determined by Force of a Condition endorsed before the Sealing and Delivery of the Deed, as well as by Force of a Condition within the Deed it self. 2 *Cro.* 453. in *Griffith and Stanhope's* Case.

(G)

For Life, good; and by what Words created, &c.

1. **A** Lease was made to a Chantry-Priest, *habendum to him and to his Executors*, and afterwards a Release was made to him and his Successors; adjudged, that he shall have an Estate for his own Life, for the Release shall enure according to the Lease, which was to him and his Executors, and not to his Successors. *Mich.* 1 *Jac.* *Wake's* Case.

2. Husband and Wife seised of Lands to them for Life, and the Heirs of the Husband bargained and sold the same to *H. R.* and his Heirs, upon Condition, that if they paid 100 *l.* to the said *H. R.* on such a Day, that it should be lawful for them to have their former Estate; and that after such Payment, the said Bargain and Sale, and all Assurances by them made, should be to the

Use of the Husband and his Heirs; afterwards the Husband and Wife joined in a Fine to the said *W. R.* and declared the Uses thereof, as in the said Deed of Bargain and Sale; then the Husband died, and the Widow paid the Money and entered, and married the Plaintiff; adjudged, that he had a good Title, during the Life of his Wife, for tho' she was not mentioned in that Limitation where the Estate was limited to the Use of her Husband and his Heirs, yet that Limitation shall not controul her Estate for Life; for the Condition it self, and all the Clauses in the Deed stood well with her Estate for Life. *Cro. Eliz. 744. Southcot versus Man.*

(H)

For Life, not good.

1. **T**ENANT in Tail of certain Lands entered into an House built on those Lands, and said, *Brother, I here demise to you my House as long as you live, &c.* adjudged, this was no Estate for Life, because it wanted *Livery*, for to every Lease for Life is requisite either an Act which the Law shall adjudge a *Livery*, or apt Words which amount to it; but if he had delivered any Thing which came off the Land, it had been a good *Livery*; or if he had said, *Enter on the Land and enjoy it during your Life*, it had been a good *Livery*. 6 Rep. 26. *Sharp's Case*.
2. Lease for Life; provided, that if the Lessee die within sixty Years, that his Executors shall have so many of those Years as shall be to come after his Death; adjudged no Estate for Life, by Reason of the *Incertainity*, and the Proviso made it only a Covenant. *Dyer 150. Gravenor's Case*.

(I)

Pleading Leases for Life and for Years, not good.

1. **D**EBT upon Bond, dated 10 November; the Defendant pleaded an Indenture dated the same Day, by which the Plaintiff demised to the Defendant the Rectory of *B.* for a certain Term, paying so much Rent, in which Deed the Defendant covenanted to discharge the Plaintiff from all Charges, &c. during the Term, and that he would repair the Buildings, and that he would not assign the Term without Licence of the Plaintiff; and then he shewed, that he entered and paid the Rent, and also five Marks, which were all the Charges, &c. and demanded Judgment *si actio*; and upon Demurrer to this Plea it was adjudged for the Plaintiff, because the Defendant did not shew the Place where the five Marks were paid. *Dyer 27.*
2. *Archbishop Cranmer, Anno 25 H. 8.* made a Lease of the Manor of *H.* to one *P.* for forty Years, which Lease was confirmed by the *Dean and Chapter*; afterwards, *Anno 30 H. 8.* he granted a Rent-charge of 10 l. per Annum to *Dr. Butts*, issuing out of the said Manor, for fifty Years, which Grant was likewise confirmed; the Doctor assigned over the Rent-charge to his Nephew; and all this Matter appearing in the Pleading, it was adjudged ill, because no Place was alledged where the Confirmation was made; neither was it pleaded, that the Rent was assigned or granted over to the Nephew by Deed, and it cannot be assigned over without Deed. *Dyer 139. Cranmer's Case Hutton 54. Lightfoot versus Brightman. S. P.* but there it was cured by Verdict.
3. Trespass for Entering his Close, &c. the Defendant, as to the Entry, &c. pleaded, that *G.* was Parson of *B.* within which Parish the Close was; and by Deed under his Hand and Seal demised the Tithes of the said Close to him for three Years, by Virtue whereof he entered, &c. and upon Demurrer this Plea was held ill, because he justified under a Lease for Years, and did not say *Hic in Curia prolat'*. 2 Cro. 360. *Rolls versus Boulton.* See 10 Rep. 92. in *Dr. Leyfeild's Case. S. P. Hill. 22 Car. B. R. Ret. 1857. Jones versus Young. S. P.*
4. Debt by an Executor, in which he declared, that his Testator was in his Life possessed of Land for a Term of Years, and being so possessed, assigned Part of the Term to another, reserving Rent; and that the Assignee made an Assignment of his Interest to the Defendant, that the Testator died seised of the Reversion of the Term, and that the Plaintiff, who was his Executor, brought an Action of Debt for the Rent arrear; upon Demurrer to the Declaration it was adjudged against the Plaintiff, because it did not appear in his Declaration, that he who made the Lease to his Testator was seised in Fee, or of any other Estate by which he could make a Lease! 1 Brownl. 48. *Scott versus Herbert.*
5. In Replevin, the Defendant made Conuſance, as Bailiff of *B. B.* for Damage-feasant, setting forth a Lease to his Master for Years, &c. the Plaintiff replied, that before the said Lease one *W. W.* was seised of the said Land, &c. and by Indenture dated 14 H. 7. it was witnessed, that the said *W. W.* demised to the Plaintiff for Life, *habendum post mortem* of *R.* and *N.* and that they being dead, he put in his Cattle; and upon Demurrer to this Replication the Defendant had Judgment, because the Plaintiff had pleaded a Grant of a Reversion, without *Livery* or Attornment; besides, he did not plead positively, that *W. W.* did demise the Lands to him for Life, but only that the Indenture witnesseth it. *Dyer 118. Saintlee's Case.*

(K)

Of Powers to make Leases.

- 4 Leon. 1. **A** Power to make Leases for twenty-one Years, and accordingly a Lease was made for twenty-one Years, and before the End of it he made another Lease for twenty-one to the same Lessee, bearing Date on the 30th Day of *March*, to begin at *Michaelmas* following; adjudged, that this second Lease was void, because, for the Time, it was a Lease in *Reversion*; and it being a Liberty or Power, it ought to be strictly pursued. *Cro. Eliz.* 5. *Salop Countess* versus *Wroth.* 5 *Rep. S. C.*
2. He who had the *Reversion* in Fee, after an Estate for Life, levied a Fine to the Use of himself till the Marriage of his Son, then to the Use of himself for Life, with Power to make Leases, provided they do not exceed twenty-one Years or three Lives, reserving the antient Rent, Remainder to his Son in Tail; he made a Lease for *ninety-nine Years*, if two Persons should so long live; adjudged, that the Lease was good, and that he had pursued his Authority, because he had a *general Power* to make Leases, tho' by the subsequent Proviso it was restrained to twenty-one Years or three Lives; but if he had only a *particular Power* to make Leases for twenty-one Years, or three Lives, in such Case he could not make Leases for ninety-nine Years, *determinable* upon three Lives. 8 *Rep.* 69. *Whitlock's Case.*
- Yel. 222. 3. Tenant for Life of a *Manor*, which was then in Lease for Years, levied a Fine thereof to the Use of her self for Life, and afterwards to the Use of her eldest Son in Tail, with a Power for her at any Time to make Leases for twenty-one Years; she made a Lease for twenty-one Years, when the former Lease was in Being, to begin after the Determination of that Lease; adjudged, that this second Lease was not good, for it ought to have been a Lease in Possession, and not in *Reversion.* 2 *Cro.* 318. *Holcomb* versus *Hawkins.* See *Winter* versus *Loveday.*
4. Lessee for Life, and afterwards the Lessor levied a Fine to the Use of L. E. for fifteen Years, then to the Use of himself for Life, with a Power to make Leases for twenty-one Years or three Lives, in Possession; adjudged, that this Term of fifteen Years is presently subject to that Power which was reserved to make Leases, &c. but that the Lessee for fifteen Years should have the Rent during that Term. 2 *Cro.* 349. 12 *Jac.* *Fox* versus *Prickwood.*
- 1 Vent. 294. 5. A Settlement was made for Life, Remainder over; Proviso, that Tenant for Life may make Leases of all or any Part of the Premises, so as he reserve 5 s. per Acre for every Acre; now, this Settlement being made of Lands and a Rectory, and the Tenant for Life having made a Lease of the Whole, rendring Rent, which amounted to more than 5 s. per Acre for the Lands, but nothing for the Tithes; the Question upon a Demurrer was, whether this was a good Lease of the Rectory; it was argued that it was, because the Power to make Leases is in the Affirmative, and the Restraint cannot be intended to extend to the Reservation of Rent by the Acre, out of that which doth not consist in Acres, as Tithes do not; adjudged upon the Authority of 2 *Roll. Abr.* Tit. Power 262. a good Lease of the Rectory; tho' per *Hale* Ch. Just. if it had been *res integra*, he should be of another Opinion. 2 *Lev.* 150. *Waker* versus *Wakeman.*

(L)

By Tenant in Tail.

1. **T**enant in Tail before the Statute 32 H. 8. entered into Recognisance to him in Remainder, not to make any Estate longer than for his own Life; adjudged, that if he afterwards makes a Lease for twenty-one Years, or three Lives, his Recognisance is forfeited; but he in Remainder shall not avoid the Lease made according to the Statute. *Pasch.* 33 H. 8. *Dyer* 48. *Earl of Bridgewater's Case*; but this Case hath since been denied to be Law. 8 *Rep.* 34. In *Paine's Case.*
2. A Guardian, during the Minority of an Infant, Tenant in Tail, who was but one Year old, made a Lease for twenty Years; adjudged not good by the Statute 32 H. 8. to bind the Issue in Tail; and so 'tis in Case of a Tenant in Dower, Tenant by the Curtesy, or of the Husband seized in Right of his Wife, because they have no Inheritance. 10 *Eliz.* *Dyer* 271.
3. Tenant in Tail made a Lease to begin at *Michaelmas* next for twenty Years; adjudged a good Lease. 8 *Eliz.* *Dyer* 271; and so is a Lease for ten Years, and afterwards for eleven Years. *Leon.* 147. *Read* versus *Nash.*
- Moor 197. S. C. 4. Tenant in Tail, with Power to make Leases, reserving the antient Rent, made a Lease of two distinct Farms, reserving the antient Rent in one entire Sum out of the Whole, when Part of it was never let before, and when it was payable before at four several Payments, and now it was to be paid at two Payments, but did not lay yearly; adjudged, that this was not the true and antient Rent. 5 *Rep.* 3. *Lord Mountjoy's Case.*
5. In Ejectment, the Court directed the Jury at Bar in these Points, (*viz.*) the Lands were Copyhold for Life; the Tenant for Life, in Possession, surrendered to the Lord of the Manor in Tail, who

who made a Lease for three Lives, to commence *from the Day of the Date*, and the antient Copyhold Rent was reserved, and more; ruled, that this Land shall be reputed to be *usually let* within the Statute 32 H. 8. tho' it was never let before but by Copy of Court-Roll, and that this Copyhold-Rent reserved on the Lease, shall be taken to be the *antient accustomed Rent* within the same Statute; and that a Lease to commence *a die datus* is good, if Livery was made after the Date. *Moor 759. Banks versus Brown.*

6. Tenant in Tail of a Manor, to which an *Advowson* was appendant, granted the *next Avoidance*, and died; adjudged, that the Issue in Tail may avoid this Grant, because 'tis only of a Chattel Interest, and not a Rent reserved on it. 1 *Roll. Rep.* 190. *Bowles versus Walter.*

7. Two Coparceners in Tail; the Husband of one of them, who was Tenant by the Curtesy, joined with the other in a Lease, rendring Rent *to one of them and their Heirs*; adjudged 'tis not a good Lease within the Statute 32 H. 8. because the Rent is not reserved to the Donee and his Heirs, but to the Tenant by the Curtesy jointly with the other. *Latch 45. Thompson's Case.*

8. In a Special Verdict, &c. the Case was, Tenant in Tail to him and to the *Heirs Males of his Body*, had Issue two Sons by *two Venters*, and died; the eldest Son entered and made a Lease for twenty-one Years, reserving Rent to himself, *his Heirs and Assigns*, and afterwards died without Issue Male, having *two Sisters* of the whole Blood, who were his Heirs at Law; the Question was, whether this Rent, thus reserved, shall go to the second Brother, to whom the Reversion descended as Heir Male of the Body of the Father, or whether it shall go to the Sisters, as Heirs at Law to the Lessor, (*i. e.*) whether this was a good Lease within the Statute * 32 H. 8. * 32 H. 8. cap. 28. to bind the Issue in Tail; and this depends upon the Proviso in that Act, (*viz.*) That the Rent shall be reserved to the *Lessor and his Heirs*, or to those to whom the *Lands would go*, if no such Lease had been made: Now the Word *Heirs* in this Case must be intended such Heirs as the Statute appoints; but this Direction was not pursued in this Reservation, because the *half Brother*, who is the Heir in Tail, is neither Heir General or Special to him who made this Lease, for he is Heir Special to his Father, and not to his elder Brother; so that he (the half Brother) can never be intended by this Word *Heirs*; if so, then the Reservation of this Rent is made to the *Sisters*, who are the *General Heirs* of the Lessor, and by Consequence the Lease is void, because the Rent is reserved to such Heirs to whom the Land would not *have gone*, if no such Lease had been void, when 'tis expressly required by the Statute, that the Rent shall be reserved to him to whom the Reversion belongs; but adjudged, that where Rent is reserved generally to a Man and *his Heirs*, 'tis incident to the *Reversion*, and in such Case the Word *Heirs* shall be taken *secundum subjunctam materiam*, (*i. e.*) Heirs to the Estate in Reversion; and if so, then the second Brother is *Heir* to the Estate, and the Statute creates a Privity between him and the Lessee, because it gives the Rent to him to whom the Reversion goes; so that this is a good Lease, and warranted by the Statute. *Hardr. 89. Cother versus Merrick.* See *Whitt's Case*, and *Mallock's Case*, and *Whitlock's Case*.

(M)

Of Leases for Years, where good, and by what Words; and what passes, and what not.

1. **L**ease for Years was made by the Words, *Demise, Grant, and to Farm let*, together with all Timber-Wood, Under-Wood, and Hedge-Wood, except great Oaks growing in a certain Close; it was the Opinion of the Ch. Just. *Dyer*, that by Virtue of the Word *Grant*, the Lessee might cut down the Timber-Trees; but the other three Judges were of a contrary Opinion. *Hill. 23 Eliz. Dyer 374.*

2. Where a Lease for Years is made by the Words *Demise* and *to Farm let*, an Action of Covenant may be brought upon the Word *Demise*, in which the Term it self, and not Damages shall be recovered. 2 *Leon. 104. Andrew's Case.*

3. The Owner of the Land said, *You shall have a Lease of my Land for twenty-one Years, paying 20 s. per Annum; make such a Lease, and I will seal it*; adjudged, that this was a good Lease by *Parol*, and the making it in Writing is but a farther Assurance. *Cro. Eliz. 33 Mallock's Case.*

4. Lease *from Year to Year, as long as both Parties please*; the Lessee possessed the Lands for two Years, and Part of the third Year, and then died; adjudged, that tho' this was only a Lease for two Years at first, yet when it was enjoyed for Part of the Third Year, it was then a Lease certain for that Year. *Cro. Eliz. 775. Agard versus King.* See *Postea pl. 7, 15.*

5. Lease for eighty Years, if the Lessee should so long live, and if he died within that Term, then his Estate *should cease*, and that then it should *remain* to B. B. for and during the *Residue* of the said Term; this Demise to B. was adjudged void, because the Original Lease to the first Lessee was not absolute for eighty Years, but only *sub modo*, if he should so long live; and then it being determined by his Death, there could be no Residue of that Term. 1 *Rep. In the Recorder of Cheddington's Case.*

6. In a Special Verdict in Trespass, the Case was, the Lessor *covenanteth, demiseth, and letteth to Farm* to *Agnes and Anthony*, (the now Plaintiff) and to the *Heirs of the said Anthony*, the *Messuages, &c. Habendum* to the said *Agnes and Anthony*, and to the *Heirs of the said Anthony*, from the Date, &c. to the *End of 99 Years*; and the said *Agnes and Anthony*, for themselves and the *Heirs of the said Anthony*, covenanted to pay one Penny yearly during the Term; and the Lessor, &c. covenanted at the End of the said Term to make a new Demise to the *Heirs of Anthony*; the Question was, whether this was a *Lease for Years*, or a Grant in Fee to *Anthony*; it was insisted, that in the Premises of this Deed, *Agnes and Anthony* were Jointenants for Life, Remainder in Fee to *Anthony*; that the *Habendum* was repugnant in itself, because in one Sense *Agnes and Anthony* had an Estate for Years, and in another Sense it was to them and to the *Heirs of Anthony* for Years; if it should be taken in this Sense, then the Estate of Freehold granted in the Premises would be destroyed, because a Freehold and a Term for Years cannot subsist in one Person at the same Time; therefore the Law will judge, that the Lessor intended to pass the Inheritance by the first Words of this Deed; but adjudged, that this is a Lease for Years to *Agnes and Anthony*; for in all Deeds a Construction shall be made according to the Intention of the Lessor or Grantor, that so such Intention is not against Law; and 'tis not material tho' in the same Sentence some Words are contradictory to the other: Now in the principal Case, the Words in the first Part of this Lease are, that the Lessor doth *covenant, demise, and let to Farm, &c.* to the said *Agnes and Anthony, and the Heirs of Anthony*, which are vain Words, because if *Anthony* should have an Estate in Fee, then the Lessor did neither *demise, nor let to Farm*, so that this Part of the Demise being repugnant, ought to be expounded by the *Habendum*, and other Covenants mentioned in the Lease, by which it appears, that the Lessor intended only to pass a Lease for Years; for tho' it mentions the *Heirs of Anthony*, yet it likewise takes Notice of the Term of 99 Years; and the Covenant to pay a Penny every Year during the Term, and that the Lessor at the End of 99 Years will grant a farther Term, plainly shew, that he intended only to grant a Term for Years, and not the Fee. 1 And. 223. *Baldwin versus Martin*.

7. Lease for one Year, and so from Year to Year, &c. adjudged, that such Lease, after three Years, is but a Lease at Will; and this differs from *Agard's Case*, *antea pl. 4.* for that was a Lease from Year to Year, so long as both Parties please. 6 Rep. 35 *B. Bishop of Bath's Case*.

Paim.

319. S. C.

8. *W. R.* Lessee of a Piece of Ground or Garden-Plot, assigned his Lease to *C.* who built two Houses on it, leaving a sufficient Garden-Plot; afterwards the Lessor made another Lease to *D.* of all the *Garden-Plot or Piece of Ground*, late in the Tenure of the first Lessee, and now in the Tenure of *C.* adjudged, that all the *Garden-Plot*, as it was in the Tenure of the first Lessee, did pass, tho' Part of it was built on; for he leased it as entirely to *D.* as he did to the first Lessee. 2 Cro. 648. *Barton versus Brown*.

9. Lease of a Stock of Sheep, and the Lessee covenanted to restore to the Lessor, at the End of the Term, so many in Number as he took in lease; afterwards the Lessor granted the same Stock to *L. E.* whereas in Truth the antient Stock were spent; adjudged, that the Property of the Sheep remains in the Lessor, as long as any of them are living which were first leased; but if any of them die, then the Property of those which come in their Room, doth belong to the Lessee; and therefore it was adjudged, that *L. E.* the second Lessee should have no more than those which were first leased, and did remain alive at the End of the Lease. Godb. 113. *Wood versus Ash*.

10. One who was seised of a Manor, and of a Tenement in Fee, and possessed of a Lease for Years, did give, grant, bargain, sell, enfeoff and confirm to *L. E.* the Manor and Tenement, and all other his Lands and Tenements, &c. adjudged, that the Lease for Years did not pass by these General Words. 1 Bulst. 99. *Turpine versus Foreigner*.

Noy 728.

11. Covenant to convey Lands to *W. R.* and his Heirs; Proviso, if the Covenantor paid to the said *W. R.* 100 *l.* at the End of thirteen Years, he might re-enter; and farther the Covenantor did covenant with *W. R.* and his Heirs, that he should enjoy the Lands till the End of thirteen Years, and afterwards for ever, if the 100 *l.* was not paid, and that he would pay yearly to the said *W. R.* two Capons, and would not commit Waste; it was insisted, that this Covenant did amount to a * Lease, otherwise the Covenant, not to do Waste would be vain; but adjudged, that it was not a Lease; for the Intent of the Parties was only to make a Conveyance by Way of Mortgage, which is but a Covenant, that *W. R.* should enjoy it during the Time of the Mortgage. 2 Cro. 172. *Evans versus Thomas*.

* See Copyhold. (N)

12. Covenant with *W. R.* that he should have, possess and occupy such Lands for 7 Years, without any Disturbance, in Consideration whereof *W. R.* covenanted to pay 200 *l.* per Annum Rent, and being disturbed he brought an Action of Covenant; it was objected, that this Action did not lie, because he had no Lease, for the Word *Demise* was omitted; but adjudged a good Lease, especially since it was made by the Owner of the Land; for in such Case a License to occupy, &c. shall amount to a Lease; but if this had been done by a Stranger, then it would have been only a Covenant: Now if a License to occupy will amount to a Lease, as it was adjudged *Trin. 37 Eliz.* in *Sir James Harrington's Case*, a Covenant, that the Person shall possess and occupy, will do so too. 3 Bulst. 204. *Tisdale versus Sir William Essex*. See Rent. (D) 1. *Drake versus Monday, S. P.*

13. The Lessor made a Lease for forty Years, and covenanted with the Lessee, that he should have convenient Estovers, &c. in a Wood, which was not Parcel of the Lands demised; adjudged, that it was good, and that these Words do not restrain him, but he may have Estovers likewise out of the Lands leased. Hetl. 77. *Thompson versus Conners*.

14. The Father being possessed of a Lease of Lands for 1500 Years, devised the said Lease to *Humphrey his Son*, after the Death of his Uncle *Nicholas*, and made the said *Nicholas* and his Wife Executors and Residuary Legatees; *Nicholas* enjoyed the Lands during his Life, and whilst he was living *Humphrey* by Indenture, reciting the Will, and the Original Lease of 1500 Years, did grant and assign the Premises to *Francis Lane* for 99 Years, if *Prudence* his Wife should so long live; and for the Natural Love that he bore to *Nicholas his Son*, he granted to him the Remainder of the said Lands, *habendum* to *Nicholas his Son*, and his Assigns, after the Death of *Nicholas the Uncle*, and *Prudence*, for all the Rest and Residue of the said Term of 1500 Years: adjudged, that this Grant to *Nicholas the Son*, his Uncle *Nicholas* being then living, was void. *W. Jones* 416. *Berry* versus *Burlace*.

15. Lease for one Year, and so from Year to Year, &c. the Plaintiff brought an Action of Debt for Rent arrear in the Third, without averring, that the Defendant entered, and was possessed, &c. in that Year; adjudged this is a good Lease for two Years, and afterwards 'tis but an Estate at Will; therefore, if an Action of Debt is brought for Rent arrear in the third Year, the Plaintiff must allege the Continuance of the Possessions, otherwise the Action will not lie. *Sid.* 423. *Gostwick's Case*. 1 *Mod.* 4. *S. C.* *Gostwick* versus *Mason*. 1 *Lutw. Rep.* 213. *Belkiff* versus *Burbridge*, *S. P.* See *antea* pl. 4. See *Venire facias*. (A) 36. *S. C.*

16. In a Special Verdict in Ejectment, the Case was, the Lessor made a Lease of Tenements, dated 23 *Septemb.* &c. *Habendum* to the Lessee for 81 Years, from *Michaelmas next ensuing*, if *W. R.* should so long live; and after the Death of *W. R.* for thirty one Years; the Lessee entered on the 23 *Septemb.* which was before the Commencement of the Lease, and continued in Possession some Years, and then the Lessor entered on him, and the Lessee being out of Possession, assigned the Term to the Plaintiff, who brought this Ejectment, and had Judgment; it was held, that this Term being not to commence till *Michaelmas*, after the Date of the Lease, it was till that Time a future Interest, and the Entry by the Lessee, was a Disseisin, and not a Possession by Virtue of the Lease; that the thirty-one Years was an Addition to the first Term, and not a future Interest, but a Continuance of the first Term; for 'tis not to be supposed, that *W. R.* should survive 81 Years, and so finish one Term before the other shall commence; but if the thirty-one Years had been to another, and not to the same Person, it would have been a future Interest, but 'tis one and the same Term with the 81 Years, and not turned into a Right by the Entry of the Lessee, because he never was possessed by Virtue of the Lease, but by Disseisin; and the Lessor had Reason to re-enter, to purge the Disseisin; but by his Re-entry he did turn the Term to a Right, and if so, 'tis assignable by the Lessee at any Place out of the Land; now the Term for 81 Years was determined by the Death of *W. R.* so that the Question was about the thirty-one Years, and some of the Judges held it to be a future Interest and never displaced, and so well assignable. 1 *Lev.* 45. *Hennings* versus *Brabazon*.

17. In a Special Verdict in Trover, the Case was, One seised of Lands, in which there were some Mines open, and some not, demised the Lands and Mines to the Defendant, who opened a new Coal-Mine never open before, and digged and carried away Coals, for which the Action was brought; it was insisted for the Plaintiff, that these Mines which were open only passed, being sufficient to satisfy the Words in the Lease; as where a Man demises Lands and Timber, the Lessee is not impowered to fell it; and so it was adjudged in this Case, that the Mines which were open passed, and no more. 2 *Lev.* 184. *Astry* versus *Ballard*.

2 *Mod.*
193.
T. Jones
71. *S. C.*

18. Ruled by *Holt Ch. Just.* that a Lease for a Year by Parol, and so from Year to Year, as long as both Parties please, and that the Lessee should not go away without a Quarter's Warning; that such an Agreement about a Quarter's Warning did not affect the Land in Point of Interest, but was only a collateral Agreement to bind the Lessee; that if at the Year's End the Lessee had quitted the Possession without giving a Quarter's Warning, he would be liable to pay a Quarter's Rent by Virtue of this Agreement; that if he enters on a second Year, he is bound for that Year, and likewise to a Quarter's Warning, and so on, and that the Case would be the same, if the Lease was in Writing; that if there is a Lease by Deed for a Year, and so from Year to Year, as long as both Parties agree; this is binding but for one Year; but if the Lessee enter upon the second Year, he is bound for that Year; but if 'tis for a Year, and so from Year to Year, as long as both Parties shall agree, till six Years expire; this is a Lease for six Years, but determinable every Year, at the Will of either Party; but if 'tis for a Year, and so from Year to Year, till six Years expire, this is a certain Lease for six Years. *Mod. Cases* 215.

(N)

Of Misrecitals and Misnomers in Leases.

1. **T**HE Dean and Chapter of *Carlisle* were incorporated by the Name of the *Dean and Chapter Ecclesie Cathedralis Sancte & individue Trinitatis Carlisle*, and they made a Lease, leaving out the Word *Individue*, and adding *totum Capitulum de Ecclesia prad'*; adjudged, that this Variance being not in the Substance of the Name, it was a good Lease. *Mich.* 11 *Elizabeth.* *Dyer* 274.

2. But where the College of *Eaton* was founded *per nomen Præpositi & Collegii Regalis Collegii Beate Mariæ de Eaton juxta Windſor*, and they made a Lease, leaving out *Collegium Beata Mariæ*; it was adjudged a void Lease. *Trin. 4 Mar. Dyer 150.*

3. Lease of a Close of Land, called *Callis*, in the Parish of *H. in the County of Berks*, whereas in Truth the Close was in the County of *Bucks*, the said Parish extending into both those Counties; adjudged, that the Lease was good. *Trin. 13 Eliz. Dyer 292.*

4. But where a Lease was made of *an House* in the Parish of *St. Botolph without Aldgate*; and it was not in that Parish, but in *St. Botolph Aldersgate*; this was adjudged void, because the Lessor had given no Name to the House. *22 Eliz. Dyer 376, 2 Ed. 4. 19. Plowd. 399.*

5. A Feme sole, who was Lessee for Years, married, then he in Reversion made a Lease of the same Lands for Years, to commence *after the Term demised to the Husband*, when in Truth it was not demised to him, but to his Wife, and transferred to him by the Intermarriage; yet adjudged, that this was a good Lease, and had a certain Commencement, notwithstanding the Misrecital. *Plow. Com. 192. In Wrioteſly verſus Adams.*

6. Dean and Chapter of *Worceſter* were incorporated by the Name of the *Dean and Chapter of the Cathedral Church of Chriſt and the blessed Virgin Mary of Worceſter*, and they made a Lease, by the Name of the *Dean of the Cathedral Church of Chriſt, and of our blessed Lady the Virgin of Worceſter, and the Chapter there*; 'tis void. *2 Bullſt 303 Butler verſus Fincher.*

(O)

By what Acts surrendered and extinguished, and what not. See *Extinguiſhment. (E) per totum.*

1. **H**E N. 8. being ſeiſed in Fee, made a Lease for twenty Years to *W. R.* and afterwards granted the Reversion to the Bishop of *B.* who regranted the same to the Crown, and now the Crown made a new Lease of the same Lands to *W. R.* and this was for sixty Years; *per Curiam*, the first Lease is drowned, because *W. R.* accepted the second Lease, and the second Lease is void for not reciting the first Lease, it being a Lease upon Record. *Cro. Eliz. 231. Wing verſus Harris.*

So where the Lessee for Years took another Lease of the same Estate from the Guardian in Socage, this is a Surrender of his first Lease; the second Lease was made in the Name of the Guardian. *4 Leon. 7. Willet verſus Wilkinſon.*

2. Lessee of a Manor for 99 Years, takes a Lease of the *Bailiwick* of the said Manor for twenty-one Years; it was objected, that this was not any Surrender, because it was of another Thing, and of another Nature, and therefore might well stand with the Lease; but if he had taken a Rent-Charge, a Common, or Estovers, or any Part of the Manor, it had been a Surrender; so if Lessee for Years of an Advowson is presented to the Church, 'tis a Surrender. *2 Cro. 84. Gibſon verſus Searle.*

3. Lease for Years by Deed, and during the Term the Lessee accepts a lesser Term by Word; this is a Surrender of the Term which he had by the Deed. *Style 448. Timbrell verſus Bullock.*

4. The Plaintiff declared on a Lease made by the Dean and Chapter, but did not set forth, that they were ſeiſed in *jure Eccleſiæ*, nor what Estate they had in the Land; adjudged, that the Declaration was ill, for he ought to set forth what Estate they had, because probable they might have an Estate for the Life of another, who might then be dead. *H. 22 Jac. Latch. 14. Newman verſus Marſh.*

(P)

Of the Dates, Commencement and Determinations of Leases.

1. **I**N Replevin, the Case was, the Uses of a Fine were declared to *Thomas Lovett* for Life, with several Remainders over; Proviso, that if *Thomas Lovett* shall lease the Tenements to any Person, for any Number of Years, not exceeding ninety-nine Years from the Time of making such Lease, reserving the antient Rent, then the Cognisees shall be ſeiſed, &c. of the Premises so demised, to the Use of such Person to whom the same shall be demised, for so many Years as are contained in the said Demise; afterwards *Thomas Lovett* demised the Premises to *Thomas Willett*, *habendum a die conſeſſionis* of the Lease for 60 Years, rendring to *Thomas Lovett* yearly, and after his Death to such Person who shall have the immediate Remainder or Reversion, by Virtue of the said recited Deed of Uses, the Sum of 3 *l.* which was the antient Rent, &c. One Question was, whether this Lease was made pursuant to the Proviso; it was insisted, that it was not, because it ought to commence from the Time of the Making; for so is the Proviso, and not from the Day of Making, as this was: *Sed per Curiam*, this Lease is warranted by the Proviso, for these Words, from the Day of the Making, &c. do not limit when the Lease to *Lovett* shall commence, but to restrain him from making a Lease for more than 99 Years, from the Time of Making

king such Lease; but he is not restrained from Making a Lease for sixty Years, to commence twenty Years after; so that the Meaning of this Proviso is, he may make a Lease for ninety-nine Years, *from the Time of the Making* such Lease, or for any other Term of Years which doth not exceed that Number. 1 *And.* 273. *Hirecours* versus *Pole*.

2. In Wasse against Executors, the Writ supposed *quod tenent* for a Term of Years, &c. the Defendants appeared and craved *Oyer* of the Indenture, which was for sixty Years, provided, that if the Lessee die after the End of the first thirty-one Years of the said Term for sixty Years, then it should be good for one Year next after his Decease, and after the End of that Year, then to be void, and that then the Lessor, his Heirs or Assigns might enter; then they pleaded, that thirty-one Years of the sixty Years, were passed in the Life-time of the Lessee, and that afterwards he died (*viz.* on such a Day) by which the Term was void, & *sic non tenent*, &c. and upon a Demurrer to this Plea it was insisted, that by the Teste of the Writ it appeared to be brought *within a Year after the Death of the Lessee*, and if so, then his Executors *tenent*, &c. and adjudged, that the Writ was good, for the Term doth not cease till a Year *after* the Death of the Lessee. 1 *And.* 285. *Leonard* versus *Pennant*.

3. Libel for Tithes, the Defendant suggested for a Prohibition, that a Lease was made of those Tithes to T. R. for three Years, and at the End thereof for other three Years, and so from three Years to three Years, during the Life of the Lessor; the Lessee died, and nine Years were expired; the Question was, whether this was a Lease for twelve Years, or not; and it was held, that it was, for a Lease for three Years, and from the End thereof to three Years, is a Lease for six Years, and so from three Years to three Years, is a Lease for other six Years. 1 *Roll. Rep.* 287. *Newberry* versus *Rathbone*.

4. In Ejectment, the Plaintiff declared on a Lease made the 14th *January*, 30 *Eliz.* to have from *Christmas* last past for three Years, and at the Trial produced a Lease dated 13 *January*, 30 *Eliz.* and he proved, that the same was sealed and delivered on that Day; it was objected, that this Evidence did not maintain the Declaration, but that it was naught for this Variance; but adjudged good, for a Lease executed 13 *January*, is a Lease on the 14th of the same Month. 4 *Leon.* 14. *Price* versus *Foster*.

5. In Ejectment, the Plaintiff declared on a Lease made the 10th Day of *October*, &c. *Habendum* from the 20th Day of *November*, without saying next ensuing, or in what Year; and this being found specially, the Question was, whether it was a void Lease; it was admitted, that where the Commencement was *impossible*, the Lease was void, as if it was to commence on the 31st of *September*, but that 'tis not so where the Commencement is *certain*, for there it shall commence from the Day of the Delivery; but adjudged, that an *incertain* Limitation makes the Lease void, because it being Part of the Agreement, the Court cannot determine what the Contract was, it being incertain what it was. 1 *Mod.* 180.

6. Error of a Judgment in Ejectment in *Launcester*, wherein the Case on a Special Verdict was, The College, in the Reign of Queen *Elizabeth*, made a Lease (*reciting* therein another Lease made by them in the Reign of *Ed. 6.*) to *Trafford*, for twenty-one Years, *Habendum* from the said Term made in the Reign of *Ed. 6.* rendring Rent, with a Clause of Re-entry for Non-payment, with a Covenant, that *after the said twenty-one Years ended*, the Lessee should have the Lands for twenty-one Years, and so till ninety-nine Years *thence* next ensuing shall be ended; the Jury found, that there was no Lease made in the Reign of *Ed. 6.* and that ninety-nine Years were expired since the Date of the Lease made in the Reign of Queen *Elizabeth*; but if computed from the End of the Term of twenty-one Years, then they are not expired; adjudged, that the Lessee shall have ninety-nine Years over and above the twenty-one Years, because the Words *thence next ensuing*, import a future Time, and must in this Case necessarily relate to the End of the first twenty-one Years, for it cannot be reckoned from the Date of the Lease made in the Reign of Queen *Elizabeth*, because then it should have been from *Hence next ensuing*. 2 *Lew.* 241. *College of Manchester* versus *Trafford*.

(Q)

Of Leases at Will.

1. **I**N an Action of Debt for Rent on a Lease at Will of Houses in *London*, and tried at Bar it was ruled, that if Lessee for Years holds over his Term, and continue to pay his Rent quarterly, as before, this amounts to a Lease at Will; and if he begins a new Quarter and determines his Will before 'tis ended, he shall pay that Quarter's Rent. *Allen* 4. *Sir Bowes's Case*.

2. In Replevin, the Defendant avowed for Rent upon a Lease at Will; the Plaintiff replied, that the Defendant, before he took the Plaintiff's Cattle, made a *Lease for Years*, by Virtue whereof the Lessee entered; the Defendant, in his Rejoinder, confessed the Making the Lease, but sets forth a Special Agreement between him and the Lessee, that the Lessee should *not enter* till such a Time, and traverses that he did enter; the Plaintiff surrejoins, and traverses the Agreement; and upon a special Demurrer it was held, that if the Defendant had done any Act inconsistent with the Continuance of the Estate at Will, it shall determine it from such Time as the Tenant at Will takes Notice of it; but if the Defendant had been outlawed, that should not determine his Will till Seizure, nor an Extent upon him until the *Liberate*. 1 *Vent.* 247. *Hinchman v. Iffes*. *Raym.* 324. 2 *Lew.* 88.

3. Ruled *per Holt* Ch. Just. that both Lessor and Lessee, where the Estate is at Will, may determine their Will when they please; but if the Lessor determines it within a Quarter, he shall lose that Quarter's Rent; and if the Lessee determine it, he must pay a Quarter's Rent. 2 *Salk.* 113. *Lighton* versus *Theed*.

Leet.

Of Leets in General. (A)

Of Pleadings in Replevin, and Avowries for Amerciaments in the Leet. (B)

(A)

Of Leets in General. See *Copyhold*. (E) per totum.

1. IF a Jury in a Leet refuse to make a Presentment, the Steward may assess a Fine. 4 *Eliz.* *Dyer* 221. *The Earl of Arundel's Case*.

And yet a Steward is not an Officer of Record, therefore where the Defendant was indicted at a Leet of the *Earl of Bath* for a Perjury, it was objected, that every Leet is the King's Court, and therefore it ought to be at the Court of the King, and not of the *Earl of Bath*. 4 *Leon.* 105.

2. The Leet was first derived out of the Sheriff's Tourn, 'tis a Court of Record, and 'tis accounted the King's Court, tho' kept in particular Manors, because the Authority was originally belonging to the Crown, and from thence derived to inferior Persons. 1 *Brown* 36.

3. A Man may prescribe to hold a Leet oftner than twice in a Year, and at other Days than appointed by *Magna Charta*, cap. 35. because that Statute is in the Affirmative. 2 *Leon.* 28, 266. *The King* versus *Partridge*. 2 *Leon.* 74. *Lawson* versus *Hare*. S. P. 3 *Leon.* 78. S. C.

4. The Defendant entitled himself to a Leet and a Fee *pro certo Leta*, by Reason of an Hundred; and in such Case 'tis sufficient for him in Pleading to say, that he is seised of the Hundred without shewing a Deed. 2 *Leon.* 74. *Lawson* versus *Hare*. 3 *Leon.* 78. S. C. *Postea* pl. 10. S. C.

5. If three Coparceners are seised of a Manor in Fee, to which a Leet is appendant, and the King purchaseth two Parts, with the Appurtenances, the Leet is still appendant to the third Part of the Manor. *Hill.* 28 *H. 8.* *Bendl.* 41.

Cro. Eliz.
148.
1 Roll.
Rep. 52,
73. S. C.

6. The Lord may have a certain Sum *pro certa Leta*, for it shall be intended it was granted at first by the Purchase of the Leet, for the Ease of the Tenants, that they need not go to the Sheriff's Tourn, but do Service at the Lord's Court-Leet. 6 *Rep.* 77. *Bullen's Case*.

7. In Replevin, the Defendant made Confession as Bailiff to *W. R.* setting forth, that he had a Leet within his Manor, &c. and that the Plaintiff was amerced at such a Court, for putting his Geese upon the Common there, for which Amerciament the Defendant distrained; but because this was not an Article inquirable in a Leet, or punishable there, the Plaintiff had Judgment. *Cro. Eliz.* 448. *Hornlighton* versus *Burton*. *Antea* Commoner. (H) 2.

8. Avowry for an Amerciament in a Court-Leet, setting forth, that *Ed. 6.* granted the Hundred of *H.* to *W. R.* in Fee, in which Hundred there was a Leet, that it descended to the Cousin of the Grantee, who being seised, granted it to *F. F.* in Fee, but did not say by Deed, who by Deed enrolled, granted it to the *Earl of L.* in Fee, and that the Defendant being resistant within the Hundred, did not appear at the Leet, &c. for which he was amerced 12 *d.* adjudged, that this Avowry was ill, because he did not set forth, that the Hundred was granted to *F. F.* by Deed, and it cannot pass without; besides, this being a *By-Grant*, the Avowant ought to shew that the Court was held within a Month after Easter; but if it had been a Leet by Prescription it had been otherwise. *Cro. Eliz.* 245. *Porter* versus *Grey*. *Antea* Intention. (A) 4. S. C.

9. Two Persons had two Manors, to which there were two Hundreds adjoining; the Avowant was seised of one of those Manors; and in Replevin brought against him, he set forth, that he was seised of the Manor, &c. and prescribed, that the Plaintiff and all the Tenants of the other Manor have used to make Suit at the Leet within his Manor, and that the Lord of the other Manor used to appear at the said Leet, or to pay 4 *s.* and if not paid, then he prescribed to distrain any Inhabitant within the Hundred for the same; and for 4 *s.* not paid, he avowed the Taking the Distress within the Plaintiff's Manor, who was one of the Inhabitants there; adjudged, that the Cattle of the Lord of the Manor might be distrained in any Land within the Hundred, for Suit

Suit and Services; but that the Cattle of a Stranger could not be distrained for personal Things, as for Amerciaments for not appearing, &c. *Pasch. 40 Eliz. Owen 146. Goosey versus Potts.*

10. In Replevin, the Defendant avowed, for that he was seised of an Hundred, and that he and all those whose Estate he had in the said Hundred, had used to hold a Leet there, and that at every Leet the Inhabitants, &c. used to pay 16*d.* *pro certa Leta*, and that they had used to distrain for the same; it was objected, that the Defendant, in Making a Title to the Leet by *Prescription*, conveys the Hundred to himself by a *Que Estate*, without shewing a Deed; now, tho' this might be a good Exception, if the Hundred it self had been in Question, 'tis not so where a Thing is claimed out of the Hundred, as a Leet in the principal Case, which is derived out of the Hundred, for there 'tis sufficient to say, that he was seised of the Hundred, without shewing any Title. 2 *Leon. 74. Lawton versus Hare. 3 Leon. 78. S. C. Antea pl. 3, 4. S. C.*

11. The King hath Power to make a Court-Leet where there was none before, and a Distress is incident to a Court-Leet of Common Right, but in a Court-Baron the Plaintiff must alledge a Prescription to distrain. 1 *Brownl. 36.*

12. In Replevin, &c. the Defendant avowed, for that he is seised of the Manor of *B.* to which there is a Court-Leet belonging, and that by Custom Time out of Mind, the Inhabitants of *B.* have used to send a Constable to the said Leet, and that he (the Defendant) by *T. P.* his Steward at *B.* aforesaid, held the said Leet and gave Notice thereof at *B.* and that they did not send a Constable, &c. whereupon the Steward imposed a Fine of 39*s.* 11*d.* on the Inhabitants, and that he distrained for the Fine, &c. the Plaintiff traversed the Custom, upon which they were at Issue, and the Avowant had a Verdict; and it was moved in Arrest of Judgment, that the Avowry was ill, because it did not set forth a Custom to distrain for the Fine, for a Distress is not incident to a Fine, neither is it implied by alledging a Custom to impose a Fine; adjudged, that where a Duty is raised by a Custom, a Distress for that Duty must be maintained by the like Custom. *Raym. 204. Peirson versus Ridley. See Blunt versus Whitacre. 1 Leon. 242. See Godfrey's Case.*

13. In an Action of Debt for an Amerciament in a Court-Leet, the Case upon the Pleadings was, that the Abbot of *Alington* was seised of the Hundred of *H.* in *Berks*, and of a Leet appendant to that Hundred, by Prescription, to be held once a Year, within a Month of *Easter*, within which Hundred there were several Villages, of which *Norcott* was one; that the Abbey was dissolved, and that King *Ed. 6.* granted to one *Lyons* several Lands in *Norcott*, of which the Abbot was formerly seised & omnes Curias, Letas, &c. & Amerciamenta pramisses in *Norcott* pertinent' provenien', &c. and that the said *Lyons*, and his Heirs, should have tot' talia & consimilia Curias, Letas, Amerciamenta & Hereditamenta, as the Abbot had infra the said Lands; and afterwards the said King granted the Hundred and the Leet to one *Owen*, which by several mesne Conveyances came to the Lord *Norris*, the now Plaintiff, and that *Barrett*, the Defendant, claimed under *Lyons*, and that he was an Inhabitant in *Norcott*, and being summoned to be at the Leet, he made Default and was amerced to 40*s.* for which the Action was brought; and adjudged, that *Lyons* had no Leet by this Grant, neither was he discharged from the general Leet of the Hundred, because the Leet mentioned in his Grant is restrained to the Land granted, for 'tis pramissis in *Norcott* pertinent' & provenien', and there was no such Leet there before the Grant; for the Leet which the Abbot had, and which came to the King upon the Dissolution, did not belong to the Lands in *Norcott*, but to the Hundred of *H.* and tho' by the later Clause of the Grant, *Lyons* was to have consimiles Letas as the Abbot had, yet that will not do, for if he cannot have easdem, he shall never have consimiles, because no Man can have a Leet in the same Place where the King had one before; and as for the Word *Amerciamenta*, it cannot properly be said provenien' from the Lands, for that arises by Reason of an Offence, not where the Lands are, but where the Leet is held, and the *Amerciamenta* in the Grant to *Lyons* are restrained infra terras in the Grant, and the Abbot had no Leet or Amerciaments infra the said Lands in particular, but infra that and other Lands and Villages entirely. *Moor 426. Lord Norris versus Barrett.*

14. In Replevin, the Defendant avowed, for that he had a Leet for all the Inhabitants and Reliants within his Manor of *D.* and that the Plaintiff being an Inhabitant, &c. was summoned to appear at the Leet on a certain Day, and for making Default he was amerced, for which he (the Defendant) distrained and avowed: The Plaintiff replied, that the Place where he dwelt was Parcel of a Monastery and Lands held in Frankalmoine, and discharged of all Secular Services; then he pleads the Statute 31 *H. 8.* and the King's Grant to his Ancestors *ad eo plene, libere & integre*, as the Abbot held it before the Dissolution, and so conveyed the Land to himself by Descent, &c. and upon a Demurrer to this Replication the Plaintiff had Judgment, for the Abbot was discharged from this Service *ratione ordinis*, as all Churchmen, Women and Noblemen are; and this Immunity Church-men had at Common Law before the Statute of *Marlbridge*, in respect of their Persons, and therefore it shall not go to the Patentee of the King; but all other Persons above twelve Years old must do Suit to the Leet, which in Truth is a Suit real; for tho' the Lord of the Leet hath the Profits and Benefit of the Court, yet 'tis the King's Court, and the Service there done is the Service to the King. 2 *Roll. Rep. 56. Dacre versus Nixon.*

15. The Portreeve of *Evil* in the County of *Somerset* was usually elected, and to continue in his Office for one Year, and at the End thereof a new Portreeve was to be elected and sworn in the Leet by the Steward of *Sir Edw. Phillips*, Lord of the Manor, who, by Reason of some Displeasure refused to hold the Leet, and thereupon Process was awarded out of *B. R.* commanding, that the Oath be tendered to the new Portreeve. 2 *Roll. Rep. 82.*

16. *Prigg* was indicted, for that he being lawfully chosen *Tithingman* of the Vill of *C. non præstitit sacramentum* before a Justice of Peace to execute the Office *sed voluntarie & obstinate*, ab-
 * See Pl. 29. flained, &c. quashed, because it did not appear that he was * summoned to appear before a Justice of Peace, nor how, or in what Manner he was chosen Tithingman; and upon a Motion a Writ was granted, directed to him, commanding him to go before a Justice of Peace. *Allen* 78. *Prigg's Case*.

17. A By-Law was made in a Court-Leet held for the King in his Honour of *Grafton*, that every Person within the Leet, who should receive or place any *Inmate* in a House there, without giving Security to the Overseers of the Poor, &c. should pay 5 *l.* per Month, and *T. S.* was fined 20 *l.* for a Breach of the said By-Law, which Fine was *estreated*, and Process issued upon it: But per *Hale* Chief Baron, 'tis hard to *estreat* the Fine before the usual Remedy for it by *Distress*; for by the *Estreat* the Land will be extended, when the Defendant may have something to plead by Way of Discharge, of which he would be deprived by that Means, as that he is not within the Leet, or that he hath received no Inmate, &c. but the Officers said it was usual to *estreat* such Fines where they belonged to the King, and not otherwise; so the Party was ordered to plead. *Hurdres* 471.

Sid. 431. 18. *Dr. Pordage* was a practising Physician, and chose Constable, and now moved for a Writ of Privilege, but it was denied, for there is a Difference as to the Privilege of a Lawyer and of a Physician; for the one hath it because of his Attendance on the Courts at *Westminster*, but a Physician is a private Calling which may be exercised in a Chamber. 1 *Mod.* 22. *Dr. Pordage's Case*.

* See Copyhold. (E) 14. 19. The Defendant was presented for refusing to be sworn * Constable of an Hundred, but it was quashed, because it did not mention before whom the Sessions was held; and *Twisden* held, that the Clerk of the Peace ought to be fined for returning such a Presentment. 1 *Mod.* 24. *The King versus Vauxs*.

See Pl. 24. S. C. 20. The Bailiff of *Westminster* had levied Money upon several Persons, upon Presentments in the Leet, for using Trades, not having been Apprentices; and upon Complaint made, the Court held, that the Statute 5 *Eliz. cap. 5.* doth not give the Leet any Power in this Matter; 'tis true, by the Statute 31 *Eliz. cap. 5.* Informations for Offences and Actions upon Penal Statutes, are to be brought in the proper Counties, either at the Assises, Sessions, or Leets, but that must be intended for such Offences as Leets have Cognizance of; but for using Trades, &c. the Presentment must be at the Sessions or in this Court. Sid. 289. *Amy versus Bennett*.

1 Lev. 235. 21. *Sir Walter Vane* having an Estate in the Manor of *D.* was chosen Reeve to gather the Lord's Rents; he moved *B. R.* for a Prohibition, for that he was a *Captain of the Guards*, and so attendant on the King; it was admitted, that he should not have this Privilege if he could make a Deputy; and tho' it hath been said, that if a Constable can make a Deputy, the Court was not satisfied in that Point; 'tis true, the Custom for the Inhabitants of every House in such a Vill, to be a Constable by Turns, is good; and if it happen on a Widow she might hire one to serve, but then he is not her Deputy, but is actually sworn into the Office and is Constable himself; but in the principal Case it was held, that he might make a Deputy Reeve, so the Privilege was denied. Sid. 355. *Sir Walter Vane's Case*. See *Phelps versus Winchcomb*. Office. (D) 4.

22. The Defendant was presented at a Leet for enclosing the Road and building a Cottage *ad commune nocumentum* of all the Inhabitants in the Vill, &c. and this Presentment being removed into *B. R.* by *Certiorari*, it was quashed, for it was not founded on the Statute 31 *Eliz. cap. 7.* of Cottages, because 'tis not alledged, that it was built for *Habitation*; besides, the Statute appoints a certain Penalty of 10 *l.* for Building a Cottage, &c. neither is the Presentment concluded *contra formam Statuti*; and if this Presentment is not good upon the Statute, it cannot be good at Common Law, because enclosing and building a Cottage on the Waste is an Injury done to the Lord of the Manor; 'tis an Offence not presentable at a Leet, so as to amerce the Offender, because 'tis no * publick Nuisance; and in this Case the Defendant was amerced, which was affirmed to 39 *s.* now a Leet cannot amerce in any Case, other than for a publick Nuisance, but not for a particular Trespass done to the Lord, or to any other, for which an Action will lie to recover Damages. 1 *Saund.* 135. *The King versus Dickenfon*.

* For that Reason Pound-Breach is not inquireable in a Leet, but excessive Toll is.

4 *Leon.* 12. *Sanderson's Case*.

Postea 28. S. C. 23. By *Magna Charta, cap. 35.* and 31 *Ed. 3. cap. 15.* the Leet must be held within a Month after *Easter* and *Michaelmas* every Year, and at no other Time, unless by Patent or Prescription; at a Court-Leet of the Mayor and Commonalty and Citizens of *London*, for their Manor called the *King-Manor* in *Southwark*, *Dakins* was chosen Constable, and fined 22 *l.* for refusing to take upon him that Office; and all this Matter being removed into *B. R.* by *Certiorari*, it was certified thus: *ff. Visus Franci plegii Majoris, Communitat', &c. Dominorum Manerii prad' pro Manerio, &c. apud quendam locum, &c. infra mensem post festum Sancti Michaelis Archi' scilicet die Martis duodecimo die Novembris, &c.* it was moved, that this Presentment might be quashed, because it appears that the Leet was held after a Month after *Michaelmas*, for which Reason it was void, which is very true; but it appears here, that it was held *infra mensem post festum, &c.* and that is well enough; and tho' 'tis said *scilicet* 12 *Novemb.* that shall be void and rejected, because 'tis contrary to the Matter precedent, which is likewise very true; but then, if this *Scilicet* be void, there would be no Day at all in the Record in which the Leet was held, but it would appear

pear to be held *within a Month after Michaelmas generally*, and then it might be held on a *Sunday*, which is not *dies juridicus*, so that there is a Necessity to mention a particular Day; for which Reason this Indictment was quashed. 2 Saund. 290. *Dakin's Case*.

24. The Defendant being present at a Court-Leet, put on his Hat in Contempt of the Court, and being admonished by the Steward, that he had not done well, he replied, he did not value what he (the Steward) could do; whereupon he fined him 40 s. for which the Lord of the Leet brought an Action of Debt; and adjudged, that it was well brought. Raym. 68. *Barburst versus Cox*.

25. Presentment in a Leet at *Westminster*, against several Persons for using Trades, not being Apprentices for 7 Years, according to the Statute 5 Eliz. and the Clerk Bailiff intending to levy 40 s. per Month upon them, this Presentment was removed by *Certiorari* into B. R. and the Question was, whether the Leet had Cognisance of this Matter by the last Clause of the Statute 31 Eliz. cap. 5. and adjudged, that it had not. Raym. 154. See pl. 19. S. C.

26. The Defendant was presented at a Leet, for Digging Coney-Borrows, and Breaking the Soil in the Lord's Waste; but the Presentment was quashed, because a Leet cannot amerce for any Thing done to the Damage of the Lord; besides, 'tis not *ad commune nocumentum*. Raym. 160. *Ayre's Case*. See *Leicester Forest's Case*.

27. In Replevin for Taking his Oxen, the Defendant made Conusance as Bailiff to the Lord of a Leet, for that the Plaintiff was amerced there, for not *scouring a Ditch in a Highway*; and upon Demurrer to the Plea, it was insisted, that it was ill, because the Statute 18 Eliz. cap. 9. gives the Forfeitures for not repairing the Highways, to the Surveyors thereof; but adjudged, that the Offender may be punished in the Leet, and likewise by the Statute for several Causes. Raym. 250. *Stephens versus Haines*.

28. *Juratores pro Domino Rege & Domino Munerii & Tenentibus*, presented the Defendant for erecting a Glass-House, &c. *ad commune nocumentum*; it was quashed; for tho' 'tis good for the King and the Lord of the Manor; for Leets are granted to the Lords as derived out of the Törn; and as for *Tenantibus*, 'tis only Surplufage; yet this Presentment is ill, because 'tis said *ad commune nocumentum*. 1 Vent. 26.

29. The Defendant was presented and fined in a Leet, for refusing the Office of a Constable; Antea 22. and upon a Motion to quash it, the Fault was, that the Court was said to be held *infra unum mensem Sancti Michaelis viz 12 Novemb.* which is *above a Month after Michaelmas*, and 'tis necessary to set down the Day, for it may be on a *Sunday*, and yet within a Month after *Michaelmas*; it was quashed. 1 Vent. 107. *Dacon's Case*. 2 Saund. 292. S. C. S. C.

30. In Replevin, the Defendant made Conusance, for that the Place where, &c. is within the Manor of *Shewstone*, where there is a Court-Leet, and that the Jury, &c. Time out of Mind, have * *chosen* one of the Inhabitants to be Constable, who by Custom is to serve, or forfeit a reasonable Penalty, to be imposed by the Jury, &c. that the Plaintiff was chosen, and ordered to take upon him the Office, under Pain of 40 s. and thereof had Notice, but neglected, which was presented at the next Court-Leet, and thereby had forfeited 40 s. for which the Defendant, as Bailiff of the Manor, distrained, &c. and upon Demurrer to this Plea, it was adjudged, that of Common Right the Constable is to be chosen by the Jury at the Leet, and if he is present and refuse, the Steward may fine him; if he is not present, the Homage must present his Refusal at the next Court, and then he is to be * *amerced*; but a Distre's cannot be taken for it, without a Custom alledged so to do. 1 Salk. 175. *Fletcher versus Ingram*. Besides *Notitiam habuit* is not sufficient, it must be set forth, that the Party was summoned to appear before a Justice, &c. 5 Mod. 124. * See Indictment. (11) 21. * See Copyhold, (E) 1. * See pl. 15.

31. Upon a *Certiorari* to the Sessions, they certify an Order made upon Complaint, that at the Leet one *Stevens* was presented to be a Constable for the Year ensuing, and that the Steward had refused to swear him, but had nominated one *Stacy* to be Constable, and had sworn him; thereupon the Justices finding it upon Examination to be true, ordered that *Stevens* should serve that Office, and swore him accordingly; it was objected, that the Justices had no Power to choose a Constable, but that it properly belonged to the Leet: *Sed per Curiam*, tho' the Election of a Constable properly belongs to the Leet, yet he being a Peace Officer, is within the general Jurisdiction of the Justices of the Peace, tho' they have not an original Authority to make a Constable, and they may examine the Matter at their Sessions, and one Justice may swear him; the Order was confirmed. T. Jones 212. *The King versus Stevens*.

32. In Trespass for Breaking his House, and taking away a Silver Cup; the Defendant justified for a Fine of five Pounds, imposed by the Steward of the Leet, for contemptuous Words spoken of him in the Court, *ipso tunc judicialiter sedente*, (viz.) *The House in which you hold the Court is the House of the Mayor of Sudbury, and that John Skinner, who was then and there present, hath more Right to be there than the Steward; and if he was Mayor of Sudbury he would not suffer the Court to be held there*; the Plaintiff replied, that the House, &c. was the Town-Hall of that Borough, and that *Skinner* was then Mayor, and the Plaintiff a Free Burge's thereof, and that he *quiete & pacifice* spoke the Words; and upon a Demurrer the Plaintiff had Judgment, because it was not lawful to impose a Fine for such Words. T. Jones 229. *Berrington versus Brooke*.

33. Indictment, for that he being *debito modo* chosen Constable in a Corporation, according to Custom, refused the Office, &c. Upon Demurrer to this Indictment, it was ruled, that at Common Law all Constables were chosen in the Leet, or at the Törn, where there was no Leet; 'tis true, it hath been a great Question, whether by the Steward, or by the Homage; but a Corporation

ration cannot choose a Constable of Common Right ; by Custom they may, but then they must prescribe for it. 2 Salk. 502. *The King versus Bernard.*

34. Presentment at a Court-Leet, for building a *Cottage* contrary to the Statute 31 *Eliz. cap. 7.* without laying four Acres of Land to it, according to the Statute *De terris mensurandis* ; it was objected, that this was but an Ordinance ; that the Caption was, *Ad Curiam visus franci plegii cum Curia Baron', &c.* whereas a Court-Baron hath no Authority to take such a Presentment ; therefore 'tis illegal, because 'tis incertain which Court took it ; but adjudged this was not an Ordinance, but a Statute ; that where two Courts have a Jurisdiction to proceed for the same Thing, but in a different Manner, it ought to appear by which of these Courts it was taken ; but here in this Case there was but one Court which had Authority, therefore this Caption must be by that Court which had Jurisdiction to proceed. 1 Salk. 195. *The King versus Everard.* See 2 Cro. 603.

35. Upon a *Certiorari* to remove a Presentment at a Leet for a Nufance ; it was objected, that the Leet is not of Common Right, but taken out of the Torn ; therefore it ought to shew how, or by what Right the Court is held ; but this was over-ruled by the Authority of Precedents. 1 Salk. 200. *The King versus Gilbert.*

(B)

Of Pleadings in Replevin and Avowry for Amerciaments in the Leet.

1. **I**N an Avowry for an Amerciament in a Leet *upon a Vill*, for not setting up a Pillory and Stocks, and a Penalty assessed upon the Vill, if not done before such a Day ; and because it was not done, the Defendant, as Bailiff of the Manor, distrained on the Plaintiff, for the Penalty, he being one of the Inhabitants of the Vill ; and upon a Demurrer this Avowry was held ill ; first because the Defendant did not alledge, that the Penalty was not paid to the Lord of the Manor, for it might be paid by another of the Vill ; and if so then the Plaintiff was not to be distrained ; besides, he did not set forth a Precept from the Steward to take the Distress, or to levy the Penalty. *Moor* 574. *Scroggs versus Stevenson.* 607. S. C.

2. In Debt for an Amerciament in a Court-Leet, the Plaintiff declared, that the Defendant was amerced by the Court, but did not say in what Sum, and that it was assessed by the Assessors to such a Sum ; this was adjudged well, for the Amerciament should be general *quod sit in misericordia*, and this to be assessed to a certain Sum. 1 Salk. 56. *Brook versus Hustler.* 2 Salk. 768. *The Pleadings.*

3. In Trespass for taking his Silver Tankard ; the Defendant justified, for that at a Court-Leet in *Westminster presentatum fuit*, that in a Cellar within the Leet the Plaintiff melted Tallow, *ad commune nocumentum, &c.* for which he was amerced by the Jurors 5 s. and having Notice thereof, and being required to pay it, he refused ; whereupon the Defendant, as Bailiff to the Dean and Chapter, and by their Command, took the Distress ; and upon Demurrer to this Plea it was adjudged, that *presentatum fuit* was good, without an *Averment*, that he did melt Tallow ; but this Plea is ill, because the Defendant justified as * Bailiff, without shewing an Estreat of Court, or Warrant from the Steward, which he ought to have done, and to justify under it. 1 Salk. 108. *Matthews versus Cary.* See *Moor* 573, 607, 847. 3 Cro. 698, 748.

3 Mod.
137.

* A Bailiff of a Liberty cannot distress by Virtue of

his Office, but he must have a Warrant from the Steward, or Lord of the Leet. 3 Mod. 138.

Legatee and Legacy.

Legatee dying in the Life-Time of the Testator, his Interest doth not survive to his Executor or Administrator. (A)
Of other Cases, where the Interest of a Legatee is determined by his Death, or by the Death of the Testator. (B)
Where the Interest of a Legatee is not determined by his Death, or by the

Death of another. (C)
Who shall not be a good Legatee, and what shall be a good Legacy, and where to be recovered; and of a Legacy given by a Debtor to his Creditor. (D)
Of Trusts to pay Debts and Legacies; (E)

(A)

Legatee dying in the Life-time of the Testator, his Interest doth not survive to his Executor, &c.

1. **B**Y the Civil Law a Legacy of Lands, and likewise of any Personal Estate, doth not survive to the Heir or Executor of the Legatee where *he dies in the Life-Time of the Testator*; and so it is, if the Legacy is *conditional*, and the Legatee dies before the *Condition is performed*; or if 'tis payable at an *incertain Time*, and he dies before that Time is come; but if 'tis payable on a *certain Day*, in such Case it shall survive to his Executor, and shall be paid after the Death of the Testator.

2. *T. P.* devised Lands to *Henry Brett and his Heirs, who died in the Life-Time of the Testator*; adjudged, that by his Death the Devise was countermanded, for the Legatee was not in Being when the Devise to him should take effect; and the Word *Heirs* in this Will is not a Name of *Purchase*, so as to entitle the *Heir of Henry Brett* to the Lands by a Designation of the Person who should take by the Will; but 'tis a Limitation of the Estate; for if it should be a Description or Designation of the Person, then his Widow would be entitled to her Dower; and if he had died without Issue, his Lands would escheat. *Plow. Com. 345. Brett versus Rigden. Antea Heirs, (D) 1. S. C.*

3. In the Case before-mentioned, there was no *new Publication of the Will*; but in this Case Moor which follows, there was, (*viz.*) the Testator having four Sons, devised his Lands to his youngest Son in Tail, with several Remainders over to his other Sons in Tail, successively one after another; the youngest Son died in the Life-Time of the Testator, leaving Issue a Son; and afterwards the Testator declared his Will was, that the Sons of his said youngest Son should have the Lands devised to their Father, as they should have, if their Father had survived him: 'Tis true, the Court was divided, whether the Son of the youngest Son should take by this Will, or not; two Judges being of Opinion, that he should not have the Lands, because the *new Publication of the Will was not in Writing*, and that he could not take as Heir to his Father, because he died in the Life-Time of the Testator, and so the Lands were never vested in him; which agrees with the Judgment in *Brett's Case*. But the two other Judges were of a contrary Opinion, (*viz.*) that he should take by *Purchase*; for the Testator knew very well, that he could not take by *Descent*, because his Father was then dead; therefore by the *new Publication* he must intend that he should take by *Purchase*. *Moor 353. Fuller versus Fuller. Cro. Eliz. 422. S. C. Posses Publication. (A) 3. S. C.*

4. The Testator being seised of Lands in Fee, devised the same to *T. P.* in Fee to the Use of *W. C.* and the *Heirs Males of his Body*, and for Default of such Issue, to his Daughters, and afterwards *W. C.* died in the Life-Time of the Testator, leaving Issue one Daughter, and his Wife with Child with a Son, who was afterwards born; adjudged, that neither the Son or Daughter shall have the Lands by Virtue of this Devise; that the Son can have no Title, because it never vested in the Father, for he died in the Life-Time of the Testator; and the Daughter could not take by the Will, because the Word *Heirs* doth not give an immediate Estate by Way of *Purchase*, but is a Word of *Limitation* of the Estate it self, how long it should continue. *Cro. Eliz. 249. Hartopp's Case. 1 Leon. 353. S. C.*

5. Devise of 500 l. to his Niece *Florence Roll, which my Sister, the Lady Cholmly hath now in her Hands of mine, as by her Bond made to me and my Heirs it appears*; and made no Executor; about ten Years before the Death of the Testator, the Lady Cholmly paid the Money to him

him, then the Testator died; adjudged, that this Legacy is due, tho' the Security is altered, because 'tis neither *Legatum nominis*, nor *Legatum Debiti*, but a pure Legacy; and the Words of the Will shew, that the Testator intended it to be as certain to the Legatee as he could make it; so where the Testator devised a Legacy out of Debts due to him in several Counties, and they were all called in before he died, yet the Legacy remained good; and this was *Theobald and Winn's Case*; so where the *Lady Verney* gave a Legacy out of Money then at Interest, and called in before her Death; and this was the Case of *Squibb and Chicheley. Hil. 1671*; and a Difference was taken between a Legacy in *numeratis*, and a specifick Legacy; for in the first Case the Legacy will remain, tho' the Money is paid in to the Testator; but a specifick Legacy may be lost by being altered. *Raym. 335. Pawlett's Case. See Goldf. 91. Johnson's Case.*

6. The Father being seised in Fee of a *Foreign Plantation*, devised it to his Son, and made the Defendant Executor, and died; afterwards the Executor made a Lease of it for Years, reserving a Rent *in Trust* for the Son, who now exhibited a Bill to have the Rent; the Defendant confessed the Devise, and the Lease made by himself, but said, that great Losses had happened on the Testator's Estate, and that he had paid and secured Sums to a great Value, for the Debts of the Testator; and therefore prayed, that he might retain the Rent to reimburse what he had paid, notwithstanding the Trust, as aforesaid; the Lord Chancellor *Fynch* decreed, that tho' a Legatee shall refund against Creditors, if there are not sufficient Assets to pay all of them; and so likewise against Legatees, where all of them have not an *equal Share*, in Regard Assets fall short; yet an Executor himself shall never bring a Legacy back after he hath assented to it: 'Tis true, if he had paid the Money by Compulsion, it might have been otherwise; but that doth not appear by the Answer; and here is a Legacy given to the Son; for as to that Matter, tho' the Plantation is an Inheritance, yet it being in a Foreign Country, 'tis a *Chattel*, and Testamentary; and as to the Refunding, if the Spiritual Court give Sentence for a Legacy, a Prohibition lies, unless they take Security to refund. *2 Vent. 358. Noell versus Robinson.*

7. The Father being an Executor, wasted the Goods of the Testator, and afterwards devised his own Goods to T. P. and made his Son Executor, and died; then a Bill was exhibited against the Son, to bring him to an Account of the Estate of the first Testator; and pending the Suit another Bill was filed against him by T. P. the Legatee, to whom his Father had devised the Goods, as aforesaid, and thereupon he delivered the Goods to T. P. and assented to the Legacy; afterwards, in the Suit upon the Bill which was first exhibited against him, to bring him to Account, it appeared, that his Father, who was Executor to the first Testator, had wasted the Goods, and thereupon the Complainant in that Bill, together with the Son, who was Executor of his Father Executor, exhibited another Bill against T. P. the Legatee, who had received the Goods devised to him by the wasting Executor, to compel him to refund; but upon that Bill there could be no Relief, because the Son, who was Executor of the Executor, was one of the Plaintiffs, and having assented to the Legacy, shall not be admitted to undo his own Assent; but Liberty was given to bring a new Bill against T. P. the Legatee, and the Executor of the Executor, and then it was decreed, that the Legatee should refund against a Creditor of the Testator, who in Equity could only charge the Executor of his Executor, upon a Wasting by the first Executor: but if an Executor pay a Debt upon simple Contract, there shall be no Refunding to a Creditor of an Higher Nature; the principal Case went upon the Insolvency of the Executor. *2 Vent. 360. Hodges versus Waddington.*

8. the Father devised his Lands to his youngest Sons and their Heirs; now in this Case it had been clear, that if both of them had survived their Father, they had been Jointenants in Fee, and that if one of them had died afterwards, the Survivor should be entitled to the Whole; but it happened, that one of them died in the Life-Time of the Testator; and even in such Case it was adjudged, that the Survivor should have the Whole, because the other was not in Being at the Time when the Will took Effect. *Carter 2. Davis versus Kemp.*

Mod. Ca. 9. Held clearly by Hol: Ch. Just. that a Legatee may maintain an Action of Debt at Common
26. Law against the Owner of the Land out of which the Legacy is to be paid; for since the
* 32 H. S. * Statute of Wills gives him a Right, by Consequence he shall have an Action at Law to recover it. *2 Salk. 415. Ewer versus Jones.*

10. The Testator devised in these Words, (*viz.*) *I give 200 l. a-piece to the two Children of T. P. at the End of ten Years after my Death*; afterwards the Children died within the ten Years; adjudged a lapsed Legacy, for the Difference is, where a Devise is to take Effect at a future Time, and where the Payment is to be made at a future Time; for wherever the Time is annexed to the Legacy it self, and not to the Payment of it, if the Legatee dies before the Time happens, 'tis a lapsed Legacy. *2 Salk. 415. Snell versus Dec. See Cloberry's Case. See Dyer 59. B.*

11. Where a Legacy is devised, and no certain Time of Payment, if the Legatee be an Infant, he shall have Interest from the Expiration of one Year after the Testator's Death; for so long the Executor shall have, that he may see whether there are any Debts, and no Laches shall be imputed to an Infant; but if the Legatee be of full Age, he shall have no Interest but from the Time of the Demand of his Legacy; but where a Legacy is payable at a Day certain, it must be paid with Interest from that Day. *2 Salk. 415. Snell versus Dec.*

12. The Testator being seised in Fee, and owing Money on Bonds, devised some Legacies to his Children, whom he had already advanced, and his Lands to his eldest Son in Tail, whom he

he made Executor, and died; the Son paid the Bond-Creditors out of the personal Estate; and now the Legatees brought a Bill in Equity to be paid out of the Lands; and the Master of the Rolls decreed, that the real and personal Estate should be so charged, that both the Bonds and Legacies should be satisfied; but in an Appeal from that Decree to the *Lord Chancellor Harcourt* the Lands were exempted; 'tis true, if they had descended to his Son, the Legatees might be relieved in Equity; but since the Testator had devised them to his Son in Tail, it was as much his Intention, that his Son should have the Lands as the other Legatees should have their Legacies; and this Court never breaks into a specifick Legacy, in order to make good a pecuniary Legacy; and here the Children being otherwise provided for, are not in Nature of Creditors. 2 Salk. 416. *Herne versus Merrick*.

13. The Testatrix being indebted in 50 l. to one *Cranmere*, devised to him a Legacy of 500 l. and made him sole Executor, but after the Making the Will, she borrowed 150 l. more of him, and then died; the Master of the Rolls decreed this Legacy should be a Satisfaction of both the Debts; but *Harcourt Lord Chancellor* reversed that Decree, because a Court of Equity cannot say the Testatrix pays a Debt when she gives a Legacy. 2 Salk. 508. *Cranmere's Case*. See *Cuthbert versus Pearson*. S. P.

14. Adjudged, that where a Devise is to Two and their Heirs, and one of them dies in the Life-time of the Testator, that the Survivor shall have the Whole. 1 Salk. 238. In *Bunter and Coke's Case*.

(B)

Other Cases, where the Interest of a Legatee is determined by his Death, or by the Death of another.

1. THE Father devised 500 l. to his Daughter, for and towards her Marriage, To be paid at the Day of Marriage or Age of twenty-one Years, and she died before either of those Times; adjudged, that her Executor or Administrator shall not have the Money, because the Testator intended only a future Interest for his Daughter, and that it should remain in Contingency; and she dying before that Contingency happened, her Interest is determined. *Dyer* 59. *Lattimer's Case*.

2. The Testator devised his Lands to his Son, when he shall come to the Age of twenty-four Years, and that his Executor shall have the Oversight and Dealing thereof; in the mean Time the Son died before he was twenty-four Years of Age; adjudged, that the Interest of the Executor determined by the Death of the Son, for the Testator did not intend to bar his next Heir until his Son would have been of that Age, if he had lived. *Yelv.* 73. *Carpenter versus Collins*. *Moor* 744. S. C. 1 *Brownl.* 88. S. C. *Antea* Authority. (A) 8. S. C. 2 *Bulst.* 123. *Roberts versus Roberts contra*.

3. Devise to his Wife from Year to Year, until his Son should come to the Age of twenty-one Years, who died before he came to that Age; adjudged, that the Interest of the Wife was determined by the Death of the Son, because the Words from Year to Year shew, that it was the Intention of the Testator, that her Estate should cease upon the Death of his Son. *Moor* 48. See *Postea* (C) pl. 8.

4. Devise of Money to one at the Age of twenty-one or Day of Marriage, without saying, To be paid at that Time, and the Legatee dies before that Time; adjudged, this is a lapsed Legacy, and so 'tis if the Devise had been to her when she shall marry, or when his Son shall be of full Age, and they die before. *Godb.* 182. 2 *Vent.* 342. *Cloberry's Case*. 2 *Ch. Rep.* 155. S. C.

5. But a Devise of a Sum of Money to one, when he shall be of Age or married, or at the Age of twenty-one or Day of Marriage, and if he die before that Time, then, that it shall remain over to another; now, in such Case, if he die before twenty-one, or Day of Marriage, the Legacy shall survive to the other. See *Postea* (C) pl. 3, 10, 11.

6. The Father having two Daughters, charged his Lands by Deed, for the Payment of 4000 l. to each of them, at their respective Ages of twenty-one Years or Days of Marriage, and by the same Deed reserved a Power of Ordering it otherwise by his Will; afterwards he made his Last Will, by which he devised 4000 l. to each of his Daughters, for their Portions, in such Manner as he had provided by the Deed; then the Testator died, and afterwards one of the Daughters died before she was married or of the Age of twenty-one Years; her Mother took out Administration, and exhibited a Bill in Chancery against the Trustees in the Deed and against the Heir at Law, to have this 4000 l. decreed to her; but it was adjudged for the Benefit of the Heir, because it was a Charge upon the Land by the Deed and not by the Will, for that was only declarative of the Deed; and it did not lie in Demand by a Suit in the Spiritual Court, as a Legacy, but by a Bill in Equity to have the Trust performed. 1 *Vent.* 366. *Lord Pawlett's Case*. 2 *Ch. Rep.* 165. S. P.

(C)

Where the Interest of a Legatee is not determined by his Death, or by the Death of another.

1. **T**HE Testator devised 500 *l.* to his Daughter, *for and towards her Marriage*, and afterwards died; then the Daughter made her Will, and appointed *T. P.* to be her Executor, and died before Marriage; adjudged, that he shall have the Money, because, by the Devise a present Interest was vested in the Daughter for her Advancement in Marriage. *Dyer 59. Latimer's Case. Antea (B) 1. S. C.*

2. So where the Testator was possessed of a Term for Years, and devised *his whole Term* to *T. P.* upon Condition, that if he should happen to die before *R. N.* that then the Term and the Interest thereof should remain to the said *R. N.* during the Residue thereof then to come; afterwards *T. P.* the Legatee sold the Term to another for a valuable Consideration, and died before *R. N.* adjudged, that he had no Remedy, because by the Will an Interest was vested in *T. P.* *Dyer 74.*

3. So where the Father devised Goods to his Son, *when he should be of the Age of twenty-one Years*, and if he die before that Time, then his Daughter should have them; afterwards the Father died, and then the Son died before he was of Age; adjudged, that the Daughter should have the Goods immediately, and not stay till her Brother would have been of Age, if he had lived. *1 And. 33.*

4. So where a Legacy was devised to an Infant *to be paid when he shall come of Age*, and he died before that Time; adjudged, that his Administrator shall have it presently, and not stay till the Infant should have been of Age, if he had lived. *1 Leon. 278. The Lady Lodge's Case.*

5. So where a Legacy was given to a Feme Covert, *to be paid within eighteen Months after the Death of the Testator*, and she died before that Time; adjudged, that she had an Interest in this Legacy immediately and before the Day of Payment, and such an Interest which her Husband might release, and therefore he has a good Right to it. *2 Roll. Rep. 134.*

6. The Husband devised his Lands to his Wife, *until his Son should be of the Age of twenty-one Years*, who died before he came to that Age; adjudged, that the Estate of the Wife should still continue. *Moor 48. See Antea (B) pl. 6.*

7. Like *Boraston's Case*, which was a Devise of his Lands for eight Years, and afterwards to his Executors, *until Hugh, &c. shall be of the Age of twenty-one Years, for the Performance of his Will, and when he shall be of that Age, then to Hugh and his Heirs*; but he died when he was about nine Years old; adjudged, that the Executors of the Devisor shall have it, until *Hugh* would have been of the Age of twenty-one Years, if he had lived; 'tis very true, the Words *when and then* are Adverbs denoting Time; but when they refer to a Thing which must necessarily happen, they make no Contingency; now, if the Word *Shall* in this Case may be taken for *Should*, as it may very well in Construction of Law, then the Devise would be thus, (*viz.*) *To his Executors, until Hugh should be of the Age of twenty-one Years*; and if so, then the Time how long they should have it doth not rest in Contingency, for it may be made certain by computing it from the Death of *Hugh*, until he should be of the Age of twenty-one Years, if he had lived, and then these Adverbs would be Demonstrations of the Time when the Remainder to *Hugh* should take Effect, and not when it shall vest. *3 Rep. 19. Boraston's Case.*

8. It was admitted in *Boraston's Case*, that if the Testator had made a *Lease* of his Lands to his Executors, *until Hugh* should have attained his Age of twenty-one Years, he being then but nine Years old, that the Lessee would not have an absolute Term of twelve Years, for his Interest would have immediately determined upon the Death of *Hugh*; but 'tis otherwise in a *Will*, for in such Case the Executors would have an absolute Term of twelve Years by a present Devise; because it being devised to them *for the Performance of the Will*, it shall be intended that the Testator had computed the Time in which his Debts might be paid by the Perception of the Profits, which might very well be in twelve Years, and therefore he never intended that their Interest should determine upon such a Contingency as the Death of *Hugh*. *9 Rep. 19. In Boraston's Case.*

9. In like Manner the Husband devised his Estate to his Wife, *until the Issue of his Body should attain the Age of eighteen Years*, bringing it up: Provided, that if he the said Husband died without Issue, that then the Lands should be and remain to his Wife for Life; afterwards the Testator died, leaving a Child, which did not live till it was eighteen Years old, but died long before; adjudged, that the Wife shall have the Land until the Child would have been eighteen Years old, if it had lived, because the Time may be made certain by computing it from the Death of the Child, until that Time. *Lane 56. In Street versus Beale. Antea Condition. (C) 7. S. C.*

10. The Brother being seised in Fee, devised his Lands to his Sister and Heir until her Son *B.* should attain the Age of twenty-one Years, and afterwards to her said Son and his Heirs; and if he die before the Age of twenty-one Years, then to the Heirs of the Body of Robert, and made his said Sister Executrix, and died; afterwards *B. the Son* died before he attained the Age of twenty-one Years; adjudged, that he had a Fee-simple immediately vested in him by this Devise, and that upon his Death it instantly vested in his Heir at Law, and that the Sister of the Testator had an Estate

State for so many Years, until B. might have been of Age, if he had lived, because she was made Executrix. 1 Mod. 189. *Tailour versus Biddall*.

11. So where the Testator devised 100 l. to T. P. at the Age of twenty-one Years; and if he die before that Time, then W. C. and T. C. shall have it, or else the Survivor of them; afterwards the Testator died, and W. C. and T. C. both died in the Life-time of T. P. and before he came of Age, and then T. P. likewise died under Age; adjudged, that T. C. who survived W. C. had a Right to the Money, and by Consequence his Administrator shall have it, tho' T. C. his Intestate died before the Contingency happened. 2 Vent. 347.

12. So a Devise of a Sum of Money, To be paid at the Day of Marriage, or Age of twenty-one Years, and the Legatee died before either of these Cases happened; adjudged, that his Administrator shall have it, because the Legatee had a present Interest, tho' the Time of Payment was not yet come; besides, 'tis a Charge on the personal Estate which was in Being at the Testator's Death; and it would be very inconvenient, if it should be discharged by this Accident; for then it would be for the Benefit and Advantage of the Executor, which was never intended by the Testator. 2 Vent. 366. See Jones 28. *Smartle versus Schollar*. S. P. and 2 Lev. 207. S. P. Implication by Devise. (A) 9. S. C.

13. A Legacy was given to an Infant, and the Executor paid it to the Father, who afterwards became insolvent, then the Legatee, when he came of Age, exhibited his Bill in the Court of Chancery against the Executor for the Payment of the Legacy; but decreed, that the Payment to the Father was good, unless the Executor had taken Security to indemnify himself from the Payment; for if he had, then he paid it at his Peril. 1 Ch. Rep. 245. *Holloway versus Collins*.

(D)

Who shall not be a good Legatee, and what shall be a good Legacy, and where to be recovered; and of Legacies given by Debtor to Creditor. See Prohibition. (C) per totum.

1. **T**IS generally agreed, that Things Testamentary are to be recovered properly in the Spi- 2 Leon. ritual Court; but several Questions have been made what is testamentary, and what not; 119. S. C. as for Instance, the Testator covenanted with T. P. to pay to three Persons, who were no Parties to the Deed, (viz.) to each of them 10 l. at their respective Ages of twenty-four Years, and gave Bond for Performance of this Covenant; afterwards he devised to these very three Persons 10 l. a-piece, in full Performance of this Covenant and Bond; it was objected, this was not given as a Legacy, but in Performance of such Securities as he had given to pay it; but adjudged, that because these three Persons were Strangers to the Covenant, it shall be taken to be testamentary and a good Legacy. *Gouldsb. 58. Peirce versus Dacres*.

2. But where the Testator devised a Legacy to T. P. to be paid out of the Profits of his Lands, See Pl. 5. and that his Executor should have the Lands for such a Term of Years to levy the Sum, and pay it to the Legatee; adjudged, this was a temporal Thing, and not testamentary, because the Legacy was to arise out of the Lands. *Bendl. 21. Paschall versus Ketteridge*.

3. It seems necessary, that the Legatee should be born at the Time of the Making the Will; 1 Roll. as for Instance, the Testator devised 100 l. to the Children of T. P. who had five then living, and Rep. 406. two more before he died: adjudged, these Two shall have no Share of the 100 l. because there being five Children living at the Time of the Making the Will, it shall be presumed that he intended this Legacy for their Benefit, and not for those who were not then born. 1 Bulst. 153. *Dennis versus Dennis*.

4. The Testator having made his Will and given several Legacies to particular Persons, afterwards said to his Executor, I Will that T. P. shall have 20 l. more: Justice Croke, who reports this Case, tells us, that the Words were, I Would you to encrease it to 20 l. the Question was, whether this was a Legacy which might be recovered, or not; and he farther tells us, this is called by the Civil Law * *Commissum fidei*, and a good Legacy, and recoverable in the Spiritual * Pl. 11. Court. *Godb. 246. Cartwright's Case*. 2 Cro. 345. S. C. by the Name of *Pearson versus Cartwright*. 2 Bulst. 207. S. C. by the Name of *Benjon versus Cartwright*. S. P.

5. The Judgment in the following Case seems to be contrary to *Paschall* and *Ketteridge's Case* Pl. 2. before-mentioned, (viz.) the Testator devised a Legacy to T. P. to be raised out of the Profits of his Lands, this was held a meer personal Legacy, and to be recovered in the Spiritual Court. 2 Cro. 279. *Love versus Naplesdon*.

6. But if Security is given to pay a Legacy, in such Case, an Action at Law is the proper Remedy; as for Instance, the Father devised 20 l. to his Daughter, and made T. P. his Executor, and died; afterwards the Executor gave a Bond in the Penalty of 40 l. with a Condition for the Payment of this Legacy; adjudged, that by giving the Bond the Legacy became a Debt at Common Law, and that the Legatee could never afterwards sue for it in the Spiritual Court. *Telco. 39. Goodwin versus Goodwin*.

7. But this was against the Opinion of Justice *Doderidge* in a parallel Case, who held, that the Taking the Bond did not totally destroy the Nature of the Legacy, but that the Plaintiff might still sue for it in the Ecclesiastical Court. 2 Roll. Rep. 160. *Gardner's Case*. See *Postea* pl. 14. S. My

8. My Lord Coke made a very nice Distinction in *Sambourne's Case*, to this Purpose, (*viz.*) He tells us, where *Lands are devised to be sold by W. R. and the Money is to be distributed by him to several Persons*, this is not testamentary and triable in the Spiritual Court, because the Money is *issuing out of the Land*; but if the Testator had devised that *W. R. should sell his Lands, and that the Money arising by such Sale should remain in his Hands and Possession, to pay Legacies*, this is testamentary, and therefore within the Jurisdiction of that Court. 2 *Bull.* 257. *Samborn versus Samborne*.

9. But the Law is otherwise, (*viz.*) the Testator devised that *W. R. should sell his Lands, and that he should distribute the Money arising by such Sale to three Persons equally*; the Land was sold, and one of the Legatees libelled in the Spiritual Court for his Share; but adjudged, this was not Testamentary, or a Legacy, but a Sum in gross arising out of Land, therefore not determined in that Court, but in a Court of Equity; for 'tis a Trust in *W. R.* the Devisee, for the Benefit of the Legatees. *Hob.* 265. *Edwards versus Graves*.

10. Libel in the Spiritual Court for a Legacy; the Defendant pleaded, that *A. B.* had recovered so much Money of him in an Action of Debt at Common Law, *ultra quod* he had not Assets, &c. the Plaintiff replied, that the Recovery was had by Covin, and that *A. B.* who had recovered against him, offered to discharge the Judgment, but that the Defendant would not accept the Release; and thereupon the Defendant moved for a Prohibition, suggesting this Matter, and that the Covin was not examinable in the Court; but the Prohibition was denied, for it was held, that the Spiritual Court might properly examine it. *Moor* 917. *Loyd versus Maddox*.

T. Jones
161.

11. The Testatrix made *Elizabeth Wheeler* Executrix, and gave her and *Sir John Shore* the Disposal of the Residue of her Estate, after the Payment of such Legacies as she had bequeathed; the Executrix did not prove the Will, but made *Elizabeth Taylour* her Executrix, and died; afterwards *Sir John Shore* administered to the Goods of the first Testatrix *cum Testamento annexato*, and made the Lady Shore his Executrix, and died; after his Death Administration de Bonis non of the first Testatrix *cum Testamento annexato*, was granted to the Lady Shore, by Virtue whereof she claimed the Residue of the Estate of the first Testatrix; and upon an Appeal to the Delegates brought by *Elizabeth Taylour*, who was an Executrix of an Executrix; it was adjudged, that the Interest which *Elizabeth Wheeler* and *Sir John Shore* had to dispose the Residue, was a meer Legacy, and that upon her Death the Whole did not survive to him; and if so the Lady Shore could not have the Whole as Executrix to him, but that she shall have an equal Share with *Elizabeth Taylour*, and no more; and that where Administration de Bonis non *cum Testamento annexato* is granted to one, 'tis good, and ought not to be repealed. *Jones* 161. *Taylor versus Shore*. See pl. 4. that 'tis *commissum fidei*, and a good Legacy.

12. The Testator devised certain Leases to his eldest Son, excepting 140 *l.* to be raised out of such Leases for Portions for his Daughters, and died; afterwards the Daughters libelled in the Spiritual Court for this 140 *l.* and upon a Prohibition, the Question was, whether this was a Legacy Testamentary, or not; it was objected, that it was not, but that it should be accounted a Sum of Money, or Rent issuing out of the Lands in Lease; but adjudged, that it was a Legacy Testamentary, and recoverable in the Spiritual Court. 1 *Bull.* 153. the Reason of the Judgment is not given in that Book, but 'tis mentioned by Justice *Twissden* in another Case, (*viz.*) Because the Lease it self was Testamentary; for 'tis a Chattel; therefore the Money arising out of the Lands in Lease, must be of the same Nature. *Sid.* 279. *In the Case of Ramsey versus Rolfe*.

13. In some Cases the Common Law takes Notice of a Legacy, not directly, but in a collateral Way; as where the Executor promised to pay the Money if the Legatee would forbear to sue for the Legacy; this was adjudged a good Consideration to ground an Action, but that it would not lie for a Legacy in Specie, for that would be to devest the Spiritual Court of what properly belonged to their Jurisdiction, by turning Suits which might be brought there into Actions on the Case. *Raym.* 23 *Nicholson versus Sherman*. *Sid.* 45. *S. C.*

14. The Lady *Cholmley* was indebted to the Testator in 500 *l.* by Bond; he made his Will, and devised to his Niece 500 *l.* which the Lady *Cholmley* had then in her Hands, and for which she gave Bond, but she paid the Money to the Testator before he died, and he never altered his Will; adjudged, that the Money was due to the Legatee, tho' it did not then rest upon that Security by Bond; for this was neither *Legatio nominis* or *Debiti*, but a specifick Legacy in Money; and the Words of the Will only shew, that the Testator intended to make the Legacy as certain as he could demonstrate; but if it had been a specifick Legacy, it would have been lost by altering the Security. *Raym.* 335. *Pawletti's Case*.

15. But as to Securities to be taken by Executors, 'tis true, they may pay Legacies, without taking any Manner of Security from the Legatees to refund, if there should happen to be any Defect of Assets to pay the Debts of the Testator, and other Legacies bequeathed by him; but the Law will not oblige him to pay any Legacy, without Taking Security from the Legatee to refund, if there should be any such Defect; for if an Executor will suggest, that the Testator was indebted to several Persons in several Sums of Money, and that he did not leave Assets to pay his Debts and Legacies, the Courts of Common Law will grant a Prohibition to the Spiritual Courts, where the Plaintiff proceeds there, for such a Legacy, except he will give Security to refund, if the Debts should be recovered on such Bonds. *Nelthrope versus Brijloe*. 1 *Ch. Rep.* 136, and *Moor* 413. *Nelson versus Sharpe*. *Owen* 72. *S. C.* *Gouldf.* 141 *S. C.*

16. And as an Executor is not obliged to pay a Legacy without taking Security to refund ; so in some Cases he may be compelled to give Security to the Legatee for the Payment of the Legacy ; as for Instance, the Testator devised 1000*l.* to *T. P.* to be paid at the Age of twenty-one, and made *W. C.* his Executor, and died ; afterwards *T. P.* the Legatee exhibited a Bill in Equity against the Executor, setting forth, that he had waived the Estate, and praying that he might give Security to pay the Legacy when it should become due ; and it was decreed accordingly. 1 *Ch. Rep.* 136. *Duncombe versus Stint.*

17. Where Goods are devised to Two jointly, and afterwards one of them dies, the Whole shall not survive to the other, but the Executor of the dead Legatee shall have an equal Share with such Survivor ; but where the Devise was of Goods to Two jointly, and the Executor assents to the Legacy, and then one of the Legatees dies, in such Case an Interest is vested by the Assent, and 'tis by that Means become a Chattel governable by the Rules of Common Law. Jones 130.
2 *Lev.* 209. *Bustard versus Stukely.*

18. The Testator had three Nieces *A. B.* and *C.* and being indebted to his Niece *A.* in 100*l.* by Bond, he devised 300*l.* to her, and to his other two Nieces 200*l.* a-piece ; afterwards he borrowed 100*l.* more of his Niece *A.* and died thus indebted to her in 200*l.* it was insisted, that so much of this Legacy of 300*l.* which he owed to his Niece *A.* should go in Satisfaction of the Debt, because the Legacy given to her was greater than the Debt he owed ; and a Man shall be intended to be just in paying Debts before he shall be Kind in giving Legacies ; but there being Proof of Assets and a greater Kindness to this Niece than the rest, it was decreed she shall have 300*l.* over and above the 200*l.* due to her. 1 *Salk.* 155. *Cuthbert versus Peacock.*

(E)

Of Trusts to pay Debts and Legacies.

1. **A**N Estate was limited to Trustees for Payment of Debts and Legacies ; they raised the whole Money, and the Heir prayed to have the Land ; it was objected, that tho' the Money was raised, yet the Debts and Legacies were still unpaid, because the Trustees had converted the most Part of it to their own Use ; but decreed, that the Heir should have the Lands discharged, for the Estate was Debtor for the Debts and Legacies, but nor for the Faults of the Trustees, against whom both the Creditors and Legatees may take their Remedy. 1 *Salk.* 153. *Mich.* 1689. *In the House of Peers.*

2. Decreed, that where Lands are made subject to pay Debts either by Deed or Will, that Debts barred by the Statute of Limitations shall be paid, for they are still Debts in Equity ; and tho' the Statute hath extinguished the Remedy to recover them, yet the Duty still remains. 1 *Salk.* 154.

3. Where a Trustee or Executor compounds Debts or Mortgages, and buys them in for less Money than is really due, he shall not have the Benefit, but the Creditors and Legatees ; and if there are none, then to him who is entitled to the Surplus ; but if one who is neither Trustee or Executor, but acts for himself, buy in a Mortgage for less than is due, he shall be allowed all that is really due, for he stands in the Place of the Mortgagee, who might have given it to him ; and what is due, not what he gave, must be the Measure of the Allowance ; for since he runs the Hazard, if Loss ensue, he ought to have the Benefit, if it turn to Advantage ; so decreed by the Lord Chancellor Cowper. 1 *Salk.* 155.

Less Sum demanded than due. See Variance. (G)

Levant and Couchant. See Trespass. (E) per totum. Distress. (A) 13, 14

Libels.

Libels.

(A)

1. **A** Libeller may be punished by Indictment at Common Law, and by Fine or Imprisonment, or by Pillory, or Loss of Ears; and 'tis a Libel to compose and publish any Writing to the Disgrace of another; as it may be done by Writing, so likewise it may be by Words and ignominious Signs. 5 Rep. 125. *B. De libellis famosiss.*

Moor 813. S. C. 2. The Person convicted for publishing a Libel must either contrive it himself, or be a Procurer of the Contriver, or a malicious Publisher thereof, knowing it to be a Libel; but if one reads a Libel, or hears it read, 'tis no Publication, because before he hears or reads, he cannot tell whether 'tis a Libel, or not; but if he repeat any Part of it in the Presence and Hearing of others, this is a Publication; if he * write a Copy of it, and do not deliver it to others, 'tis no Publication. 9 Rep. 59. *Lamb's Case.*

* Postea pl. 17.

3. The Ancestor, whose Name was *Peacock*, being seised of Lands in Fee, and one *William Peacock* being his Heir at Law; the Defendant sent a Letter to the Ancestor subscribed by himself, and directed to him, intimating, that the said *William Peacock* was a Frequenter of Taverns, and a Whoremaster, and that all the Ancestor's Estate would not discharge his Debts, and that the said *William Peacock* was not the Son of a *Peacock*; adjudged, that this Letter was a Libel, for which the Defendant was fined and imprisoned; but if the Letter had been directed to the Plaintiff himself, and not to a Third Person, it had not been a Libel. 2 Brownl, 151. *Peacock versus Sir Geo. Reynell.*

4. *Sir Baptist Hix* who built *Hix-Hall*, and an Hospital, &c. had a Letter directed to him by the Defendant, intimating, that he had done those Works as the proud Pharisee for Vain Glory, &c. and taxed him with divers unlawful Acts; adjudged, that for a private Letter, purporting a Libel, an Action on the Case did not lie at Common Law, because the Plaintiff could not prove the Publication to make it a Libel; but because it tends to the Breach of the Peace, and might discourage others from doing Acts of Charity, 'tis punishable by Indictment. Poph. 139. *Sir Baptist Hix's Case.* Hob. 215. S. C. See Postea pl. 12. S. P.

4 Leon. 240.

5. The Defendant wrote an infamous Letter to the Prosecutor, and dispersed Copies of it; adjudged, that the Writing such a Letter, and directing it to the Party himself, and not to a third Person, is an Offence against the King, because 'tis a Motive to revenge, and tends to the Breach of the Peace, and therefore 'tis punishable by Indictment; and the Dispersing Copies of it aggravates the Offence or rather makes it a new Crime, for which the Party may have an Action on the Case. Poph. 35. *Edwards versus Wotton.* Hob. 62. *Barton versus Lewellin.* S. P.

6. If the Contents of a Libel are true, yet it ought not to be justified. Hob. 252. *Lake versus Hutton.*

7. There being a Libel against a Person for Incontinency, the Defendants repeated a great Part of it maliciously, in the Presence of several others; this is a Libel; but to repeat it in a jesting Manner, and not maliciously, is not a Libel, it being without any Design of Defamation; and it was held, that a Libeller is punishable, tho' the Matter of the Libel is true; and so is he who disperses Libels, tho' he doth not know them to be so, and never heard them read. Moor 627. *Warr's Case.*

8. The Defendant exhibited a Libel against the Ch. Justice, directed to the King, affirming, that the Judgment which he gave in the Case of *Magdalen College*, was Treason, and in which he wrote, that the Ch. Just. was a Traitor, and a perjured Judge, and this Libel he fixed on the Gate entering *Westminster-Hall*; and being indicted for the same, he put in a scandalous Plea, and being convicted, he had Sentence to stand in the Pillory with a Paper mentioning his Offence, to be bound to his good Behaviour during Life, and was fined 1000 Marks. Cro. Car. 125. *J. ff's Case.*

9. *Captain Sreater* was committed, by the Council of State and the Parliament, to the Gate-House *Westminster*, for publishing a seditious Libel and Pamphlets against the Government, and being brought to the Bar by *Habeas Corpus*, and a Return filed, he prayed, that he might be bailed, but it was denied, and he was turned over to the Marshal, and not remanded back again to the Prison of the Gate-House; because upon filing the *Habeas Corpus* the Court was possessed both of his Person, and of the Cause. Mich. 1653. *Style 379. Sreater's Case.*

10. Case, &c. in which the Plaintiff declared, that he is Chancellor to the Bishop of Lincoln, and that the Defendant to scandalize him in his Office, had printed several Libels on him, importing, that the Plaintiff extorsively, and by Colour of his Office, had cited several Persons to his Court, to obtain Fees of them, &c. the Defendant justified the Printing the Papers, and all the Matter contained in them; and moreover, that he (the Defendant) exhibited a Petition

1 Mod. 53.
Hardr.
470.
2 Vent. 28.
Lev. 240.
S. C.

tion to the Parliament against the Plaintiff, and as soon as it was committed, he (the Defendant) printed the said Paper to instruct the *Committee*, and delivered them for the better Dispatch of his Complaint, and traversed that he dispersed them *aliter vel alio modo*; and upon a Demurrer to this Plea, the Question was, whether the Defendant could justify the *Printing any Papers* which imported a Crime in another, tho' it was to instruct the Judges or Counsel; and the better Opinion was, that he could not. *Sid. 414. Lake versus King.*

11. Ruled by the Court, that a Copy of a Libel must be granted where the Suit is between Party and Party, but not where the Suit is *ex Officio* of the Judge of the Spiritual Court; and where one appears there, and cannot have a Copy of the Libel, and is excommunicated for not answering, he shall be absolved upon a Prohibition delivered, without taking the Oath *parendi mandatis Ecclesiae*. *Sid. 232. Scurr versus Dr. Burrell.*

12. *Mr. Mellish* of the Temple being a Suitor to a Citizen's Widow, the Defendant *Sumner* Lev. 139. wrote a Letter to her, advising her not to marry him, for he was a debauched Man, and had S. C. the Pox, and was not worth a Groat; but that if she married him, he would keep a Whore, and allow her 50 *l. per Annum*; he did not subscribe this Letter, but it was proved upon him, and that he got it conveyed to the Widow; and for this Libel he was indicted at the Sessions in London, and fined 200 *l.* and upon a Writ of Error brought, the Error assigned was, that this was not within the Commission of the Justices of the Peace; but adjudged, that it was; then it was objected, that a *Private Libel* is not indictable, (*viz.*) for a private Matter, as this was; but adjudged, that such private Libel tends to the Breach of the Peace, and is indictable, and the Party may be fined to the King. *Sid. 270. The King versus Sumner, & al. See antea pl. 4. S. C.*

13. Case, &c. brought by *Mr. King* a Barrister at Law, against *Sir Edw. Lake*, Chancellor of the *Bishop of Lincoln*, for Printing and Publishing a false and malicious Libel against him, (the Plaintiff) in which were these Words, in answer to a Petition preferred by the Plaintiff against the Defendant to the House of Commons, (*viz.*) The Prosecutor is *Mr. King*, whose Violence formerly and lately, is notorious; to say nothing before the Restoration, of which much might be said, too horred to be related, &c. he said in the Consistory Court at *Lincoln*, with a loud Voice, and in the Presence of many People, that he would *strike at the Root*, (whereas this Respondent conceives there is *no Root* under God of Spiritual Government, but the *King himself*) always referring himself to the Judgment of this Honourable House; and in the Margin, with an *Asterisk*, there were these Words, *saltem quoad potestatem coercivam*; and that the Petition of the Plaintiff is stuffed with *illegal Assertions*, clogged with *gross Ignorance, Absurdities and Solecisms*, &c. by Reason of which Words and Libel he is damaged in his good Name and Credit, and Profession, &c. After a Verdict for the Plaintiff, in which the Jury found these Words, *always referring himself to the Judgment of his Honourable House*, and also the Words in the Margin which were omitted in the Declaration; it was moved in Arrest of Judgment, that the Words were too general to found an Action upon; but adjudged, that there was no material Difference between the Declaration, and the Finding in this Special Verdict; and tho' these Words, *if spoken* had been *too general*, yet when they are *written and published* they contain more Malice, and are actionable; the Judgment was affirmed, and the Plaintiff had 150 *l.* Damages. *Hardr. 470. King versus Sir Edw. Lake. See Godb. 405. 4 Rep. 14. B. Hob. 252.*

14. Information against the Defendant, for causing to be framed, printed and published, a scandalous Libel: Upon Not guilty pleaded, the Evidence was, that upon Search of the Defendant's Lodgings by a Warrant from the Secretary of State, two of the Libels were there found; adjudged, that tho' he could give no Account how he came by them, yet this was no Crime within the Information, unless he had maliciously published it. *1 Vent. 31.*

15. The Plaintiff in a Prohibition being chosen Churchwarden, the Commissary tendered him an Oath *ex Officio* to present every Parishioner who had done any Offence, which he refusing to take, was excommunicated; and now a Prohibition being granted, the Plaintiff caused above 2000 printed Copies thereof to be dispersed, with this Title, (*viz.*) A translated Copy of a Writ of Prohibition granted by the Lord Ch. Just. &c. in *Easter-Term*, 1676, against the Bishop of *Chichester*, who had proceeded against and excommunicated one *T. Waterfield* a Churchwarden, for refusing to take the Oath usually tendered to Persons in that Office, by which Writ the Illegality of such Oaths is declared, &c. this was adjudged a Libel. *2 Mod. 118. Waterfield versus Bishop of Chichester.*

16. The King having set forth a Declaration for Liberty of Conscience; and by Order of Council it being enjoined to be read twice in all Churches, and that the Bishops should distribute that Order thro' their respective Dioceses; the Archbishop of *Canterbury*, with six other Bishops, petitioned the King, setting forth, that the Declaration was founded on a dispensing Power, which had been declared illegal in Parliament, &c. and therefore they could not in Honour or Conscience be Parties to the Distribution and Publication thereof; for this they were summoned to appear, before the Council which they did, and refusing to give a Recognizance to appear in *B. R.* they were committed to the Tower by a Warrant from the Council-Board, and the Attorney General afterwards moving for an *Habeas Corpus*, returnable *immediate* the same was granted and returned the same Day, and they were all brought into Court; the Substance of the Return was, that they were committed by Warrant, &c. under the Hands and Seals of the Lord Chancellor *Jef-feries*, naming more *Dominos Concilii*, for contriving and publishing a seditious Libel against the King; the return was filed, and an Information was read against them for this Crime; and it was

* For tho' they are Lords of the Council, they do not always act in Council.

moved, that they might plead *instante*; it was objected against the Reading it, for that the Bishops were not legally committed; for it was *per Dominos Concilii*, when it should have been ** per Dominos in Concilio*, or by Order of Council; besides, the Bishops are Peers, and the Fact is only a Misdemeanor, for which a Peer ought not to be committed *instante*, but ought to be summoned by way of *Subpœna* out of the Crown-Office; but these Objections being overuled by three Judges, for that a Peer may be committed for a Breach of the Peace, and this Libel is a great Breach thereof; then the Information was read, setting forth the Declaration, and the Order of Council, and that after the Making thereof the Defendants did *consult and confire* amongst themselves to lessen the Authority and Prerogative of the King; and to elude the Order did maliciously frame, compose and write a Libel, which they caused to be published under the Pretence of a Petition, which was set forth *in hæc verba in contemptu Domini Regis*; then it was moved that they might plead *instante*, it being the Course of the Court so to do where a Defendant appears in Person, or upon a Recognisance, or is a Prisoner in Custody, upon any Information for a Misdemeanor; then the Archbishop offered a Plea in Writing of all the aforesaid Matter, which was overuled; then he pleaded Not guilty, and so did the other six, and about a Fortnight afterwards they were tried at Bar, and acquitted. 3 *Mod.* 212. *The Bishops Case.*

* Antea pl. 2.

17. Information for a Libel tried at Bar, where the Evidence was, that the Defendant ** wrote* the Libel, it being dictated to him, that he put it into his Study, and by Mistake delivered it to one *Brereton*, who transmittit a Copy thereof, thro' several Hands, to the Mayor of *Bristol*, who sent for *Brereton* and examined him on Oath, and not in the Presence of *Paine* the Defendant, who was afterwards examined by the Mayor, and confessed, that he *did write* the Libel, but that he did not *compose or publish it*; *Brereton* was now dead, and the Defendant was prosecuted as the *Composer, Author and Publisher* of this Libel, and the Jury gave a Special Verdict, (*viz.*) that a certain Person, to them unknown, did pronounce, dictate and repeat the Words contained in the Libel, which the Defendant ** did write*, and if that will make him guilty of *composing and making it*, then they find him guilty, and as to the Publication they find him Not guilty; the Question was, whether the *Writing* this Libel did amount to the Making and Composing it; and it was insisted, that it did not; for if that should be true, then every Man must be a *Maker and Composer* of what he *writes*. But the Court held, that if one Man dictates, and another *writes* a Libel, both are guilty; for the *Writing* after another shews his Approbation of what is contained in the Libel; besides, it doth not appear, that this Libel was ever written before; so that the first Reducing it into *Writing*, may properly be said to be the *Making* it, but not the *Composing*; for if one repeats, and another *writes*, and a third approves what is written, they are all *Makers* of the Libel, because all Persons who concur and shew their Approbation to an unlawful Act, are guilty. 5 *Mod.* 163. *The King versus Paine.*

* Antea pl. 2.

18. Indictment for composing, writing, making and collecting several Libels; in one of them 'tis contained amongst other Things, *juxta tenorem & ad effectum sequen'*: Upon Not guilty pleaded, the Defendant was found guilty, as to the *Writing and Collecting*, and as to the rest, Not guilty; adjudged upon a Motion in Arrest of Judgment, that the Copying a Libel without Authority, is writing a Libel, and that he who thus writes is a Contriver; and that he who hath a written Copy of a *known Libel*, and 'tis found upon him, this shall be Evidence of the Publication; but if such Libel be not publickly known, then the bare having a Copy is not a Publication; that if this Indictment had been *ad effectum sequen'*, it had been naught, because the Court is to judge of the Words themselves, and not of that Construction, which is made by the Prosecutor; but that *juxta tenorem sequen'* is of a more certain and strict Signification; for the *Tenor* of the Thing is the Transcript, and imports the very Words themselves, and therefore the Words *ad effectum*, shall be corrected by the Words *ad tenorem*; the bare Writing is criminal, yet it was not punishable in the Star-Chamber. See for this *Hob.* 62, 215. 12 *Rep.* 35. *Heil.* 4 *Moor* 421. *Dyer* 372. The principal Case was 2 *Salk.* 417. *The King versus Bear.*

19. Information against the Defendant for writing a Libel against the Government, in which Libel were contained several scandalous Matters *secundum tenorem sequen'* setting forth a Sentence in the Libel, and the Word ** Nor* instead of *Not*, but that did not alter the Sense: Upon Not guilty pleaded, this Matter was found specially; and adjudged, that *Tenor* implies a true Copy, and that this was not *Tenor*, because *Not* differs from *Nor* both in Grammar and Sense, and that no Man could swear, that the Libel in the Information was a true Copy of the written Libel; that there are two Ways of describing a written Libel, either by the Words, or by the Sense; the first is *ujus Tenor sequitur*, or *quæ sequitur in hæc Anglicana verba, &c.* in which the Description is by particular Words, and of which every Word is a Mark; so that if there is any Variance, 'tis fatal; the other Description is by the Sense, and that is to set forth in the Information, that the Defendant made a Writing, and therein wrote so and so, translating it into *Latin*, in which Case 'tis not material to be very exact in the Words, because the Matter is described by the Sense of them. *Salk.* 660. *The King versus Drake.*

License.

(A)

Pleading it, good, and not good.

1. **I**N Replevin for Taking his Horse; the Defendant justified as *Bailiff* to *T. S.* Damage-feasant in *H.* the Plaintiff replied, that he rode over the Lands *per Licentiam* of the Defendant, who is, and then was *Bailiff* of *T. S.* the Defendant traversed the License, upon which they were at Issue, and the Plaintiff had a Verdict; it was moved in Arrest of Judgment, that Issue was taken upon the License, which is void in Law, because a *Bailiff* cannot lawfully do any Thing but what is for the Benefit or Profit of his Master; 'tis true, if he had received any Consideration for this License, it might have been otherwise, because in such Case he might have accounted to his Master; the Plaintiff had Judgment. 1 *Roll. Rep.* 258. *Wingfeild versus Bell.*

2. In Replevin, the Defendant avowed for Damage-feasant; the Plaintiff replied, that the Parson of *C.* and his Predecessors, Time out of Mind, had Common in the *Place where, &c.* as belonging to their Glebe, and that the Plaintiff's Beasts were *Levant and Couchant* on the Glebe, and that he put them into the Common by the *License* of the Parson; the Defendant traversed the *Levancy, &c.* and it was found against him; and now he moved in Arrest of Judgment, that the Replication was ill, because the Plaintiff had set forth a *License* to take a Profit *in alieno solo*, and did not alledge that such License was by Deed in Writing, as it ought to be; but adjudged, that a Parol License was sufficient, because it passeth no Interest, 'tis only by Way of Excuse for the Trespass; and 'tis for no certain Time, but only *pro hac Vice.* 1 *Vent.* 18, 25. *Rumsey versus Rawson*, and 124. *S. P.* *Raym.* 171. *S. C.* 2 *Cro.* 757. *S. P.* 2 *Saund.* 327. *S. P.* 2 *Roll. Rep.* 146, 175. *S. P.* 1 *Vent.* 123. *S. P.* 163. *S. P.*

3. In Trespass, the Plaintiff declared, that the Defendant on the 24th Day of *January*, did enter and take Possession of his House, and kept him out of Possession to the Day of exhibiting his Bill *ad damnum, &c.* The Defendant pleaded, that before the said Time, *quo, &c.* the Plaintiff did license him to enjoy the House till such a Day, *&c.* and upon a Demurrer to this Plea it was objected, that it was ill in Substance, because a License to enjoy from Time to Time is a Lease, and as such it ought to be pleaded, it being a certain and present Interest; but adjudged, that it might be pleaded as a License. 1 *Mod.* 14. *Hall versus Seabright.*

4. Trespass, *&c.* for immoderately riding his Mare, *&c.* the Defendant pleaded, that the Plaintiff lent him the Mare, & *licentiam dedit eidem* (the Defendant) *equitare*; and that by Virtue of this License the Defendant and his Servant *alternatim* did ride, *&c.* and upon a Demurrer to this Plea it was adjudged ill, because the License is personal, and cannot be communicated to the Servant, or any other; 'tis true, if the Mare had been lent for a Time certain, there the Party hath an Interest during that Term, and in such Case his Servant may ride. 1 *Mod.* 210. *Bringloe versus Morrice.*

Life. See Estate for Life.

Limitation.

Limitation of Actions by the Statutes | Limitation of Estate, and how it differs
32 H. 8. and 21 Jac. cap. 16. (A) | from a Condition. (B)

(A)

Limitation of Action by Statute 32 H. 8. and 21 Jac. cap. 16.

1. **A**djudged, that *Debt for Rent arrear*, upon a Lease for Years by Deed, is out of the Statute 21 Jac. and so is a *Rent-charge* founded on a Deed or a Reservation of Rent upon a Fee-simple by Deed, out of the Statute 32 H. 8. *Hutton* 109. *Freeman* versus *Stacie*.

2. The Statute is in the Negative, (*viz.*) *That the Plaintiff shall not maintain an Action*, but within such a Time, therefore if he bring an Action within the Time, and alledge the Promise to be made beyond the Time limited in the Statute, there upon his own Shewing the Action will not lie; so if he alledge the Contract to be made within the Time, and it appears upon the Evidence that it was beyond the Time, the Defendant shall take Advantage of it, for the Evidence will not maintain his Action. *Cro. Car.* 81. *Brown* versus *Hamock*, and 116. *Tankerly* versus *Robinson*. S. P.

3. The Defendant being indebted to the Plaintiff in 400 *l.* and not able to pay it, he accepted 100 *l.* for the Whole and gave the Defendant a Release, and in Consideration of giving the said Release, he promised to pay the Residue of the Debt *when God should enable him*, which Promise he often renewed; but afterwards, when an Estate of great Value came to him, and he was able to pay the Debt, he refused so to do, all which Matter the Plaintiff set forth in his Bill; adjudged, that if the Promise was made before the Release, then 'tis discharged by the Release; but if after the Release, then the Promise is void, because there was no Consideration to make such Promise, for the Debt was discharged; adjudged likewise, that this is not within the Statute of Limitations, for 'tis no more than a *Trust* which the Plaintiff reposed in the Defendant to pay the Residue of the Debt when he was able; and a *Trust* is not taken away by the Statute. *March* 151. *Mosse* versus *Brown*.

4. Action on the Case for Words spoken 20 Sept. 7 Car. and the Action was brought in *Michaelmas-Term*, 10 Car. which was three Years after the Words were spoken, when such Actions ought to be brought within two Years by the Statute; upon Not guilty pleaded, it was found for the Plaintiff; and upon a Motion in Arrest of Judgment, it was adjudged, that the Defendant shall not take Advantage of the Statute, having not pleaded it; but if he had pleaded it, then the Plaintiff in his Replication must have shewed Cause why he did bring the Action within the Time limited by the Statute, otherwise he shall be barred. *Cro. Car.* 293. *Hawkins* versus *Billhead*.

5. In a Writ *de rationabili parte Bonorum*, the Plaintiff declared, and set forth the Custom of *Nottingham*, &c. and shewed, that the Defendant *partialiter* detained Goods which belonged to the Plaintiff as his Portion, &c. Upon *Non detinet* pleaded, it was found, that the Plaintiff was entitled to this Action many Years before the Statute of Limitation 21 Jac. and that he had not brought his Action within the Time limited by that Statute; but yet it was adjudged for the Plaintiff, because this Action is an original Writ, and not mentioned in the Statute; and tho' the Issue is *Non detinet*, yet 'tis not an Action of *Detinue*; for that will not lie for Money, unless 'tis in Bags; but the Writ *de rationabili parte bonorum* will lie for Money numbered. *Trin.* 6 Car. *Hutt.* 109. *Sherwin* versus *Carrwright*.

6. *Assumpsit*, &c. for that the Defendant had a Dog which killed five of the Plaintiff's Sheep, and the Defendant, in Consideration he would not sue him for the Sheep, but suffer the Defendant to dispose of them, promised to make him Satisfaction, *upon* * *Request*, and the Plaintiff alledged this Promise to be made 18 Jac. and that afterwards, on such a Day *Anno* 2 Car. he did require so much of the Defendant, which he refused to pay; the Defendant pleaded the Statute of Limitations; but adjudged an ill Plea, for where a Thing is to be *upon Request*, there is no Cause of Action till the Request is made, and both the Time and Place where it was made are issuable; and the Intent of the Statute was to bar those Plaintiffs who had compleat Causes of Action; now, in this Case, the Cause of Action was the Breach of the Promise, and that could not be till the Request was made. *Mich.* 4 Car. *Godb.* 437. *Shetford* versus *Borough*.

7. In *Trover*, the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that he was beyond Sea, &c. and upon a Demurrer to this Replication, it was adjudged, that *Trover* was

* W.
Jones
329.
Peck v.
Ambler.
S. P.

W. Jones
252.

an Action within the Statute, tho' not named in the Paragraph of Limitation of personal Actions, which directs in what Time it shall be brought, (*viz.*) *All Actions on the Case* within six Years, and then enumerates several other Actions; and tho' Trover is not named, yet 'tis implied in these general Words. *Cro. Car.* 245, 333. *Swain versus Stephens.*

8. By the Statute before-mentioned, 'tis enacted, that *all Actions of Trespass shall be brought within three Years after the Sessions of that Parliament, or within six Years after the Cause of Action, and not afterwards: Provided, if the Defendant be outlawed in the Suit, and afterwards shall reverse the Outlawry, then the Plaintiff may commence a new Action within a Year after such Reversal, and not after:* Within three Years after the Making this Statute, (*viz.*) *Anno 2 Car. 1.* An Original in Trespass was filed against the Defendant, and he not appearing, was outlawed; afterwards, *Anno 3 Car.* this Outlawry was reversed; and *within a Year* after that Reversal, the Plaintiff brought a new Original against the same Defendant; and adjudged good, tho' Justice *Winch* held, that it ought to be brought *immediately* after the Reversal; but the other Judges were of Opinion, that if the *Original is brought within Time*, and the Defendant is outlawed, and then the six Years expire, and after the Expiration thereof the Outlawry is reversed, even in such Case a new Original may be brought *within a Year after that Reversal.* *Cro. Car.* 294. *Lamb versus Finch.* Winch 52. S. C.
W. Jones 311. S. C.

9. *Case, &c.* upon a Promise to pay 100 *l.* at such a Time, and whilst it should be unpaid, that he would pay to the Plaintiff 10 *l. per Annum*, and the Action was brought for all the Arrears, being for the Space of *twenty-eight Years*; the Defendant pleaded the Statute of Limitations; and upon Demurrer to this Plea the Plaintiff had Judgment, because all could not be barred by the Statute. *Allen 62. Harvey versus Thorn.*

10. Upon a Reference out of Chancery to four Judges, the Case was, there was an Account between two Merchants, and upon stating it, one of them did acknowledge that he was indebted to the other in 1200 *l.* but he insisted, that more was due to him; and before the Account was closed he died, and his Executor exhibited a Bill in Chancery against the other, &c. who pleaded the Statute of Limitations; but the Judges certified, that it was no Bar, because the Account was not finished. *W. Jones 401. Sir Geo. Sands versus Blodwell.*

11. A Note was given to assure Lands to the Value of 500 *l. per Annum*, upon the Marriage of a Woman with T. S. for her Jointure, and above twenty Years after this Note was given, the Plaintiff exhibited a Bill in Chancery to compel the Performance of it; and upon a Demurrer to the Bill it was held, that the Plaintiff was barred by the Statute of Limitations. *W. Jones 417. Row versus Lord Newburgh.*

12. *Case, &c.* the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that he is a Merchant and was in Ireland, and did not return till such a Time, and shewed when, and that within six Years after his Return he brought this Action; the Defendant demurred to this Replication, and Judgment was given against him upon the Demurrer; then he brought a Writ of Error, and assigned for Error, that the Replication was double, because the Plaintiff had alledged himself to be a Merchant, and so he is a Person out of the Statute, and then he shews that he brought his Action within six Years after his Return to England, which is needless and impertinent, because as a Merchant, he is not within the Statute; it was likewise objected, that *the Statute could not be pleaded to an Action on the Case*, because 'tis not one of the Actions therein mentioned, but the Judgment was affirmed; and as to the last Objection, adjudged, that the Word *Trespass* in the Statute comprehends *Trespass upon the Case.* *Style 230. Robinson versus Walker.*

13. *Case, &c.* in which the Plaintiff set forth, that the Defendant was a Merchant, and sent several Goods beyond Sea, and promised, that if the Plaintiff would give him so much Money, he the Defendant would give him so much out of the near Proceed of such a Parcel of Goods, &c. The Defendant pleaded, that *the Cause of Action did not arise within six Years*; and upon a Demurrer this was adjudged a good Plea; 'tis true, the Statute is not pleadable to an Account current between Merchants, but 'tis to an Account stated as this is. *1 Mod. 70. Martin versus Delboe.* 1 Vent. 89.
1 Lev. 298.
Sid. 469.

14. *Case* against a Sheriff, &c. setting forth, that he levied such a Sum of Money upon a *Fi. fa.* at the Suit of the Plaintiff, and *did not bring it into Court at the Day of the Return of the Writ, &c.* The Defendant pleaded the Statute of Limitations, to which the Plaintiff demurred and had Judgment; for this Action is not grounded on the Contract, but arises *ex maleficio*; 'tis true, if the Plaintiff had brought an *Indebitatus Assumpsit*, as he might have done, then he would have grounded his Action on the Contract, and in such Case the Statute would have been a good Plea, if the *Fi. fa.* had been grounded on the Record, and 'tis the Fault of the Sheriff that 'tis not returned. *1 Mod. 245. Cockram versus Welby.* 2 Mod. 212.

15. *Indebitatus Assumpsit* and an *Insimul computasset*; the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that he is a Merchant, and the Defendant was his Factor, and recites a Clause in the Statute, by which *Actions of Account between Merchants and Merchants, and their Factors, concerning their Trade and Merchandize, are excepted*; and avers, that the Money became due to him, upon an Account between him and the Defendant concerning Merchandize; and upon an impertinent Rejoinder and Demurrer, it was insisted for the Plaintiff, that this Statute being in Nature of a Penal Law, by restraining the Liberty which Men had at Common Law to bring their Actions when they would, ought to be beneficially expounded; 'tis true, an *Insimul computasset* is not properly an Action of Account, but 'tis an Action grounded on an Account; 2 Mod. 311.
* See Antea pl 8.

and the one being excepted out of the Statute, the other by Equity is likewise excepted: But adjudged, that when an Account is stated, an *Indebitatus* lies, and not an Action of Account; and these Actions are only excepted and not the other; for when an Account is stated, the Certainty of the Debt appears, and the Intricacy of the Account is over, and in such Case the Action for the Balance must be brought within six Years. 1 *Mod.* 268. *Farrington* versus *Lee*.

Sid. 453.
S. C.

16. An Infant brought an *Action on the Case* by his Guardian; the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that he was under Age at the Time of the Promise made; and upon Demurrer to this Replication it was insisted, that the Privilege of Infancy did not by this Statute extend to *Actions on the Case*; for tho' the Bringing such an Action is restrained by the Body of the Statute to six Years, yet 'tis not excepted in the Proviso or saving Clause, for by that Clause the Privilege of Infancy extends to Actions of *Trespass*, *Debt*, *Detinue*, *Trover*, and to several other Actions therein named; but *Actions on the Case* are omitted; adjudged, that these Actions are within the *Equity* of this Statute, tho' they are not expressed in the Proviso; for the Intent of it was to preserve the Rights of Infants; and 'tis absurd to say, that it preserves their Right to little Actions for Slander, and not for a Duty really owing to them. 2 *Saund.* 120. *Chandler* versus *Violet*.

17. Adjudged, that where an Action is commenced in an inferior Court, and afterwards removed into *B. R.* and there the Plaintiff proceeds *de novo*, that this Commencement of the Action in the inferior Court shall prevent the Statute of Limitations. Sid. 228. In *Bevin* and *Chapman's* Case.

18. Case, &c. for Slander, and also for that *crimen felonix ei imposuit*, by Reason whereof the Plaintiff was likely to lose the Office of Enrolments: The Defendant, as to the Charge of Felony, pleads Not guilty, and as to the slanderous Words he pleads the Statute of Limitations 21 *Jac.* c. 16. viz. *Non cul' infra duos Annos ultimos elapsos*; and upon Demurrer it was adjudged, that where the Words are actionable in themselves, there Damages shall be recovered according as they were first spoken; and in such Case, if the Action is not brought within two Years, the Party will be barred by that Statute; but where the Words are actionable only in respect to the special Damages which happen after the Speaking, in such Case, if the Damage is seven Years after the Speaking, the Statute is no Bar. Sid. 95. *Saunders* versus *Edwards*.

2 *Saund.*
120.

19. An Infant brought *Assumpsit* by his Guardian against the Defendant, who pleaded the Statute of Limitations; and upon a Demurrer, the Question was upon the Saving in the Act 21 *Jac.* cap. 16. (viz.) *To all Infants, Actions of Trespass*, and *Trespass for Words*, but *Trespases on the Case* are not mentioned; but adjudged, that the Saving of *Trespases generally* shall extend to Actions on the Case, for all Actions on the Case are *Trespases on the Case*. Sid. 453. *Chandler* versus *Violet*.

20. *Indebitatus Assumpsit* brought against an Executor, upon a Promise of his Testator; the Defendant pleaded the Statute of Limitations, (viz.) that his Testator did not at any Time within six Years make such Promise: The Plaintiff replied, that he was an Infant at the Time of the Promise made, and that he came to full Age on such a Day, and that within six Years afterwards he brought this Action; and upon a Demurrer to this Replication, it was insisted, that an *Indebitatus Assumpsit* was an Action not mentioned in the saving Clause of that Statute: *Sed per Curiam*, this Act shall be extended to particular Cases within the same Reason; and that Actions of *Trespass* therein mentioned shall comprehend this Action, because 'tis a *Trespass on the Case*; and the Saving in the Proviso is of the Right of Infants in Actions of *Trespass*; and tho' no particular Words in the enacting Part relate to this Action, yet the Proviso doth restrain the Severity of that Part of the Act, and restores the Common Law. 2 *Mod.* 71. *Croser* versus *Tomlinson*.

Sid. 415.
1 *Lev.*
273.

21. In an Action of Debt, the Plaintiff declared, that he and the Defendant *submitted themselves to an Award* of such Persons, and that if the Arbitrators did not make an Award within such a Time, then they to chuse an Umpire, and they to stand to his Umpirage, so that 'tis made under his Hand and Seal before such a Day; then he avers, that the Arbitrators made no Award, but that they chose an Umpire, and that he made an *Umpirage under his Hand and Seal*, by which he awarded the Defendant to pay the Plaintiff 15 *l.* for which the Action was now brought: The Defendant pleaded the Statute of Limitations in Bar; but adjudged, that an Umpirage in Writing under the Hand and Seal of the Umpire is a *Specialty*, and the Statute only limits all Actions of Debt grounded upon any *Lending or Contract*, without *Specialty*, and Actions of Debt for *Arrears of Rent to be brought within six Years*; besides, admitting this is no *Specialty*, yet this Action of Debt is not barred by the Statute, because 'tis not founded upon any *Lending or Contract in Fact*; 'tis true, all Debts are grounded either upon a Contract in Fact or in Law; but the Statute never intended to limit all Actions of Debt grounded upon Contracts generally (tho' it doth not distinguish between *Contracts in Fact* and *in Law*) but upon *Contracts in Fact only*, because such Contracts often happen between Men, but Contracts in Law very seldom; for this see *Sherwyn* and *Carter's* Case, for which Reasons this Action of Debt is not within the Statute of Limitations. 2 *Saund.* 64. *Hodsdon* versus *Hurridge*.

22. *Indebitatus Assumpsit* and *Infirmul computasset* brought by one Merchant against another for 55 *l.* 11 *s.* 7 *d.* The Defendant pleaded *Non Assumpsit infra sex Annos*; The Plaintiff replied, that the Money on the several Promises, &c. became due and payable upon Trade between him and the Defendant as Merchants, and wholly concerned Merchandizing; and upon Demurrer to this

this Replication, it was argued for the Defendant, that this Case is not excepted out of the Statute; 'tis true, it limits all Actions of Account, and upon the Case, to be brought within six Years; but 'tis *other than such Accounts as concern the Trade of Merchandize between Merchant and Merchant, and their Factor or Servants*; and the Word Accounts there must be intended Accounts current, because Merchants which Trade at a great Distance from one another in several Parts of the World, may have Accounts current many Years, and not meet to adjust them; but when an Account is stated, as this is for 55 l. 11 s. 7 d. 'tis then a Duty, and an Action of Debt will lie for it immediately; and it was adjudged accordingly. 2 Saund. 124. *Webber versus Tivill.* 2 Mod. 311. *Parrington versus Lee.*

23. The Husband made his Wife Executrix, and died; afterwards she brought an *Assumpsit* against the Defendant for Money due to her said Testator; the Defendant pleaded the Statute of Limitation; the Executrix replied, that her Testator filed an *Original* against the Defendant *in placito transgressionis, &c.* setting forth the whole Declaration in this her Replication, and that *pendente placito* *prad'* her Husband died; and upon a Demurrer to this Replication, the Question was, Whether this Action brought by the Testator by *Original*, was within the Equity of the fourth Paragraph of the Statute, by which 'tis enacted, that *if the Action shall be brought by Original (as this was) and the Defendant outlawed, and afterwards shall reverse it, in such Case, the Plaintiff, his Heirs or Executors, may bring a new Action within a Year, but not afterwards*; Now this being an Action brought by the Testator by *Original*, and he dying pending that Action, *but before the Defendant is outlawed*; it was adjudged, that the Executrix could not bring a new Action within the Year; 'tis true, 'tis a hard Case, but there was no Remedy provided by the Statute. 1 Lut. 261. *Gargrave versus Every.*

24. Case against an Executor for 50 l. had and received by his Testator; the Executor pleaded the Statute of Limitations in Bar, &c. the Plaintiff replied, that she was an Infant under the Age of twenty-one Years, at the Time when the Testator made the Promise, and that within six Years after she came of full Age, she filed an *Original* against the Executor, &c. who rejoined, that the Statute of Limitations doth not give Liberty to an Infant to bring an *Action on the Case* within six Years after he comes of Age; and upon Demurrer to this Rejoinder the Plaintiff had Judgment upon the Authority of *Violet and Chandler's Case*, which was thus. 1 Lutw. Rep. 242. *Gery versus Cooke.*

25. Case, &c. by Husband and Wife, as Executrix of *Sir John Heron*; the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that the Testator in his Life-Time filed an *Original* in Trespass against the Defendant, with an Intention to declare against him upon his Appearance; that this Writ was delivered to the Sheriff of N. who returned *non est inventus*, and thereupon a *Capias* issued against the Defendant, and that *pendente placito* the Testator died, so that the Pleadings were discontinued; and that afterwards the Plaintiffs proved the Will, and then they declared against the Defendant, and aver, that the Cause of Action did accrue within six Years after the said *Original* filed; the Defendant rejoined, that the Testator died long before the *Original* filed, and traversed, that he was then alive; the Plaintiffs surrejoined, and shew, that the Defendant was stopped to plead that the Testator died before the *Original* filed, because it was against a Record; the Defendant demurred, and the Plaintiff joined in Demurrer, but nothing farther was done. 1 Lutw. Rep. 254. *Saffin & ux' versus Shaftoe.*

26. Case by an Administratrix against an Executor for Money due to the Intestate; the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that the Intestate in his Life-Time filed an *Original* in Trespass, &c. against the Testator within six Years after the Cause of Action did accrue, and that he did not appear, but soon after died, whereupon the Intestate recenter, (*viz.*) on such a Day, filed another *Original* against his Executor, the now Defendant, who appeared, and the Intestate declared against him, and that he prosecuted the said first *Original* against the Testator, with an Intention to declare against him, if he had appeared, and averred, that the Cause of Action did accrue within six Years next after the first Filing the said first *Original*; and upon a Demurrer to this Replication, it was objected, that it was ill, because it did not appear, that the *Original* was returned, or made a Record in Court; for the Plaintiff should have set forth, that the *Original* was delivered to the Sheriff to execute, and that the Defendant not appearing, the Sheriff had returned, that the Plaintiff had found Pledges to prosecute the Writ, (*viz.* *John Doe and Richard Roe*) and that the Defendant *nihil habuit in Balliva sua*, by which he might be attached; all which was omitted in this Replication, and there being no Appearances or Continuances alledged, the Plaintiff ought not to have Judgment; but it was otherwise adjudged, for the filing an *Original* had put the Case out of the Statute, and that it was not necessary for the Plaintiff to aver, that the Writ was returned, for it shall be so intended, unless the contrary appear on the other Side. 1 Lutw. Rep. 256. *Kinsey versus Heyward*; this Judgment was afterwards reversed upon a Writ of Error, and the Reversal was afterwards affirmed in Parliament.

27. Case, &c. by Husband and Wife, upon several Promises made to the Wife *dum sola*; the Defendant pleaded the Statute of Limitations, the Plaintiffs replied, that 7 *Januarii* 4 *Willelmi*, they filed an *Original* in Trespass, &c. *quare clausum fregit*, against the Defendant, directed to the Sheriff of Suffolk, with an Intent to declare against him upon his Appearance in an Action of Trespass on the Case, and that Process of *Capias* was continued against him till he appeared, and farther, that the Defendant *Assumpsit infra sex Annos, &c.* and upon Demurrer to this Replication

plication, the Plaintiff had Judgment, but it was reversed, for the Reason in the Case last mentioned, (*viz.*) because it did not appear, that the *Capias* was returned, and made a Record of the Court. *Brereton & Un' versus Moyse.* 1 *Lutw.* 279.

28. *Trespass, &c.* for an Assault at *Fort St. George* in the *Indies*, (*viz.*) *apud London*, in the Parish of *St. Mary le Bow*, and for detaining him in Prison, and taking from him 3000 *Pegadoes*, &c. The Defendant as to all, besides the Taking the Money, pleaded the Statute of Limitations, (*viz.*) that the Cause of Action did not arise within four Years; and as to the Taking the Money, that it did not arise within six Years: the Plaintiff replied as to the *Trespass*, that he was beyond Sea, and as to the Taking the Money, that the Cause of Action did arise within six Years; and upon Demurrer, the Opinion of the Court was against the Defendant, because the Statute of Limitation cannot, even in Equity, be extended to Cases where the Defendants are beyond Sea, because 'tis expressly enacted, that if the * Plaintiff is beyond Sea when the Cause of Action doth accrue, he shall have Liberty at his Return to bring it; but if the Defendant is beyond Sea, and the Plaintiff here, then he must file an Original against the Defendant, and continue it till he returns. 2 *Lutw. Rep.* 946. *Davis versus Tale.* 1 *Lev.* 143. *Beven versus Clapham, S. P.* *Sid.* 228. *S. C. pl.* 23. *S. C.*

* Hardr.
502. Buk-
ly v. Mor-
rice. S. P.

29. *Formedon in Remainder*, brought by *J. W.* for one Messuage, twenty Acres of Land, &c. in which the Demandant set forth, that *C. W.* was seised in Fee of the Premises, and settled the same upon Trustees and their Heirs, to the Use of himself for Life, and after his Death to the Use of his Son *C. W.* and the Heirs of his Body, and for Default of such Issue to *J. W.* and his Heirs; that *C. W.* the Father and Son are both dead, and that the Demandant is Son and Heir of *C. W.* the Son, to whom *remansit jus*, &c. The Tenant pleaded the Statute of Limitations, (*viz.*) that *C. W.* the Son, did not prosecute his Writ within twenty Years after the Cause of Action did accrue, & *hoc parat' est verificare*, &c. 2 *Lutw. Rep.* 962. *Wright versus Byard.* 2 *Lutw. Rep.* 1199. *Eyloe versus Cook, S. P.*

1 Mod.
71, 89,
S. C.

30. *Assumpsit*, &c. upon a Promise made seven Years since, to pay Money within three Weeks; the Defendant pleaded *Non Assumpsit infra sex Annos ante exhibitionem Billæ*; adjudged this was wrong, it should be *causa actionis non accrevit infra sex Annos.* 1 *Vent.* 191. *Puckle versus Moor.*

Sid. 66.

31. *Assumpsit*, &c. in which the Plaintiff declared, that in Consideration he would deliver to the Defendant such a Deed, he promised to redeliver it upon Request; and also, in Consideration, that the Plaintiff had delivered to the Defendant another Deed on Request, he promised to pay him 40 *l.* and alledged, that he had delivered the first Deed, and that tho' on such a Day he required the Defendant to redeliver it, he did not, &c. the Defendant pleaded the Statute of Limitations, that he did not promise within six Years before the Action, &c. and upon Demurrer to this Plea the Plaintiff had Judgment, because the Cause of Action did not arise on the Promise, but on the Request and Refusal afterwards, and the * Request was within six Years; then it was objected, that the 40 *l.* was to be paid without any Request, and therefore as to that the Plea is good; but adjudged, that where the Statute is pleaded to two Things, where 'tis pleadable only to one, if 'tis ill for that one Thing, 'tis ill for the Whole. 1 *Lev.* 48. *Webb versus Martin.*

* W. Jon.
194. Shut-
ford v. Pe-
row.
Cro. Car.
139, S. C.

Raym.
86.

32. *Assumpsit*, &c. in which the Plaintiff declared upon a Promise made 1 *May* 3 *Car.* 1. the Defendant pleaded, that the Writ was first brought 4 *Feb.* 14 *Car.* 2. and that he did not promise within six Years before the said 4th of *Feb.* the Plaintiff replied, that the Defendant did promise within six Years before the said 4th of *Feb.* and there was a Verdict for the Plaintiff, and he had Judgment; for tho' the Cause of Action did arise twenty Years before 'tis brought, yet the Plaintiff shall recover, if the Defendant doth not plead the Statute of Limitations. 1 *Lev.* 110. *Lee versus Rogers.*

33. *Assumpsit* against the Defendant for a Debt due by Contract to a Bankrupt, and the Action was brought by an Assignee of the Commissioners; the Defendant pleaded the Statute of Limitations, and upon a Demurrer to the Plea it was held, that the Statute is no good Plea in this Case, because the Debt was assigned by Virtue of an Act of Parliament. 2 *Lev.* 166. *Copley versus Dorminque.*

34. In Replevin, the Defendant avowed upon a Tenure by Fealty, Rent and Suit of Court; the Plaintiff in his Replication confessed the Tenure, but pleaded, that the Avowant, nor none of his Ancestors, were seised of the said Services, or any of them, within fifty Years last past; and upon a Demurrer to this Replication the Defendant had Judgment; for such casual Services which may not happen within fifty Years, are not within the Statute of *H. 8.* of Limitations. 3 *Lev.* 221. *Bonnet versus King.*

35. *Assumpsit* by an Attorney, for his Fees, &c. for Money laid out, and for Labour, &c. the Defendant pleaded the Statute of Limitations; and upon Demurrer to the Plea, it was adjudged ill, for the Statute is not pleadable where the Action is for Fees, because they depend on a Record. 3 *Lev.* 367. *Olliver versus Thomas.*

36. Upon a Rehearing before the Lord Keeper *Bridgman*, assisted with Justice *Vaughan* and others, concerning the Redemption of a Mortgage, which had been made above forty Years; it was decreed, that no Relief should be after twenty Years, because the Statute 21 *Jac. cap.* 16. did adjudge it reasonable to limit the Time of Entry to that Number of Years, and that the Rules in Equity ought to be conformable, (as near as may be) to the Rules and Reason of the

Law;

Law; 'tis true in some particular Cases, as of Infants and Feme Coverts, they may be relieved beyond that Time. 2 Vent. 340. *White versus Ewer*.

37. *Assumpsit* against four Defendants, who pleaded *Non Assump. infra sex Annos*; the Jury found, that one of them did promise within six Years, but that the other three did not; the Judgment was arrested as to that one Defendant, because all the Defendants being sued upon an entire Contract, they must all be found to promise, otherwise the Issue is found against the Plaintiff: 'Tis true, *Torts* in their Nature are different, and therefore one Defendant may be found guilty, and the other acquitted; but Contracts are entire: *Ventris* Just. of a contrary Opinion; 'tis true, if these four Defendants had pleaded *Non Assump.* and one of them had been found to promise, and not the rest, the Plaintiff would have failed in his Action; but here 'tis *Non Assump. infra sex Annos*, from which it may be inferred, that all of them promised at first, and the Jury have found, that one of them renewed the Promise within six Years, but the others did not. 2 Vent. 151. *Bland versus Haslerig & al.*

38. *Assumpsit*, &c. the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that before the six Years were expired, he brought an Original in *Trespas* against the Defendant, *ea intentione* to declare against him in *Assumpsit secundum consuetudinem Curiae de tempore cujus*, &c. the Defendant rejoined *Null tiel Record*; the Plaintiff surrejoined, and produced an Original filed within the six Years, against the Defendant and two others, which was *de placito transgr. & insult. in London*; and upon Demurrer it was insisted for the Defendant, that this Record did not warrant the Plea, for it should have been a *clausum fregit*, and not *Trespas* and *Assault*; besides, the Plea was of an Original against the Plaintiff, and the Surrejoinder was of an Original against him and two more; the Prothonotaries informed the Court, that the Practice was to file an Original in *Trespas* and *Assault in London*, and a *Clausum fregit in other Counties*; and that the Replication being of an Original in *Trespas* generally, it may be applied to this, and 'tis not material, tho' two others are joined. *Dubitatur*. 2 Vent. 193. *Norwood versus Woodley*.

39. *Indebitatus Assumpsit*, the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that before the six Years expired, he filed an Original in *Trespas Quare clausum fregit* against the Defendant, *ea intentione* that he might be arrested, and that the Plaintiff might declare against him, &c. and upon a Demurrer to this Replication, it was agreed, that the Practice was to declare in any Action upon a *Clausum fregit in C. B.* as it was upon a *Latitat* in the King's Bench; but then the Plaintiff ought to have set it forth in his Replication, (*viz.*) that he had taken out an Original *Quare clausum fregit, ea intentione* to declare against the Defendant in an *Assumpsit secundum consuetudinem Curiae de tempore quo*, &c. all which was omitted, and it was only, *ea intentione* that the Defendant might be arrested, and that the Plaintiff might declare against him; but there being many Precedents where there was no such Clause, it was held well enough. 2 Vent. 259. *Every versus Carter*.

40. The Wife lent an Hundred Pounds, and the Borrower gave a Note, that he would pay and dispose it as she should direct; an Action at Law being barred for this Money by the Statute of Limitations, the Husband exhibited his Bill against the Borrower for Relief, and the Statute of Limitations was insisted on in his Behalf; but because the Court took this Money to be only a *Depositum* or a Trust in the Borrower, for the Wife, thereupon they decreed the Money to the Husband. 2 Vent. 345. *Lord Hollis's Case*.

41. In Debt upon an Escape, wherein the Plaintiff declared, that one *Fabian Hill* was taken in Execution upon a *Testatum fieri facias*, and escaped; the Defendant pleaded the Statute of Limitations in Bar to the Action; and upon Demurrer to the Plea, it was insisted for the Plaintiff, that this Plea was ill, because *Debt for an Escape* was not within this Statute; for 'tis not founded upon any Lending or Contract without Specialty; and these are the Debts which are mentioned in the Statute, and not Debts generally; besides an Action of Debt for an Escape is founded on a Specialty, (*viz.*) upon the Statute 1 R. 2. cap. 12. which gives the Creditor an Action of Debt against the *Warden of the Fleet* for an Escape, which by an equitable Construction is extended to other Gaolers and Sheriffs; for before that Statute no Action of Debt did lie at Common Law, for an Escape out of Execution, the Remedy was only by an Action on the Case. 2 Inst. 383. and tho' the Words of the Statute of Limitations are general as to Actions of *Debt for Arrears of Rent*, yet it has been adjudged, that an Action of Debt for Arrears of Rent reserved upon a Lease, is not within the Statute, nor an Action of Debt for not setting out Tithes, because 'tis founded on a Specialty, (*viz.*) on the Statute 2 Ed. 6. Judgment for the Plaintiff. 1 Saund. 37. *Jones versus Pope*. See *Freeman versus Stacy*, and *Talory versus Jackson*. Cro. Car. 513.

42. In Assault, Battery and False Imprisonment from 10 Aug. 24 Car. 2. *usque exhibitionem Billa*, which was thirteen Years; the Defendant pleaded Not guilty *infra sex Annos*; the Plaintiff replied, that the Writ was sued out 2 Octob. 1 Jac. 2. and that the Defendant was guilty within six Years next before the Writ brought, upon which they were at Issue, and the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that this being a continued Imprisonment, therefore so much as was before the Writ brought, is barred by the Statute: *Sed per Curiam*, the Verdict is good, for the Jury have rejected the Beginning of the *Trespas*, and have given Damages for that only which was done within six Years before the Action brought; and this may be done, because 'tis laid *usque exhibitionem Billa*. 3 Mod. 110. *Aldridge versus Duke*.

Sid. 305.
Lev. 193.

43. Case, &c. upon a Bill of Exchange drawn 14 Years since ; the Defendant pleaded the Statute of Limitations, by which *Actions of Account which concern the Trade of Merchandize, between Merchant and Merchant, their Factors and Servants, are excepted* ; the Plaintiff replied, that the Bill was a negotiating Bill, and that it was upon an Account between Merchants ; and upon Demurrer the Defendant had Judgment, because the Statute excepts only Accounts which are current, and not those which are staled ; as upon a Bill of Exchange, or against the Drawer of such Bill for Value received. 4 Mod. 105. *Chicvley versus Bond*.

Mod. Ca.
309.

44. The Plaintiff, as Executor, declared upon a Promise made to his Testator ; the Defendant pleaded the Statute, and at the Trial it appeared, that there was a *new Promise* made within six Years to the *Executor himself* ; adjudged, this Promise could not be given in Evidence, to maintain this Declaration, but that the Plaintiff ought to have declared upon a Promise made to himself. 1 Salk. 28. *Dean versus Crane*.

5 Mod.
425.

45. *Indebitatus Assumpsit*, the Defendant pleaded *Non Assumpsit infra sex Annos*, and at the Trial the Evidence was, that it was above six Years since the Goods were sold, and that the Defendant being required to pay for them, denied that he bought them, but said, *prove it, and I will pay you* ; adjudged, that by this Promise, tho' it was *conditional*, the Defendant had waived the Benefit of the Statute, and had brought his Case within it, as much as if he had expressly promised to pay the Money. 1 Salk. 29. *Heyling versus Huskins*.

46. In Ejectment, if *T. P.* hath been in Possession twenty Years, without Interruption, and afterwards *R. W.* gets into Possession, *T. P.* may bring an Ejectment, because twenty Years Possession is a good Title in him to maintain an Ejectment, as if he had at that Time been actually possessed ; because a Possession for so long a Time, is like a Descent, which takes away Entry, and gives a Right to the Person dispossessed. 2 Salk. 421. *Stokes versus Berry*.

47. The Testator being seised in Fee, and having Issue two Daughters, devised his Land to his Grandson by his eldest Daughter, she being then dead ; afterwards the Grandson died without Issue, and his Heir on the Part of the Father, and the Heir of the other Sister and Coparcener, took the Profits by Moieties for twenty Years together ; then the Heir of the Grandson brought an Ejectment against the Heir of the other Coparcener ; and upon a special Verdict found, it was objected, that the Devise was void as to one Moiety ; but that being over-ruled, it was then insisted, that the Bringing the Ejectment for the Moiety, admitted the Plaintiff to be out of Possession for more than twenty Years, and then he is barred by the Statute of Limitations ; but adjudged, that there must be an actual Disseisin, and not a Disseisin by Perception of Profits for twenty Years, for otherwise the Statute will be no Bar. 2 Salk. 423. *Reading versus Royston*.

48. In a Trial at Bar in Ejectment, it was resolved, that a Claim or Entry to bar the Statute of Limitations, must be upon Land, unless there be some special Reason to the contrary. 1 Salk. 285. In *Ford and Gray's Case*.

49. Libel in the Admiralty for Mariners Wages ; the Defendant pleaded *actio non accrevit infra sex annos ante tempus mentionat' in libello* ; and this Plea was over-ruled there, and thereupon the Defendant moved for a Prohibition ; it was insisted against the Prohibition, that the Statute extended only to the Courts at Common Law, and that it was not pleadable to a Suit in the Spiritual Court *pro violata injectione manuum super Clericum* ; which is very true, because that Suit is not for Damages, but *pro reformatione morum* ; the better Opinion was, That a Prohibition should be granted, and that it was strange the Statute should be a Defence in one Court, and not in another ; 'tis pleadable to a Suit in Chancery, and therefore it doth not extend only to Suits at Common Law ; 'tis true, 'tis no Plea to an *Indictment for Trespass*, but 'tis good to an *Action of Trespass*. 2 Salk. 424. *Hide versus Partridge*.

50. Libel in the Admiralty for Mariners Wages ; the Defendant pleaded the Statute of Limitations, (*viz.*) that *the Suit was six Years after the Cause of Action accrued*, and now he suggested for a Prohibition, that the Court of Admiralty had rejected that Plea ; but the Prohibition was denied ; 'tis true, the Statute of Limitations is a good Bar to a Suit for * *Seamens Wages*, if 'tis well pleaded ; but in this Case it was ill pleaded, for it was, that *the Suit was prosecuted six Years after the Cause of Action accrued* : Now the Time of prosecuting the Action is not material, and therefore the Defendant ought to have pleaded directly, that *no Suit had been within six Years after the Cause or Action accrued*. Mod. Cases 26. *Exter versus Jones*.

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51. *Indebitatus Assumpsit*, &c. the Defendant pleaded the Statute, &c. the Plaintiff replied, that he sued out a Bill of *Middlesex* against the Defendant, *Teste die Lunæ prox' post tres septimanas*, &c. and returnable on the same Day, and that the Sheriff returned *Non est inventus*, and continued down by *Vicecomes non misit breve, & precept' fuit sicut alias* ; and upon Demurrer to this Replication, it was adjudged ill, because there cannot be a Bill of *Middlesex* returnable on the same Day on which 'tis *Teste*. 2 Salk. 421. *Green versus Rivett*. Farr. 12. S. C.

52. *T. P.* received Money due to the Intestate, and afterwards Administration was granted to *R. W.* and within six Years after the Administration, brought an Action against *T. P.* for the Money, *as had and received by him to the Use of the Administrator* ; the Defendant *T. P.* pleaded the Statute of Limitations ; the Plaintiff replied this Special Matter, that within six Years after the Administration granted, he brought the Action, &c. and upon Demurrer to the Replication, it was adjudged, that the Cause of Action did arise immediately upon the Administration granted, and not upon the Receipt of the Money by *T. P.* the Defendant ; but that he could not receive

it to the Defendant's Use as Administrator, because at that Time he had not the Administration granted to him. 9 Salk. 421. *Cary versus Stephenson*.

53. *Assumpsit*, &c. in which the Plaintiff declared, that in Consideration he, at the Defendant's Request, would receive T. P. and R. W. into his House, as *Hospites*, and find them Diet, &c. he promised to pay; the Defendant pleaded *Non Assumpsit infra sex Annos*, &c. and upon Demurrer this was adjudged an ill Plea; for where the Consideration is executory, the Defendant cannot plead *Non Assumpsit infra sex Annos*; for in such Case 'tis not material when the Promise was made, but when the Cause of Action did arise, for the Dieting may be long after the Promise, therefore in this Case the Defendant ought to have pleaded, that *causa Actionis non accrevit infra sex Annos*; and tho' it appear by the Declaration, that it did not arise within that Time, yet the Defendant shall not take Advantage of it without Pleading it, because by that Means he would take away the Advantage that the Plaintiff might have in his Replication, in shewing that there was an original filed. 2 Salk. 422. *Gould versus Johnson*.

54. Case, &c. the Defendant pleaded the Statute of Limitations; the Plaintiff replied, that the Defendant was beyond Sea; and upon Demurrer to this Replication it was adjudged ill, because the Plaintiff might either file an Original or have outlawed the Defendant. 2 Salk. 420. *Hall versus Wyborne*. 3 Mod. 311.

55. Case, &c. The Defendant pleaded the Statute of Limitations; the Plaintiff replied, that he sued out an Attachment against the Defendant, returnable in *Michaelmas-Term* 34 Car. 2. and thereupon *taliter processum fuit*, that the Defendant appeared in *Michaelmas-Term*, 2 Jac. 2. &c. and upon a Demurrer to this Replication it was adjudged ill, because the Plaintiff had not set forth any Continuances to the Time of Appearance; for tho' a *Taliter processum fuit* may be sufficient for Matters after a Declaration, 'tis not so for Matter before it. 2 Salk. 420. *Budd versus Berkenhead*.

56. In *Trespass for Assault*, &c. The Defendant pleaded the Statute, &c. (*viz.*) *Non cul' infra sex Annos*, when it should be *infra quatuor Annos*; and upon Demurrer to this Plea it was adjudged ill, because there is no such Plea at Common Law nor on the Statute, for that is not pursued; besides, the Plaintiff could not take Issue upon it, for if he had replied, that the Defendant was guilty *infra sex Annos*, this had been an immaterial Issue, because the Jury might have found him Not guilty *infra quatuor Annos*, but guilty *infra sex Annos*. 2 Salk. 423. *Blackmore versus Tidderley*. Mod. Cases 240.

57. In *Trespass for imprisoning him and detaining him there*, from 32 Car. 2. till the 3d of April 2 Jac. 2. The Defendant pleaded as to all till 34 Car. 2. on such a Day *Non cul' infra quatuor Annos*, and as to the rest, that a Plea was levied, and a *Capias* issued against the Plaintiff, &c. and upon Demurrer to this Plea it was adjudged, that tho' the Plaintiff had declared for one continued Imprisonment, from 32 Car. 2. to 2 Jac. 2. yet the Defendant may divide the Time, and plead the Statute as to Part of it, and as to that, Judgment shall be given against the Plaintiff, for he might have replied and shewed the continuing Imprisonment, which he had now waived by his Demurrer. 2 Salk. 420. *Coventry versus Appley*.

58. Debt in an inferior Court, and after some Proceedings there, the six Years expired; then the Defendant removed the Cause by *Habeas Corpus cum causa*, &c. into B. R. and there the Plaintiff declared *de novo*; and the Defendant pleaded, that *causa actionis non accrevit infra sex Annos*; and upon Demurrer this was held a good Plea, but the Plaintiff might have replied and set forth the Suit below, and averred that to be within six Years, not that it was a Continuance of the Suit below, but that it should not be in the Power of the Defendant to defeat the Plaintiff, without any Default in him; as where an Action is brought within six Years, and the Plaintiff dies before Judgment, and then the six Years expire, his Executor shall not be prevented by the Statute. 2 Salk. 424. *Matthews versus Phillips*.

(B)

What shall be a Limitation of an Estate, and how it differs from a Condition.

1. A Condition either creates, enlarges or determines an Estate, in all which Cases it depends upon an incertain Event; but a Limitation in the legal Signification of the Word, imports how long the Estate shall continue, or is rather a Qualification of the precedent Estate, and the most apt and proper Words to make a Limitation are, *As long as*, *Whilst*, *If*, *whilst that*, *until*, and the like, but it may be made by other Words, as will appear in the following Cases.

2. The Father devised his Lands to his eldest Son in Tail, Remainder to his youngest Son in Tail, Remainder to the Heirs of the Body of the Testator, he having at that Time issue a Daughter besides his Sons, Remainder over in Fee; and, *If either of those on whom he had entailed his Lands should molest the other for the same, or mortgage, sell, or otherwise incumber it, that from thenceforth such Person shall be excluded, and the Entail made to him shall be of no Force, but that it shall descend and come to the next in Tail, as if such disorderly Person had not been mentioned in the Will*: The Father died, the eldest Son levied a Fine of the Lands, and he and his Brother joined in suffering a Recovery; and thereupon their Sister entered for a Forfeiture, and adjudged, that her Entry was lawful, because the Word *If* in the Beginning of that

Clause did not make a *Condition* but a *Limitation* of the Estate-tail; for if it had been a *Condition*, then the eldest might have entered upon a Breach of it, and so might have defeated all the Remainders, which could never be intended by the Testator, it being expressly contrary to his Will; but 'tis a *Limitation* of their Estates, which determines the same respectively, and casts the Freehold upon the next in Remainder, without Entry. *Plow. Com. 2. Part 1. Newis versus Lark. Moor 543. S. C. by the Name of Sharrington versus Minors. Postea Remainder. (F) 1. S. C. Antea Conditions. (D) 8. S. C.*

2 Cro. 592. 3. If. In Wills there must be a Devise over to make a *Limitation*, except 'tis to the Heir at Law, paying a Sum of Money, and there, tho' the Word *Paying* generally makes a *Condition*, yet in such Case it makes a *Limitation*, because, if it should make a *Condition*, it must descend to the Heir, who is the Devisee, and would be extinguished in his Person, and by Consequence there would be no Remedy to compel the Payment of the Money; as for Instance, the Testator devised his Lands to his Wife for Life, Remainder to his eldest Son, paying 40 s. to each of his Brothers and Sisters; adjudged, this made a *Limitation* of his Estate, and not a *Condition*, so that upon Non-payment of the Money it should cease and be transferred to the next Heir. *Cro. Eliz. 204. Wellock versus Hammond. 3 R. p. 20. S. C. 2 Leon. 114. S. C. Fee-simple in Wills. (B) 3. S. C. See Dyer 317. S. P. See Postea pl. 7. S. P.*

Cro. Eliz. 414. S. C. Moor 400. S. C. 4. A Lease of an House was granted to a Woman for forty Years, upon Condition, that if she continue so long sole and dwell in the House: She continued a Widow during her Life, and lived and died in that House; the Question was, whether the Term was determined by her Death; adjudged, that had the Word *If* been omitted, this would have been a *Condition*, for then the Clause would have been thus, (*viz.*) A Lease to a Woman for forty Years, upon Condition she continue so long sole and live in the House; now she not living in the House forty Years, but dying before that Term was expired, the Lease was likewise determined, because the Condition upon which it was granted extended to the whole Term; but in the principal Case the Lease was not determined by her Death, but continued afterwards, because the Word *If* made a *Limitation*, or rather a Qualification of her Estate, for then the Clause would be thus: A Lease of a House to a Woman for forty Years, *If* she continue so long sole, *And live in the House, (i. e.) live in the House during her Life*; but in the other Case she was to live in the House during the Term. *Gouldsb. 179. Sayer versus Hardy. Antea Condition. (A) 6. S. C.*

5. The Father having two Daughters, covenanted to stand seised to the Use of the eldest in Tail, upon Condition, that she pay to her Sister 300 l. within a Year after his Decease; and if she fail, or die without Issue, then to the Use of the youngest Daughter in Tail; the Father died, his eldest Daughter married and had Issue one Child, which died soon after it was born, and then the Mother died, and both before the Time appointed for the Payment of the 300 l. adjudged, that the Husband should be Tenant by the Curtesy; for admitting, that the Words, upon Condition to pay 300 l. do make a Condition, yet the Estate of the Wife is not determined by any Breach of that Condition, because she died before the Money was to be paid; so that the Condition (if it had been such) was not broken by her; then, as to the Subsequent *if she die without Issue*, those do not make a Condition, but rather a Limitation of her Estate, and they amount to no more than what the Law saith without them, (*viz.*) *If she die without Issue*, the Estate-tail would be spent by that Means. 1 Leon. 167. Samms versus Paine.

6. So where the Testator had Issue two Sons and two Daughters, and devised his Lands to his youngest Son in Tail, upon Condition, that he pay to the Daughters 20 l. per Annum at their respective Ages of twenty-one Years; and if he died, then to his eldest Son and his Heirs, upon the like Condition; and if he did not pay the Annuities, then he devised his Lands over to his Daughters and their Heirs: Justice Croke, who reports this Case, tells us, this was a Condition, and that if the youngest Brother failed in Payment of Annuities, the eldest Son would have the Estate as forfeited by the Breach of Condition: But my Lord Rolle, who reports the same Case, says, that if it should be a Condition, it might not only defeat the Daughters of their Annuities, but the Devise over to them, which is contrary to the Will of the Testator; therefore it shall be construed to be a Limitation of the Estate of the younger Brother, which shall continue in him until he makes Default in Payment, &c. and then it shall be transferred to the elder Brother, who must take it upon the like Limitation. *Cro. Eliz. 376. 1 Roll. Abr. 411. S. C. Baldwin versus Wiseman.*

The same Case is reported in other Books in a clearer Manner, (*viz.*) the Testator devised his Lands in Tail, upon Condition that the Devisee should pay to T. P. 20 l. and if he failed, then the Land should remain to T. P. and his Heirs; adjudged, that these Words, upon Condition, did not make a Condition, but rather a Limitation of the Estate; for if it should be a Condition, then the Heir at Law would have a good Title to enter, if the Condition was broken; and if so, then T. P. to whom the Money was devised would have nothing; therefore it shall be construed to be a Limitation of the Estate of the Devisee, so that if he failed in Payment of the 20 l. T. P. might enter and take Advantage of it, but not in the Nature of a Remainder Man, but as a new Devise to him. *Owen 112. Wiseman versus Baldwin. Gouldsb. 152. S. C. Cro. Eliz. 376. S. C.*

Cro. Eliz. 833. Noy 51. S. C. 7. Devise to his eldest Son, upon Condition, that he pay to his younger Brothers 20 l. a-piece, and if he fail in Payment to them, or either of them, that then the Lands should be to them and their Heirs; adjudged, this was a Limitation of the Estate of the eldest Son, and determined by Non-payment of the Legacies. *Hainsworth versus Pretty. Moor 644. Antea pl. 4. S. P.*

8. The Husband levied a Fine to the Use of himself, and of such Woman whom he should afterwards marry, and after their Deceases to *I. M.* and the Heirs of her Body; afterwards he married one *Anne*, and died, upon whom *I. M.* entered, and the said *Anne* re-entered; the Question was, whether *Anne* by this Limitation of an Use by the Husband to the Woman whom he should afterwards marry (and she happening to be that Woman) shall take jointly with her Husband, or whether this Limitation shall be void, because she was not at that Time known to be the Woman; and adjudged, that she shall take jointly with her Husband. *Moor* 96. *Mutton's Case*, and 340. *S. P.*

9. In Ejectment, the Jury found a Special Verdict, that *Sir Arthur Throgmorton* being seised of six Tenements and of Lands in *Loofeild* in Fee, settled the same upon the Marriage of his Daughter *Anne* with *Sir Peter Temple*, to the Use of himself for Life, then to the Use of the said *Sir Peter Temple* and *Anne*, and to the Survivor for Life; then to the Use of the first Son of the Body of *Anne*, by the said *Sir Peter* to be begotten, in Tail Male, with divers Remainders to the second and other Sons of that Marriage; and for Want of such Issue to the Females, &c. Proviso, that it shall be lawful for *Sir Arthur*, at any Time during his Life, to make Leases of the Premises, which at any Time heretofore have been usually let, for twenty-one Years or under, or for any Number of Years determinable upon three Lives in Possession, reserving the Rents for the same now paid, so long as the Lessees, &c. shall duly pay the said Rents, and commit no Waste: The like Proviso for *Sir Peter Temple* and *Anne* his Wife verbatim, after the Death of *Sir Arthur*, who died, and *Sir Peter* entered and made a Lease of the six Tenements to *Sir Tho. Gower*, for 30 *l.* Rent, and this was for the Term of ninety Years, determinable upon three Lives, so long as the Lessee should pay the Rent; they find that the said Rent was not paid at Michaelmas 1653, or within one Month after: They find that *Sir Peter Temple* made another Lease of Lands in *Loofeild* to the said *Sir Tho. Gower* for the like Term of ninety Years, and upon the like Limitation as in the former Lease, reserving 100 *l. per Annum* Rent, payable equally at Lady-day and Michaelmas, and that the same had been formerly leased by *Sir Arthur Throgmorton*, for twenty-one Years, reserving the like Rent, which said Term of twenty-one Years was long since expired; and that it did not appear to them, that the Premises in *Loofeild* were leased at the Time when the Settlement was made, or for twenty Years before, but that 50 *l.* for half a Year's Rent was due and unpaid at Michaelmas 1653; that the said *Sir Peter* had issue *Anne* the Defendant, who entered; that *Sir Tho. Gower* entered on her Possession, and made a Lease to the Plaintiff, by Virtue whereof he was possessed, till ousted by the Defendant: The first Question was, whether the Defendant's Entry into the six Tenements was lawful, the Rent not being paid on the Day on which it was to be paid; and adjudged, that it was lawful, because the Lease was not derived out of the Estate of *Sir Peter Temple* the Lessor; for he was only Tenant for Life, and had no Reversion in him, but it was derived out of the Estate of *Sir Arthur Throgmorton* by Virtue of the Proviso in the Marriage-Settlement; so that it was not a Lease upon Condition to pay the Rent, but by Way of Limitation, and determined by Non-payment; for it was to continue so long as the Rent was paid, and no longer, which are Words of Limitation; 'tis true, *Sir Peter Temple* had Power to make Leases, but he had no Interest in him out of which the Leases could be derived, so that having an Authority only to make them by Virtue of the Proviso; the Leases, when made, must be subject to such Limitations as are mentioned in the Proviso.

The next Question was, whether the Lease of *Loofeild* Lands was warranted by the Proviso, for that gave Power only to make Leases of Lands, which at any Time heretofore had been usually leased; 'tis true, the Jury found, that the Lands in *Loofeild* had been formerly leased; but they likewise found, that the Lease was expired, and that they were not demised for the Space of twenty Years before this Proviso made; adjudged, that this Lease was not warranted by the Proviso, for the Words at any Time heretofore usually leased import, that it must be always or commonly in Lease, but what was not in Lease at the Time of the Proviso, nor twenty Years before, cannot be said to be at any Time before commonly leased; for these twenty Years were a Time before in which it was not in Lease. *Vaugh.* 28, 34. *Tristram versus Roper*.

10. The Testator devised his Lands to *W. R.* who was Heir at Law, and other Lands to *W. W.* in Fee, and that if *W. R.* molest *W. W.* by Suit, or otherwise, he shall lose what is devised to him, and it shall go to *W. W.* the Testator died, his Son and Heir entered; adjudged, that this Entry and Claim is a sufficient Breach to entitle *W. W.* to the Lands, and that these Words make a Limitation of the Estate, and not a Condition. 2 *Mod.* 7.

11. Upon the before-mentioned Authority, the Case of *Fry and Porter* might be adjudged, (viz.) 2 *Lev.* 61. *S. C.* *Raym.* 236. *S. C.* The Husband devised his Lands to his Wife for Life, and afterwards to his Granddaughter, the Lady *Anne Knolls* in Tail, provided, and upon Condition she marry with the Consent of his said Wife, and the Earls of Warwick and Manchester, or the major Part of them; and in Case she marry without such Consent, or die without Issue, Remainder over to a Stranger; adjudged, that these Words, provided, and upon Condition, do not make a Condition, but rather a conditional Limitation of the Estate to support the Intent of the Testator, and to let in the Remainder Man; for 'tis in Effect as if he had said, If she marry without Consent, or if she die without Issue, my Estate shall remain to another: But if it should be a Condition, and the Granddaughter should not perform it, then the Heir at Law might enter for the Breach, and hold the Estate as forfeited to him, and by Consequence would defeat him in Remainder, which was never the Intent of the Testator, therefore it must be a Limitation of her own Estate, which is to continue no longer than

than she complies to the Terms upon which it was given, or her Dying without Issue; in both which Cases it shall be determined, and the Freehold transferred to another. 1 Vent. 199. *Fry versus Porter*.

Livery and Seisin.

See *Feoffment*. (C) per totum.

(A)

1. **F**eoffment of an House, and the Deed was sealed and delivered in the House, but without any other Circumstances, this doth not amount to a Livery. 1 Leon. 207. *Mills versus Shomball*. 2 Cro. 80. *Vaughan versus Holdis*.

1 Brownl. 21. Moor 875. S. C. 2. Dean and Chapter of *Norwich*, Anno 42 Eliz. made a Lease to the Plaintiff for three Lives, rendering Rent, with a Letter of Attorney to make Livery, which was done after the Rent became due to the Lessors; adjudged, that tho' the Livery was made after the Rent-day, yet 'tis good, for until it was made, the Lessors shall retain the Lands, and no Rent is due from the Lessee, because by Intendment of Law the Possession of the Lands is better than the Rent. Owen 136. *Waller versus Dean and Chapter of Norwich*.

1 And. 8. S. C. 3. Lease for twenty Years to the Husband, to commence from Michaelmas last past, before the Date of the Lease; and after the Expiration of the said Term, then to the said Husband and his Wife, and to John their Son, for their Lives and the longest Liver of them, with a Letter of Attorney to make Livery and Seisin, according to the true Meaning and Effect of the present Grant and Lease, this is a good Lease for Years, with a Remainder for Life, if Livery and Seisin was made by the Attorney at the same Time with the Executing the Lease; but if the Lease was first delivered by the Lessor, and some Time afterwards Livery and Seisin was made by the Attorney, in such Case the Livery is void. Moor 14. *Helier versus Okeden*.

4. Upon a Special Verdict in Ejectment, the Case was, That one Heydon being seised in Fee, and having borrowed Money of one Cardell, for Repayment whereof he agreed to assure his Lands, and they both coming thither together, Heydon spoke these Words, *I am indebted to you in 20l. and if I do not pay it before Michaelmas next, then I bargain and sell these Lands to you; but if I do pay it, &c. then I will have my Lands again*; and he left Cardell in Possession, who stayed a little while there; adjudged, this was a good Livery and Feoffment. Mich. 25 Eliz. Moor 144. *Keale's Case*.

1 And. 245. 5. Letter of Attorney to four conjunctim & divisim to make Livery and Seisin, and afterwards one of them makes Livery in one Part; adjudged, that their Authority was not determined by this Act, but that they might either conjunctim or divisim, afterwards make Livery and Seisin in the other Parts, either of the Whole or any Part or Parts. Moor 280. *Bathey versus Trevilian*.

6. A Lease was made to Husband and Wife, and to their Daughter, habendum from Michaelmas next; and the Lessor himself made Livery after Michaelmas; the Question was, whether this was a good Lease, and adjudged that it was, because the Livery was made by the Lessor himself, but it had been otherwise if he made Livery before Michaelmas, or if it had been to be done by Attorney. 2 Roll. Rep. 109.

7. Writ of Error on a Judgment in Ejectment on a Lease of running Water; adjudged, that no Livery and Seisin could be made of it, because 'tis running; but 'tis otherwise of a standing Pool, for there Livery may be made with a Dish of Part of the Water. 4 Leon. 248.

8. Adjudged, that where there is Tenant for Life, with Power to make a Lease for Life, who afterwards makes such Lease for Life, this is a good Lease without Livery, and better than if Livery were made. 2 Lev. 149. In *Wigson and Garrett's Case*.

London.

Of the Customs in *London* in general. (A) | Of the Customs concerning Orphans and Widows. (B)

(A)

Of the Customs in *London* in general. See *Recognisance*, (A) 3.
Trade, (A) 6, 13.

1. **T**HERE are several Customs in *London* which are against Common Right, and against the Rules of the Common Law, and yet are allowed to be good; as for Instance, a Custom, that the Creditor may arrest his Debtor before the Day of Payment, in order to make him give Security for the Debt; so a Custom to enter the House of another against his Will, (*viz.*) that when a Priest hath a Woman in his House, and one hath an ill Suspicion of them, he may come with the Constable or Beadle of the Ward, and may enter the House, and commit the Offender. 2 *H.* 4. 12.

2. By the Custom of *London*, Lands and Houses there might be bought and sold by Word only, without any Deed or Enrollment; and this is a good Custom notwithstanding the Statute 27 *H.* 8. of *Enrollments*. *Pasch.* 6 *Eliz.* *Dyer* 229. *Chibborn's Case*.

3. Husband and Wife were seised of an House in *London*, to them and the Heirs of the Husband, and *he alone*, without his Wife, covenanted by Indenture in Consideration of 20 *l.* to him paid, to suffer a Common Recovery by Writ of Right, according to the Custom of *London*, which binds as a Fine doth at Common Law; and this should be to the Use of the Husband until he had made a Lease for forty Years; and afterwards to the Use of him and his Wife, and his Heirs, and accordingly he made a Lease for forty Years, which was adjudged good, and not to be defeated by the Wife, who survived him, by Reason of the Custom, and yet the Husband was only Party to the Deed. *Mich.* 12 *Eliz.* *Dyer* 290. 2 *Rep.* 57. *In Beckwith's Case*.

4. Upon an *Habeas Corpus* directed to the Sheriffs of *London*, they returned the Custom of the City, &c. that where any Man under the Allegiance of the King, came and dwelt there for a Year and a Day, & *si interim de nulla villana vel servili conditione fuerit defamatus vel calumniatus*, he might live there peaceably and quietly all his Life-Time, if he would; and because the Defendants had so remained, and for that the Liberties of the City were confirmed by several Kings, they (the Sheriffs) could not have the Bodies of the Defendants, &c. and upon producing their Charter, this was held a good Return. *Moor* 3. *The Sheriffs of London's Case*.

5. Debt upon Bond against an Administrator, who pleaded a Custom in *London*, that if a Contract is made by a Citizen to pay so much Money to another Citizen; in such Case, if the Debtor dieth Intestate his Administrator is bound to pay that Debt as well as a Debt upon Bond; and this was adjudged a good Custom, for tho' none could be charged at Common Law by the Name of Administrator, because there was no such Name before the Statute * 31 *Ed.* 3. and tho' that Statute was made within Time of Memory, so that a Custom cannot begin within that Time; yet because he was chargeable at Common Law, as Executor, such a general Custom is good, and shall bind the Plaintiff, tho' he is a Stranger, and no Citizen. 5 *Rep.* 82. *Snelling's Case*. *Cro. Eliz.* 409. *S. C.*

* See *Per-*
cival v.
Crispe.

6. There is a Custom in *London*, which alters the very Course of Justice, and that is where an Action is brought before one Judge to remove the Proceedings before another; as for Instance, in Debt upon an Escape, the Defendant pleaded, that there is a Custom in *London*, that where a Plaint is entered in the Sheriff's Court, in such Case, the Lord Mayor, at the Suggestion of either Party, may send for the Parties and examine them, and if upon such Examination he finds, that the Plaintiff is satisfied, he shall be barred from any farther proceeding against the Defendant; then he set forth, that the Plaintiff did enter a Plaint against the Defendant in the Sheriff's Court, and was afterwards examined before the Mayor, who found, that he had received Part of the Money for which the Plaint was brought, and that he had taken Bond for the Rest; and thereupon the Lord Mayor awarded, that he should be barred; and this was held a good Custom, the rather, because the Examination was made, pending the Action; but if the Custom had been to examine the Matter after Judgment, it had not been good. 8 *Rep.* 121. *Case of the City of London*.

7. Error of a Judgment by Confession. in an Action of Debt brought by the Successor of the late Chamberlain of *London*; the Error assigned was, That the Action was brought by the Plaintiff as Successor of *W. R.* Chamberlain of *London*, upon a Bond made to him, *solvendum* to him and his Successors, setting forth the Custom of *London*, that the Chamberlain there had used Time out of Mind, to take Bonds payable to him and his Successors, and they to put all such Bonds in Suit; and that all their Customs were confirmed by Parliament 7 R. 2. and that the Plaintiff had Judgment upon this Bond; whereas by Law a Bond being but a Chattel, cannot go in Succession; but adjudged, that the Chamberlain being a single Corporation by Custom to take Bonds to him and his Successors, and that Custom being confirmed by Act of Parliament, such Bonds may be well allowed to go to the Successor, and not to the Executor. *Pasch. 38 Eliz. Cro. Eliz. 464. Bird versus Wilson.*

8. A Citizen of *London* called Alderman *Garrett Fool and Knave* publicly upon the Exchange, for which he was committed by the Lord Mayor to *Newgate*; and upon an *Habeas Corpus* the Cause of his Commitment was returned, and the Custom of *London* to commit a Citizen for such a Misdemeanor; adjudged, this being a private Abuse, and not done in any Court, or in Contempt thereof, he ought not to be committed, and therefore he was discharged. *Trin. 44 Eliz. Cro. Eliz. 689. Dean versus Alderman Garrett.*

9. In Trespass for taking a Bag of Nutmegs, the Defendant justified for Wharfage-Money, due for Goods brought to *Queenhithe* to be carried by Water; the Plaintiff replied, that Time out of Mind there had been a Custom in *London*, that all Freemen of the said City, had been and ought to be discharged of Payment of Wharfage for their Goods, and averred, that he was a Freeman of the City, &c. the Defendant rejoined, that there was no such Custom, &c. and then suggested another Custom, that where any Issue is joined upon a Custom of the City, tho' the Lord Mayor and Aldermen are Parties to the Action, yet they have used to certify to the Judges the Truth of such Custom, and so prayed a Writ to the Mayor, &c. to certify, &c. adjudged, that 'tis not a good Custom for them to certify another Custom, which concerns the Interest of the Corporation, whereof they are a Part; especially since this Custom is in Nature of a Prescription, and if so, then it cannot be their Custom; but 'tis not such a Custom as is within the Reason or Meaning of that special Form of Trial by Certificate, which is used in *London*, because 'tis against Right and Natural Equity to allow a Certificate, wherein they are to try and judge their own Cause. *Hob. 85. Day versus Savage. Moor 871. See Smith versus Hancock.*

10. In an Action on the Case for certain Parcels of Plate, the Issue was, Whether there was a Custom in *London* for a Common Market there for all Goods in all Shops, every Day, except Sundays and Holydays, from the Rising to the Setting of the Sun; and the Defendants suggested a Trial of this Custom by the Certificate of the Recorder, and prayed a Writ for that Purpose, which was granted, returnable in *Trinity-Term*, and continued until *Octob. Mich.* and then it was moved, that the Defendant ought to have concluded his Plea to the Countrey; and it was ruled accordingly, and issue was taken upon it, and a *Venire facias* to the Sheriff of *London*, &c. which proves, they shall not try a Custom by their Certificate. *Hob. 87. Bilford versus Love.*

11. If a Man leaves an Horse in an Inn in *London*, and there he eats more than he is worth; by the Custom of *London*, the Horse shall be appraised by the next Neighbour to the Inn-keeper, and afterwards sold; but if he leave several Horses in an Inn in *London*, and afterwards takes them all away but one, in such Case, the Inn-keeper cannot sell that Horse to make Satisfaction for what was eaten by the other Horses, tho' it amounts to more than what the Horse is worth; because by the Custom, every Horse is to be sold to satisfy the Debt due for his own eating only, and not for what another eat. 1 *Bull. 207. Mosse versus Townsend. Postea Trover, (C) 5. S. C.*

12. A Custom in *London*, that *Appothecaries* who sell unwholsome Drugs, shall forfeit such a Sum; an Action of Debt was brought by the Chamberlain of *London*, for this Forfeiture; and adjudged, that the Action lies there, and therefore upon an *Habeas Corpus cum causa* brought by the Defendant, a *Procedendo* was awarded. *Moor 403. Wilford versus Masbam.*

13. In Covenant between the Master and his Apprentice, they were at Issue upon a Custom of *London*, and a *Certiorari* being awarded to the Lord Mayor, the Recorder *ore tenus* certified the Custom, that if one of the Age of fourteen Years, and under twenty-one Years, and not married, bind himself Apprentice by Indenture, in which there are several Covenants, that this shall bind him, tho' an Infant, and tho' the Indenture is not enrolled with the Chamberlain within the Year; and that if 'tis not enrolled within that Time, the Apprentice may come before the Mayor and Aldermen, and set forth the Matter by Petition to them in *French*, and thereupon a *Scire facias* shall issue to the Master to shew Cause, why the Deed is not enrolled; and if he is in the Fault, then the Apprentice may sue out his Discharge; but if the Fault was in the Apprentice, for not appearing before the Chamberlain, then he cannot sue out his Indenture, and be discharged. 2 *Roll. Rep. 305.*

14. Upon the Return of an *Habeas Corpus*, the Case appeared to be, that *W. R.* would set up a Tavern in *Birchin-lane* in *London*; and that the Mayor and Commonalty, knowing that was not a fit Place for a Tavern, forbade him; but yet he set up the Tavern against their Wills, and for this Disobedience they committed him; and adjudged, that he should be remanded, for the Mayor and Commonalty have an Authority over him, and may appoint the Place where a Tavern shall be set out; and the Recorder certified *ore tenus*, that the Custom was so. *Pasch. 15 Car. March 15.*

15. *Chamberlaine* was committed by the Lord Mayor and Court of Aldermen, and upon a *Habeas Corpus* returned, the Case appeared to be thus, *ff.* A Custom was returned, that Time out of Mind the Mayor and Aldermen, at such Times, &c. usually held a Court, and that every Alderman ought to attend *Subpoena*, &c. that *Chamberlaine* was chosen an Alderman of the City, and absented himself three Weeks from the Court, and being convened before the Mayor and Aldermen, and demanded, for what Reason he absented; he replied, that he went into the Countrey to collect his Rents; and this being taken for a Contempt to the Court, he was fined 300 *l.* and committed, and also removed from the Office of an Alderman, &c. it was objected, that his Absence is no more than a Nonfeasance, and that will not make a Trespasser, and by Consequence he is not finable; besides, the Fine is to the City, to the Use of the Mayor and Aldermen, &c. and so they are Judges and Parties; and the Imprisonment is contrary to *Magna Charta*: 'Tis true, the Customs of *London* are confirmed by several Acts of Parliament; but such Confirmation extends only to the good Customs, which this is not; for 'tis an unreasonable Custom, that the Judge who sets the Fine, should have it to his own Use; for which Reasons it was moved, that he might be discharged; but it was answered, that he could not be bailed upon this *Habeas Corpus*, because his Commitment was by a Judgment of the Court of Aldermen, which is a Court of Record; and therefore he ought to bring a Writ of Error, if he would be bailed: Neither is this Fine to the Judge, (*viz.*) to the Mayor, but to him, and the Commonalty, and Citizens of *London*; and 'tis not unreasonable in Respect to the Offence, because he being one of the Judges of the Court, there may be a Failure of Justice, if he should absent without a Cause; the Court inclined, that the Mayor and Aldermen might fine and commit for Nonpayment; but doubted, whether they could deprive him from his Place of Alderman; but he submitted, so no solemn Judgment was given. *Palm.* 533. *Chamberlaine's Case*.

16. Information against the Defendant, for using a Trade of Studding Points in *London*, not being an Apprentice for seven Years; the Defendant pleaded, that he was a Freeman of *London*, and that by the Custom, &c. a Freeman of *London*, and that he was free of one Trade, might exercise another; and then he sets forth, that he was free of the Cloth-workers Company; and that by the Custom he might use any other Trade, tho' he had not been an Apprentice to that Trade; the Plaintiff replied, and denied the Custom, upon which they were at Issue, and thereupon a Writ issued to the Mayor and Aldermen, to certify the Custom by the Mouth of the *Recorder, who certified, that there was no such Custom; & *per Curiam*, this Certificate is good, and the Plaintiff had a Verdict, and Judgment. *W. Jones.* 412. *Appletoft versus Stroughton*.

Cro. Car.
516, 347,
361.
1 Saund.

311. 1 Roll. Rep. 10. Sid. 427. S. P.

17. The Wife of a Merchant in *London* may sue and be sued by Custom, because *London* being the chief Place of Trade and Merchandise, 'tis intended, that Merchants cannot be always resident there, but sometimes beyond Sea, and in other Places, about their Affairs; and therefore 'tis reasonable, that the Wife should sue and be sued in the Absence of her Husband. *Hill.* 7 *Jac.* 2. *Brownl.* 118. *Gittins versus Cowper.* 1 *Mod.* 26. S. P.

18. *Prohibition*, &c. to the Mayor's Court, suggesting the Statute 3 *Ed.* 1. *cap.* 35. by which all Persons (except the King's Ministers) are prohibited to arrest any one within a Liberty, passing thro' the same, and holding nothing thereof, for any Contracts, Covenants or Trespasses made or done out of such Liberty, in Pain to pay double Damages to the Party grieved, and a Fine to the King; then the Plaintiff suggests farther, that the now Defendant levied a Plaint against him in the Sheriffs Court in *London* for 200 *l.* Debt, that he was arrested, and a Declaration delivered in an Action of Debt on Bond, which was removed to the Mayor's Court, and is still depending; and avers, that the Cause of Action *extra jurisdictionem* of the City, &c. it was objected, that the Plaintiff in the Prohibition ought to have pleaded to the Jurisdiction of the Court, and to swear his Plea to be true; but a Prohibition was granted, there being Oath made, that the Bond upon which this Action was brought, was made *extra jurisdictionem.* 2 *Lutw. Rep.* 1023 *Turner versus Weston.* Sid. 464. S. P. *Waineman versus Smith,* S. P. 1 *Mod.* 63. S. C. and that these Prohibitions are grounded on the Statute *W.* 1. *cap.* 34. *Vent.* 88.

19. By the Custom of *London* a Tenant at Will paying under 40 *s.* Rent must have a Quarter's Warning, before he is turned out; and if the Rent be above 40 *s.* he must have half a Year's Warning. 2 Sid. 20. *Dethick versus Sanders.*

20. *Swallow* was chosen Alderman of *London*, and refusing to take upon him the Office was committed; and upon an *Habeas Corpus* brought, and the Return of the Cause of his Commitment filed, he moved, that he might have Leave to plead to the Return; it was agreed, that he could not plead against the Matter of the Return, for if it was false, he might bring an Action on the Case; but that he would plead that which consisted with the Return, (*viz.*) that admitting the City of *London* had a Custom to choose Aldermen, yet the Defendant was privileged, as being the Surveyor of the Melting Works; but he was remanded, and ordered to suggest his Privilege on the Roll in the Crown-Office in the same Manner as Suggestions are usually made for Prohibitions, which he did, (*viz.*) that the Moneyers had a Privilege by Patent, and by Prescription; and afterwards the Patent being enrolled by the Order of Court, it was, That the Moneyers, not any of them, shall not be Mayor, Sheriff, Escheator, Collector of Tenths, *vel alius officarius, vel minister quicumq;* it was objected, that an Alderman was not within this Privilege, because

not mentioned; but adjudged, that since a Superior and an Inferior Officer to an Alderman are mentioned, he shall be included; and tho' the Privileges of *London* are confirmed by Act of Parliament, yet the King may grant, that such Persons shall be exempted from Offices; and there-upon *Swallow* was discharged. *Sid.* 287. *Swallow* versus *City of London*. See *Langham's Case*.

1 Vent.
327.

21. *Certiorari*, &c. the Return was, A Custom for the Company of Merchant-Taylors to choose Livery-Men, and when chosen, to commit those who refuse to accept the Office, &c. and that *Smartford* was elected, and, *without reasonable Cause, refused*; it was objected against this Return, that the Custom to commit, is not good, because this Custom doth not concern the Government, but the State of a Company only; besides, it doth not appear, that *Smartford* was *habilis & idonea persona* to execute this Office; but adjudged, that this Custom is good, because all the Customs of *London* are confirmed by Act of Parliament; and it being alledged, that he *refused without reasonable Cause*, that implies, that he was *habilis persona*. 2 *Lev.* 200. *The King* versus *Merchant Taylors*.

22. Upon an *Habeas Corpus* and *Certiorari*, the Return was, Of a Custom, &c. that if any Freeman spoke contemptible Words of an Alderman, that in such Case, the Common Serjeant hath usually exhibited an Information against him before the Mayor and Court of Aldermen, and that if the Offender be convicted by Verdict or Confession, their Use is, to punish him by Fine or *Disfranchisement*; that *Clerke* spoke scandalous Words of *Alderman Lawrence*, (*viz.*) *that he would undo the City, and that he was a Knave*; it was objected, that a Custom to try a Man for Words spoken of an Alderman, &c. in the Court of Aldermen, is unreasonable, because he is both Judge and Party; besides, it doth not appear, that *Clerke* is a Freeman; 'tis true, in the Information which is returned *in hac verba*, he is said to be a Freeman; but that is not sufficient, for it ought to be returned in Fact, that he is a Freeman; but the most material Objection was, that a Custom to *disfranchise* a Man for Words, is void; to which the Court inclined. 2 *Lev.* 201. *The King* versus *City of London*.

23. The Case was, The Father was a Freeman of *London*, and devised, that his third Part should make the customary Part of his Children 500 *l.* a-Piece, if their customary Parts did not amount to so much; and that if any one of them died before 21, his Part should be divided amongst the Survivors; all of them died before 21, except the Plaintiff's Wife, her Brother *John* being the last that died, and the Plaintiff had received out of the Father's Part as much as made his Wife's Customary Part 500 *l.* and the Question was, If she should be entitled by the Will to have *John's* Part; it was objected, that she should not, for 'tis not due by the Will, but by Custom, and she ought to administer to *John* to make a Title, for the Father had no Power to appoint a Survivor thereof; but adjudged, that he had, tho' he had not the Power to dispose the Customary Part from his Children. 1 *Lev.* 227. *Hammond* versus *Jones*.

24. Debt upon a By-Law, which was, That ever one of the Leather-Seller's Company in *London*, who should be chosen upon the Livery before he was Warden of the Yeomandry, should pay 25 *l.* the Defendant pleaded the Custom of the City of *London*, that no Man should be chosen of the Livery of any Company, who was not free of the City, and that he is no Freeman; the Plaintiffs deny the Custom, & *hoc parati sunt verificare*; and upon a Demurrer to the Replication, it was objected, that it should be concluded to the Countrey; but adjudged well enough, because the Custom, is not to be tried by a Jury, but by a Certificate from the Mouth of the Recorder. *T. Jones* 149. *Leatherfellers Company* versus *Beecon*.

25. In an Attachment upon a Prohibition to the Prerogative Court, the Case was, (*viz.*) The Custom of *London* for Distribution of a Freeman's Estate, dying Intestate, is, that one Part shall go to his Widow, another to his Child, and the third Part to his Administrator; and now the Administratrix was sued for a Distribution according to the Statute, for her Part, who insisted, that it belonged to her according to the Custom; it was objected, that it was not a good Custom for to make it so; it must be Time out of Mind, but an Administrator began *Anno* 31 *Ed.* 3. which is within Time of Memory: *Sed per Curiam*, the Custom is good; this Case is the same as *Snelling's* Case, and an Administrator was at Common Law, (*viz.*) the King, as *parens patriæ*, was originally the Administrator; and by the Custom the Heir shall have a Share in the Distribution. *T. Jones* 204. *Percivall* versus *Crispe*.

26. Upon a *Certiorari* the Custom of *London* was returned, to punish by Information in the Court of Aldermen, either for an Assault, or contemptuous Words spoken of an Alderman in the Execution of his Office, and to fine him, and that at a Wardmote held by *Sir Robert Jeffries*, the Defendant assaulted him, and said, *I have as much to do here as you; you think sure you are amongst your Bridewell-birds, but you are mistaken*; adjudged, that an Information did lie in the Court of Aldermen, tho' an Alderman was aggrieved; but he must not sit when 'tis heard; * if the Offence had been only for Words, it might be doubtful, whether an Information would lie; but this was for an *Assault* as well as for Words; but a Custom to *disfranchise* for Words had been ill. 2 *Salk.* 425. *The King* versus *Rogers*. *Far.* 28. *S. C.*

* Jones
229.
2 Lev.
200.

1 Vent. 16, 327. Cro. Eliz. 78. Moor 347. Sid. 144.

Where a Freeman of *London* hath no Wife, but Children, the Half of his Personal Estate goes to them, and he may dispose the other Moiety; so if he have a Wife, and no Children, the Half belongs to her; but if he hath both Wife and Children, then one Third Part belongs to the Wife,

Wife, another Third to the Children, and he may dispose of the other Third: And if he die Intestate, the Custom only affects two Thirds, and the remaining Third is to be distributed according to the Statute.

Where a Freeman hath *two Sons*, and the eldest Son dies, leaving a Son, then the Freeman dies, the Grandson (tho' in Law a Representative of the Son) hath no Share by the Custom, because that extends to *Children* and not to Grandchildren.

Where a Freeman, &c. hath but one Child, and he hath received some Portion from his Father, who dies, leaving his Wife and this one Child, that Child shall have its full Orphan's Part, without any Regard to what he hath before received, for that Advancement in Part shall be brought into Hotchpot with *Children*, and not where there is but one Child.

Where a Freeman hath advanced any of his Children by a Portion, and if it appears in *Writing under the Father's Hand, or by Marriage-Settlement, how much that Advancement was*, tho' by that Writing, Will or Settlement, 'tis said it shall be in full of his Child's Part by the Custom; yet that Child shall come in for its customary Part of the rest of his Father's personal Estate, bringing what was advanced into Hotchpot.

27. Upon an *Habeas Corpus* to the Keeper of *Newgate*, he returned, that in *London* there are Companies, some Freeman of which Companies are Livery-men, and that there is a Court of Aldermen, and that if any Person duly chosen doth not take upon him the Office of a *Livery-man*, he may by Custom be committed by the Court of Aldermen to any Officer of the City; and that Clerk being before that Court, and refusing, &c. was committed to the *Keeper of Newgate*, until he should declare his Consent to take upon him that Office; adjudged, that *B. R.* takes Notice of Livery-man, and of the Nature of his Office; but they could not take Notice that the Keeper of *Newgate* was an Officer of the City of *London*, &c. 1 *Salk.* 349. *King versus Clerke.*

(B)

Customs concerning Orphans and Widows.

1. **A**djudged, that if an Orphan, who by the Custom of *London* is under the Government of the Lord Mayor and Aldermen, sue in the Spiritual Court for any Legacy, &c. that a Prohibition shall be granted, because the Government of Orphans doth by Custom belong to the Lord Mayor and Aldermen, and they only have Jurisdiction of them. 5 *Rep.* 73. *Orphans of London Cafe.* Postea Prohibition. (C) 1. *S. C.*

2. Upon an *Habeas Corpus*, the Mayor, Aldermen, and Sheriffs of *London* return the Custom concerning the Orphans of Freeman, and for securing their Portions, they use to take sufficient Security of them who ought to pay the Money, and to commit them to the *Compter*, if they refuse to give it, there to remain till they give Security; then they return, that their Customs were confirmed by Act of Parliament *Anno 2 R. 2.* &c. and that *W. R.* who was a Freeman of *London*, had Issue a Son and Daughter by *E.* his Wife, and died; that the Prisoner being a Suitor to the Widow, agreed before Marriage, that she should dispose of 200 *l.* and was bound in a Statute to permit her to make a Will for that Purpose, and accordingly she devised to her Son and Daughter, each of them 100 *l.* and died, that the Prisoner agreed to the Will, but refused to give Security to the Chamberlain of *London* to pay it at the Time appointed by the Will, pretending that he was bound by a Statute acknowledged to the Friends of the Orphans to perform it; upon Reading this Return the Prisoner was remanded, and this was adjudged a good Custom, and that the Recognisance which he had given before Marriage, to permit his intended Wife to make a Will, did not discharge him to give that Security which he was bound to do by the Custom. *Pasch.* 16 *Jac.* *Hutton* 30. *Andrew's Cafe.*

3. *Harwood* was committed to *Newgate* by the Court of Aldermen, for that he having married an Orphan without Leave of the Court, was fined 40 *l.* and refusing to pay it; all which appeared upon the Return of the *Habeas Corpus*; and after several Exceptions taken to the Return, and all over-ruled, he was remanded. 1 *Vent.* 178. *Harwood's Cafe.* 1 *Mod.* 77. *S. C.* *Raym.* 116. *S. C.* *Sid.* 250. *S. P.* 2 *Lev.* 32. *S. C.*

4. In Trespas for a Battery and False Imprisonment, the Defendant justified by the Custom of *London*, for that the Mayor and Aldermen had a Court of Orphans for the Government of Infants of Citizens, (*viz.*) of the Males till twenty-one, and of the Females till eighteen Years of Age, or Marriage; and that one *Paine*, a Citizen died, leaving *Mary* his Daughter within the Age of eighteen Years, and unmarried; and that the Court of Orphans committed the Custody of her to *Sir William Bolton*, the now Defendant, by Virtue whereof he was possessed of her; and then sets forth a Custom, that if any Person take such Ward away, they may commit him to *Newgate* till he produce the Infant, or be discharged by due Course of Law; and because the Plaintiff took the Child away, he was committed, &c. it was objected upon a Demurrer to this Plea, that it was an ill Custom to commit a Man without being heard; and as 'tis an ill Custom, so 'tis laid too general, *viz.* If any Person take the Child away they may commit, &c. so that they may imprison a Peer, if this is a good Custom; to which it was answered, that this being a great Offence 'tis reasonable, that any Person who is guilty should be committed; then it was objected, that the Custom is laid to have the Custody of the Person, and of all the Estate real and personal, which

may extend to Lands out of *London*; but this was affirmed to be their common Practice. *Sid.* 250. *Wilkinson versus Bolton*.

5. The Father being a Freeman of *London*, and possessed of a Term for Years, assigned it to his Son, as a Provision for him, and died; the Widow exhibited her Bill in Equity for her customary Part; and upon an Issue directed to try whether she is barred by this Assignment, it was proved and found by the Jury that she is not, because it was voluntary, and that she had a Title to her customary Part of a Term for Years as well as of Goods. 2 *Lev.* 130. *City versus City*.

Lunatick.

See *Copyhold.* (a) per totum.

(A)

1. **T**HE King by his Prerogative hath the Protection of his Subjects, and the Government of their Lands, who are naturally defective in their Understanding; and these are called Ideots or natural Fools from their Birth; and for this Purpose there is a Writ in the Register *De Idiota inquirendo vel examinando*, directed to the Sheriff to call before him the Party suspected of Idiocy, and to examine him in the Presence of a Jury of twelve Men impanelled by him, who are to be on their Oaths to inquire, whether the Party is an Ideot, or not; and when the Inquisition is taken, the Sheriff is to certify it into the Chancery.

2. A Lunatick, or one *Non compos mentis*, is one who became a Fool by Misfortune or Accident, but was not born so; and because such a Fool may have *lucida Intervalla*, therefore at such Times he may have Discretion enough to dispose and govern his Lands, and for that Reason the King shall not have the Custody of him and his Lands, as he hath in the Case of *Idiocy*: For the Custody of the Body, Goods and Chattels of an *Idiot* are given to the King by the Common Law, and the Custody of his Lands by the Statute *de Prærogativa Regis*, and the Use of them is in the King, but the Freehold is in the *Idiot*; and if he alien his Lands, the King shall have a *Scire facias* against the Alienee and reseise the same into his Hands, and the Inheritance shall be vested in the *Idiot*; but this must be understood after he is found by *Inquisition* to be an *Idiot*, for all Alienations and Gifts by him, before *Inquisition* found, shall be avoided after 'tis found; but if the *Idiot* die before Office found, none can be found afterwards to entitle the King to his Lands; and one who is *Non compos* is in the same Condition after Office found as an *Idiot* as to the Alienation of his Lands or Goods; for the Writ *de Idiota inquirendo* extends to both. 13 *Eliz.* *Dyer* 302. 5 *Rep.* 125. *S. P.*

1 *And.* 23.

3. In Trespals, the Defendant pleaded, that it was found by Office that the Plaintiff is a Lunatick; and thereupon the King seised his Lands, and by Letters Patents granted the Rule and Government of him and his Lands to the Defendant, to take the Profits to his own Use, quam diu the Plaintiff was a Lunatick, and so justified and prayed in Aid of the King; adjudged, that he should not have Aid, because the King hath not the Custody of the Body and Lands of one *Non compos mentis*, to his own Use, as he hath of an *Idiot*; for in the Case of a Lunatick he is bound to maintain him and his Wife and Family out of the Profits, and hath nothing to his own Use, and therefore hath nothing in * Interest to grant over; adjudged likewise, that if a Man, of his own Wrong, before Office found, takes upon him to receive the Rents and Profits of the Lands, he shall be accountable as a Bailiff to the Lunatick, or to his Executors or Administrators. 28 *H. 8.* *C. B. Rot.* 401. *Frances's Case.* *Moor* 4. *S. C.*

* But the Custody of an *Idiot*, and of his Lands, the King may grant over. 1 *And.* 23.

4. Where a Person who is *Non compos mentis* levieth a Fine or suffereth a Recovery, and declareth the Uses thereof, this shall bind him as long as the Fine or Recovery stands in Force; because, since he was admitted to levy a Fine as a Person of sound Memory, so long as that Fine is in Force, the Law will allow him to declare the Uses thereof; and these Things being Matters of Record, shall not be avoided by his Heir or Executor, by an Averment that he was *Non compos*, because that would be against the Office and Dignity of a Judge, or the Person whom the Law had entrusted to take the Fine. 2 *Rep.* 58. In *Beckwith's Case.* 4 *Rep.* 125. In *Beverley's Case.*

5. Debt upon Bond, the Defendant exhibited a Bill in Chancery to be relieved against the Bond, setting forth, that at the Time of the Sealing and Delivery thereof he was *Non compos mentis*; it was resolved in this Case, that every Deed made by a Person who is *Non compos* is voidable, but not by himself, because he shall not be allowed to work his own Disability by Making himself a Fool; that 'tis a Maxim in Law, that a Man shall not be received in any Case to disable himself; therefore he shall not have any Relief for that in Equity, because that would be to destroy a Principal in Law. 4 *Rep.* 124. *Beverley's Case.*

6. Where Lands are seized by the King, by Virtue of a Commission of Lunacy, and he grants the Custody of the Lunatick *sine computo reddendo*; yet if he afterwards is of a sane Memory, he shall have an Action of Account for the Profits; but in the Case of an Idiot *a natiuitate*, 'tis otherwise, because there the King and his Grantee have the Profits to their own Use. *Dyer 25 Holmes's Case.*

7. All Acts which a Man *Non compos mentis* doth in a Court of Record concerning his Lands or Goods, shall bind him, but he shall not lose his Life, tho' he killeth a Man, neither shall he forfeit his Lands or Goods in any criminal Case, except High Treason, for *Actus non facit reum nisi mens sit rea*; but whilst he is Lunatick, he is *Demens*, and 'tis his Madness and not his Intention, which is the Cause of the Action; and for that Reason his Punishment could not be an Example to others. *4 Rep. In Beverley's Case. Plow. Com. 19. S. P. 1 Inst. 247. S. P.*

8. The Marquess of Winchester, by his Last Will in Writing, devised several Lands to his natural Sons, and bequeathed Money and Plate to them, and died; afterwards, this Will being about to be proved in the Prerogative Court, it was suggested for a Prohibition, that the Marquess, at the Time of the Making the said supposed Will, was not of *Sound Memory*; and this appearing by several Circumstances, a * Prohibition was granted, &c. in which Case it was adjudged, that a * Ex mo-
tione
Coke.
1 Roll.
Rep. 21.
Memory which the Law allows to be a Sound Memory, is when the Testator hath Judgment and Discretion to distinguish between Persons and Things, and a reasonable Understanding to dispose his Estate, which is the most considerable Circumstance to the Making a good Will, and consists in his Words, Actions, and Behaviour at that Time, and not in giving a plain Answer to a common Question. *6 Rep. 23. Marquess of Winchester's Case.*

9. An Idiot and his elder Brother were Jointenants for their Lives, *W. R.* purchased the Interest of the elder Brother, and then seized the Body of the Idiot and took all the Profits of the Lands; afterwards the Ideocy was found by Inquisition; adjudged, that the King shall have the Profits of the Idiot's Lands only from the Time of the Inquisition; but to prevent all Incumbrances made by the Idiot, it shall have Relation to the Time of his Birth. *8 Rep. 170. In Tower-son's Case.*

10. In Trespass, &c. the Defendant pleaded, that *B. D.* was seized in Fee of the Lands, and by the Writ *de Ideota inquirenda* was found an Idiot, not having lucid Intervals *per spatium octo Annorum*, by Virtue whereof the King was entitled, who granted the Custody, &c. to *Sir A. F.* who died, and that the Defendant is his Executor; and upon a Demurrer it was agreed, that the King, by his Prerogative, hath the sole Interest in granting the Estate of an Idiot, but not of a Lunatick; but the Question was, whether this Person was found to be an Idiot; 'tis true, 'tis found that he was so, having no lucid Intervals *per spatium octo Annorum*, but before these eight Years she might have such Intervals, and there can be no Idiot, but *a natiuitate*: *Sed per Curiam*, here is a general Finding, that she is an Idiot; and the Words which follow *per spatium octo Annorum* shall be Surplusage, and the Grant of the Custody of the Idiot to the Testator carries an Interest to his Executor as well as a Trust. *3 Mod. 43. Prodgers versus Frazier.*

In a Special Verdict in Ejectment, the Case was: *ff. Nicholas Leech* devised his Lands to the Heirs Males of his Body, and for Want of such Issue, to his Brother *Simon Leech* for Life, Remainder to the first Son of the Body of *Simon* in Tail Male, Remainder to *Sir Simon Leech* in Tail, Remainder to his own right Heirs: The Testator died without Issue, and afterwards *Simon Leech* married, and two Months before the Birth of his Son, surrendered, &c. the Lands to *Sir Simon* and his Heirs; but that at the Time of the Sealing and Delivery of this Deed of Surrender, the said *Simon Leech* was not *Compos mentis*; that about two Months after this Surrender, *Charles Leech*, the Son and Heir of *Simon* was born, who is now Lessor to the Plaintiff; the Question was, whether this Surrender by a Person *Non Compos* was void *ab initio*, and so could pass no Estate to the Surrendree; for if so, then it can be no Bar to *Charles* in Remainder, because the Act being void, the Estate in Law remains in him: *Et per Curiam*, the Grants of Infants and Lunaticks are parallel both in Law and Reason, and there are express Authorities, that a Surrender made by an Infant is void, therefore so is a Surrender by one *Non compos*; and in all Cases where 'tis said, that the Deeds of Infants are not void, but voidable, the Meaning is, that *Non est factum* cannot be pleaded to such Deeds, because they have the Form, tho' not the Operation of Deeds; therefore they cannot be avoided upon that Account, without shewing some special Matter to make them void; therefore where an Infant makes a Letter of Attorney, tho' 'tis void in it self, yet it shall not be avoided by his Pleading *Non est factum*, but by shewing his Infancy: The Plaintiff had Judgment, and it was affirmed upon a Writ of Error in the House of Peers. *3 Mod. 301. Thompson versus Leech. See Remainder.*

Mathem. See Trespass. (B) per totum.

Maintenance.

Maintenance.

(A)

What is Maintenance. See *Jurors*. (A)

1. **M**aintenance is either when People side with one another to take or keep Possession of Houses or Lands, and then 'tis called *Ruralis*, or when they side with one another in Quarrels, or Suits in Courts, and then 'tis called *Curialis*.

2. If a Man assigneth a Bond to another in Satisfaction of a Debt due to the Assignee, this is not Maintenance; but if he assign it for a Consideration, 'tis Maintenance. *Noy 52. Harvey versus Bateman*.

Cro.Eliz.
594. S. C.
Gouldf.
113. S. C.

3. Maintenance cannot be in Suits in the Spiritual Court, by the Statute 32 H. 8. and so it was adjudged in *Constantine* and *Barnes's Case*. See *Noy 68. Tisdale versus Berington*.

4. If an Attorney take a Bribe or Reward to raise a Record, or cause another Attorney to appear on the other Side and confess the Action, this is Maintenance. *Hob. 9. Yardley versus Elliott*.

5. Where there is a Bond for Performance of Covenants in a Lease, and after the Covenants are broken, the Lessee assigns both the Lease and Bond to another, and then the Assignee puts the Bond in Suit, this is Maintenance; so if the Lessee assigns the Bond and not the Lease, and afterwards the Covenants are broken, and the Assignee puts the Bond in Suit, that likewise is Maintenance. *Godb. 81. Reynolds versus Truelock*.

6. One of the Defendants, supposing he had a Title to Lands then in the Possession of O. L. agreed to sell the said Lands to the other Defendant, and for that Purpose he made a Lease thereof to the third Defendant to try the Title, and this was to the Use of him with whom the Agreement was made; but nothing was done upon this Lease, and the Year and Day were long since past; but yet all three Defendants were fined in the Star-Chamber, upon a Bill exhibited against them for Maintenance; for this is Maintenance at Common Law, but not on the Statute * 32 H. 8. because the Year was past. *Moor 751. Sir Olliffe Leigh versus Helgar & al'*.

* Cap. 9.

(B)

What is not Maintenance.

4 Leon.
203.

1. **T**HE Lord Cromwell, pretending that W. R. a Copyholder, had forfeited his Estate, caused a Servant to make an Entry in his Behalf, which was accordingly done, and thereupon the Copyholder brought an Action of Trespass against the Servant; and they being at Issue upon the Forfeiture, the Copyholder being informed, that the Bailiff of the Franchise, under the *Earl of Arundel*, who had the Return of Writs, intended to return great Men, and several Lords of Manors, applied himself to the Defendant, who was chief Servant to the Earl, and told him, if the Bailiff returned such Persons, they would not appear at the Trial so readily as Men of a lower Condition, and therefore prayed his Order to the said Bailiff for making an indifferent Panel; the Defendant advised the Copyholder to petition the *Earl of Arundel* in this Matter; whereupon a Petition was drawn in Form, which the Defendant delivered to the *Earl*, upon which the *Earl* delivered the Freeholders Book to three of the chief Agents, and thereupon a Jury was impanelled, and the Defendant had a Verdict; and afterwards a Bill was exhibited in the Star-Chamber against this chief Servant of the *Earl*, for unlawful Maintenance; adjudged, that it was not Maintenance, because the Defendant being chief Servant and Agent to the *Earl*, and hearing of this undue Practice intended by his Bailiff, he could not do better than to inform his Lord thereof, for it concerned his Honour and the Inheritance of his Franchise; but if the Defendant had been a meer Stranger, and there had been no Manner of Privity between the *Earl* and him, then it had been Maintenance. *Mich. 28 Eliz. 2 Leon. 133. Lord Cromwell versus Townsend*.

2. 'Tis not Maintenance for any Man to sollicite and prosecute for another any Manner of Suit, tho' he is neither an Attorney or Counsellor, so as he do not lay out any Money to maintain such Suit. *Hob. 67. Worthington versus Gaston*.

3. Tenants of a Manor may all join to defend a Cause for a Thing which is common to them all, because 'tis in Effect but one Cause and one Defence. *Hob. 91. Lord Howard versus Bell*, and *Dunch versus Banister. Moor 562. Amerideth's Case. S. P. Moor 788. Lord Grey's Case. S. P.*

1 And.
201. S. C.

4. In an Information upon the Statute 32 H. 8. of Maintenance, there was a Special Verdict, which found that the Husband was seized in Fee, and made a Feoffment in Fee to the Use of himself and B. B. whom he then intended to marry, and to the Heirs of the Husband; the Mar-

riage

riage took effect; then the Husband made a Feoffment to a Stranger, and died; the Widow never was in Possession, but she made a Lease of the Lands for Years to the Defendant, who was her half Brother, to try the Title; adjudged a good Lease to pass an Interest by this Statute, tho' she never was in Possession; for the Meaning of the Statute was to suppress the Practices of those who pretended a Right to Lands, and for the Furtherance of such pretended Right, would convey their Interest to some great Person, who by his Power might oppress the Possessor; but still it was held, that this Lease to the Brother of the half Blood was in Danger of the Statute and therefore Judgment was given for the Plaintiff. *Mich. 31 Eliz. 1 Leon. 166. Slywright versus Page. Moor 266. S. C.*

Mandamus.

Where, and to whom it lies, and of the lie. (B)
 Form of the Writ. (A) | Of Returns to it, good, (C)
 Where, and in what Cases it doth not | Of Returns to it, not good. (D)

(A)

Where, and to whom it lies, and of the form of the Writ.

1. **I**T lies to a Mayor to restore a Citizen to his Freedom, being disfranchised for refusing to stand to the Award of two Aldermen in a Cause depending between him and another Citizen. *Dyer Pasch. 16 Eliz. 333.*

2. It lies to restore a Citizen, who was disfranchised, for speaking contemptible Words to the Chief Magistrate, because such Words are no Cause of Disfranchisement; it must be for some Act done, (and not only endeavoured to be done) against his Duty and Oath; neither can he be disfranchised without Authority so to do, either by Charter or Prescription, unless he is convicted by due Course of Law, of some *infamous Crime*; and if a sufficient Cause is returned upon the *Mandamus*, tho' 'tis false, the Party shall never be restored; but he may have an Action on the Case for the false Return; and therefore it ought to be certain. *11 Rep. 93. Bagg's Case. Clerk's Case, S. P. Palm. 451. The King versus Mayor of Oxford, S. P. Latch 229, S. C. Noy 2 Cro. 506. 93. S. C.*

3. The Office of Town-Clerk of *Bedford* was granted to one in Reversion, after the Life of the Town-Clerk then living, who died, and another was chosen; yet the Court granted a *Mandamus* to the Reversioner. *Poph. 196. Audley versus Ivy.*

4. *Mandamus* lies to restore an *Usher* to a *Grammar School*; and that was *Crawford's Case*; it lies to restore an *Alderman*, and that was *Shuttleworth's Case. 2 Bulst. 122.* it lies to restore a *Common Council-Man*, and that was *Estwick's Case. Style 32.* it lies to restore a *Town-Clerk* and a *Constable. Noy 78. Poph. 167.* and it lies to restore a *Burgess of a Borough-Town*, and that was *Clerk's Case. 2 Cro. 506.* and it lies to restore a *Steward of a Court-Let*; but doubted, whether to restore a *Steward of a Court-Baron*, and this was *Stamp's Case. Raym. 12.*

5. *Mandamus* to restore him to his *Fellowship of Christ-College in Cambridge*; the Master and Fellows return, that if any Fellow of the College be peccant, he shall be corrected by the Master and Dean, and if he find himself aggrieved, he may appeal to the *Chancellor of the University, and to two Senior Doctors*; and upon this Return the Court adjudged, that he should have no Remedy here, but that he ought to appeal to the Visitor; the *Mandamus* was denied. *Raym. 31. Dr. Widdrington's Case. 1 Lev. 25.*

6. *Mandamus* to restore him to the Place of *Attorney of the Town-Court of Canterbury*; the Court divided, and so it was not granted. *Raym. 56. Hurst's Case; it was afterwards granted. Sid. 94, 152.*

Mandamus to the Mayor, &c. of *Oxford*, to make one *Townsend* free of the City, having served an Apprenticeship to a Taylor there for seven Years, and his Master refusing to make him free, the *Mandamus* was granted, *Raym. 69. Townsend's Case*; thereupon the Mayor returned, that if any Person binds himself an Apprentice, the same, by the Course of their Corporation, is to be enrolled; that *Townsend* did bind himself Apprentice by Indenture to one *Colley* for seven Years, and covenanted, that he would not marry during his Apprenticeship, (which was to the Trade of a Taylor) that the Indenture was enrolled, and that he married within the two first Years,

Years, &c. and afterwards served rather as a Journeyman than an Apprentice; it was adjudged an ill Return, because incertain, and that 'tis a Breach of Covenant, and no Reason to bar him of his Freedom. *Raym. 92. Townsend's Case.*

1 Lev. 65.
Sid. 346.

7. *Mandamus* to the Senior Fellow of *Queen's College in Cambridge*, to admit *Dr. Patrick Presbiter*, being lawfully chose, or to shew Cause to the contrary; after an *Alias & Pluries*, he returned, that *H. 6. 30 Martin Anno 26* of his Reign, gave License to *Margaret Queen Consort*, to found a College, to consist of a President, &c. *ad studendum & orandum*; and that she founded a College accordingly, and made *Andrew Duckett* first President, and four Fellows, and that they might choose more, and that they should be governed by such Statutes as the *Bishop of Coventry and Chancellor of the Exchequer* should make whilst living, that the said *Bishop of Coventry*, &c. did appoint it should be called *Queen's College*, and made several Statutes for the Government thereof, &c. That *King James* confirmed all Grants made to the Universities; and that the Chancellor of the University, or in his Absence, the Vice-Chancellor, should be Visitor of all Colleges and Halls, where no special Visitor was or should be appointed; that no special Visitor of this College was appointed, &c. that ever since the Death of the last President, *Edward Earl of Munsford* had been Chancellor, and out of *Cambridge*, and that *Dr. Dillingham* had been Vice Chancellor; that the University of *Cambridge* is within the Diocese of *Ely*; that *Matthew Wren* was and is Bishop of *Ely*; that *Dr. Patrick* hath not appealed to the Chancellor, Vice-Chancellor, or Bishop of *Ely*, and therefore he cannot be admitted President; it was objected against this Return, that it was ill, because it sets forth, that *Dr. Patrick* had not appealed to the Bishop of *Ely*, in whose Diocese this College is; now 'tis plain he is not appointed Visitor by the Founder, and he cannot be so by Law, because where a Head of a Corporate Body is constituted without the Concurrence of the Ordinary, there he hath no Jurisdiction, tho' the Corporation is Spiritual; 'tis certain he hath not, if the Corporation is Temporal, and this is rather so than Spiritual; for neither the Persons or Employment are Spiritual; for 'tis *ad studendum & orandum*; 'tis true, the last is Spiritual; but 'tis the Duty of every Person to pray; but certainly *ad studendum* is not Spiritual, for the Study of Humane Learning is chiefly the Business of the Fellows; in the next Place, the Letters Patents of *King James* make no Alteration in this Case, for those are, that the Chancellor, or the Vice-Chancellor *per Cancellarium Universitatis in ea parte appunctuatur*, &c. shall be Ordinary, Visitor, &c. Now by this Grant the Chancellor is not to be a Visitor, unless he is in the Town and University, and the Vice Chancellor is not to visit, unless he is in *ea parte appunctuatur*, and that is not alledged in this Return; on the contrary it was argued, that where the Foundation of a Corporation is *Elementary*, let it be Spiritual or Lay, the Ordinary is Visitor; and if not, then the Founder; and if neither, then the King, for he is the Fountain of Authority; and if so, then the King hath granted this Power to the Vice-Chancellor, and to him *Dr. Patrick* ought to appeal, and cannot come hither *per saltum* for Relief; the Court was divided. *Raym. 101. Dr. Patrick's Case.*

8. *Mandamus* to restore him to the Place of one of the approved Men of *Guilford*; and upon the Return, it appearing there was just Cause of Restitution, the Matter was referred to two neighbouring Gentlemen, who made an Award, that he should be restored; and yet they refused to restore him; whereupon a Motion was made for an Attachment, but it not lying against a Corporation, a Rule was made for an Attachment *nisi*, &c. and if upon serving that Rule, the Corporation refused, then *B. R.* would grant a Restitution. *Raym. 152. Mill's Case.*

9. *Mandamus* to the Mayor of *Barnstable*, to restore the Recorder; they returned, that *non constat nobis* that he was ever chosen Recorder; this Return was held insufficient, and the Party restored. *Raym. 153. The Recorder of Barnstable's Case. See Postea Munton's Case.*

Sid. 461.
1 Vent.
77, 82,
1 Lev.
291.

10. *Mandamus* to the Mayor of *Stratford upon Avon*, to restore on *Dighton* to his Office of Town-Clerk; the Return was, that the King by his Letters Patents granted, that there should be a Town Clerk, and that he should continue in his Office during the Pleasure of the Mayor and Aldermen, and that the said *Dighton* was chosen Town-Clerk, and afterwards they turned him out; it was objected against this Return, that it was ill, because no Cause was shewed, why they turned him out; and for that Reason the Return of a *Mandamus* in *Warren's Case*, who was an Alderman was held ill; but adjudged in the principal Case, that the Corporation had an Arbitrary Power by this Grant, and therefore they could not restore *Dighton*; but advised a *Scire facias* to repeal the Patent. *Raym. 188. Dighton's Case.*

11. One *Amburst of Grays-Inn* had some Lands adjoining to *Newgate Market*, which was taken into the Market for the enlarging thereof, and thereupon according to the Act 19 Car. 2. cap. 8. and 22 Car. 2. he prayed Satisfaction of the City, and had a Jury impanelled, who gave him 500 *l.* and the Lord Mayor and Aldermen refusing to enter Judgment upon that Verdict, he moved for a *Mandamus* to make them enter it, and it was granted. *Raym. 214. Amburst's Case.*

12. The Case was *Quarles Brown* made a Will, and constituted *Michael Dunkin* Executor in Trust for *Margaret*, and died; afterwards Administration with the Will annex'd was granted to *Michael Dunkin*, who made his Will, and constituted the now Plaintiff Executor, and did; then the Defendant took out Administration to *Quarles Brown's Estate* for the Use of *Margaret*, and put in a Caveat to hinder the Plaintiff from proving the Will of *Michael Dunkin* his Father, and prays, that it may not be proved till a Commission of Appraisement issued to appraise the Goods of *Michael Dunkin*, and a Commission of Inspection to view his Books and Papers; all which was granted; and then the Plaintiff appealed to the Delegates; and afterwards prayed a *Mandamus*

to the Judge of the Prerogative Court, to command him to proceed in proving the Will; for that the Will it self was not controverted, but the Probate stopped for a collateral Cause, and the *Mandamus* was granted. *Raym.* 235. *Dunkin versus Munn.*

13. *Mandamus* to *Charles Luxon* Mayor of *Trevena Befeney*, to swear *Manaton* into that Office, being duly elected by the said Borough; *Luxon* returns, that before the issuing the said Writ, he the said *Luxon* was removed from the Place of Mayor, and one *William Amy* was then chosen, admitted and sworn, and was and is still Mayor, and hath the Custody of the Common Seal, and thereupon *Luxon* could not restore him; two Judges of Opinion, that this Return was ill, because 'tis not returned, that the new Mayor *Amy* was *debito modo electus*, and Returns must be certain, and not taken by Implication; but two other Judges, that it shall be intended, that he was duly chosen, according to the Charter. *Raym.* 365. *Manaton's Case.* See Recorder of *Barnstaple's Case*; but in the Case of the Mayor of **Saltaſh* the like Return was adjudged ill; and that he ought to have returned, that *Veale* was not duly elected, that he might have an Action against the returning Officer, if the Return had been false. *Raym.* 431. *Veale's Case.*

* T. Jon.
177. By
the Name
of The
King &
Stephens;

14. *Mandamus* to the Mayor, Aldermen, &c. of *Carlisle*, to restore *Timothy Haddock* to the Place of Alderman, &c. there was a very long Return, the Substance whereof was, That the City of *Carlisle* was incorporated by the Name of Mayor and Citizens, &c. Time out of Mind; and that there were always twelve *Conciliarii*, alias *Aldermanni* of the said City, of which Number a Mayor was yearly chose, and thirty-two sufficient Citizens, who together with the Mayor & *Conciliarii*, alias *Aldermanni*, were to be the Common Council, &c. that King *Charles* the first did by Letters Patents 21 July 13 Car. incorporate the said City by the Name of Mayor, Aldermen, Bailiffs and Citizens, and so sets forth the Letters Patents of Incorporation, wherein there is a Power given to the Corporation to remove a Mayor for ill Government, or other reasonable Cause, but no Power to remove an Alderman; then they return, that Time out of Mind, to the Time of the Making the said Letters Patents, quilibet *Conciliarius*, alias *Aldermanus*, was removable for just Cause; that *Timothy Haddock* was chose Alderman, &c. and was removed for just Cause, setting it forth; and therefore they could not restore him; and this Return was held good; for tho' by the Letters Patents of Car. 1. the Corporation had no Power to remove an Alderman; yet since a *Conciliarius* alias *Aldermanus*, was antiently removably for just Cause, that Power still remains, for the Letters Patents doth not abridge the Corporation of any of their antient Privileges; if it should, it would be very prejudicial to most of the Corporations in *England*, who had been so Time out of Mind, but of late had surrendered, and taken new Charters. *Raym.* 437. *Haddock's Case.*

15. *Mandamus* to *Sir Tho. Exton*, Commissary to the Dean and Chapter of *St. Paul's London*, to swear *Edward Carpenter* one of the Church-wardens of *Stoke-Newington* in *Surrey*, the Dr. finding that there was a Dispute between the Parson and Parishioners, he claiming a Right by the Canon to choose on, and they claiming a Right by Custom to choose both: Now, to save himself from a Contempt, and that he might not be liable to an Action for a False Return, he returned the Fact after this Manner, That there was a Suit depending in the Spiritual Court, between the Parson and the Church-warden chosen by him, and the Church-warden chosen by the Parishioners; then he sets forth their Allegations on each Side, which were admitted by the Court, and that the Parishioners produced Witnesses to prove the Custom of chusing two Churchwardens, and a Day was appointed for a Proof, but that they neglected to have them then examined, and that the Court was ready to give Sentence for the Right of the Parishioners when they should prove the Custom; then he certifies that he gave the Oath of Church-warden to one of those who was chosen; but this Court awarded a *Mandamus* to swear the other, because the Spiritual Court cannot try this Custom as alledged in the Return. *Raym.* 439. *Carpenter's Case.*

16. It was granted to restore one *Middleton* to the Office of Treasurer of the New-River Water, for the regulating whereof certain Persons were incorporated Anno 9 Jac. and amongst other Officers appointed, this of the Office of Treasurer was one. *Sid.* 169. *Middleton's Case.*

1 Lev.
123,

17. It was granted to the Monyers, to restore on *Sterling* to his Place of Workman in the Mint; but it bearing Teste 4 Julii, which was after the Term, it was quashed. *Sid.* 304. *Sterling's Case.*

18. It was granted to restore *Dr. Goddard* to the Place of one of the College of Physicians in *London*. *Sid.* 29. *Dr. Goddard's Case.* See 3 Mod. 265. Shower 74. S P. 1 Lev. 19. S C.

19. It was granted to restore one *Stamp* an Attorney to the Office of a Steward of a Court-Leet for the Manor of *Stepney*; but not of a Court-Baron, because that is only of a private Matter. *Sid.* 40. *Stamp's Case.*

20. It was granted to a Person to deliver up Records, (viz.) by the Name of Evidences, and other Things particularly expressed in the Writ; and this was to deliver them to the succeeding Officer. *Sid.* 31. *The Town-Clerk of Nottingham's Case.*

21. *Mandamus* to the Mayor of *Oxford*, to swear the Person who had served an Apprenticeship, and to make him free of the City; it was doubted at first, whether such a *Mandamus* would lie; *Raym.* but upon producing a Precedent, where it was granted to the Mayor of *Norwich*, commanding him to admit one to his Freedom there, who was entitled to it by Birth; it was likewise granted in the principal Case. *Sid.* 107. *Townsend & Mayor of Oxford.* See 3 Mod. 128. 4 Mod. 234.

1 Lev. 91.
Raym.
92.

22. *Mandamus* to the Chancellor or Surrogate of the Bishop of *Chester*, to swear a Church-warden into his Office, who returned, that the Person was not duly elected, and thereupon an Action on the Case was brought against the Chancellor, in which the Plaintiff declared, that he was duly chosen, &c. and that the Defendant refused to swear him; thereupon the Plaintiff moved for a *Mandamus* to swear him, and it was granted; then he alledges, that he offered himself to the Chancellor to be sworn, who refused, and made a False Return of the *Mandamus*, (*viz.*) that the Plaintiff was not duly elected, *quorum pretextu* he was deprived of his Office. 2 *Lutw.* 322.

23. *Mandamus* was granted to the Spiritual Court to swear two Church-wardens, who were chosen by the Parish, suggesting, that it was the Custom of that Parish so to do; but that the Court refused to swear them, upon Pretence, that the Parson ought to choose one. 1 *Vent.* 115.

Raym. 24. It was granted to the Lord Mayor and Court of Aldermen, to give Judgment upon the Statute 13 *Car.* 2. 11. for rebuilding the City of *London*; and it hath been granted to the Ordinary to grant Administration. 1 *Vent.* 187. *Amburst's Case*.

25. It was granted to restore an Alderman of *Canterbury* to the Precedency of his Place of Alderman, being removed. 1 *Lev.* 119. *The King versus City of Canterbury*.

Raym. 26. It was doubted, whether it might be granted to restore an Approved Man of *Guilford*, he being only suspended from the Office, because the Freehold was still in him; but Justice *Twisden* held, that it was a temporary Removing, and probably they might never restore him. 1 *Lev.* 162. *The King versus Approved Men of Guilford*.

27. *Mandamus* to the Archdeacon of *Norwich*, to swear a Church-warden suggesting a Custom, that the Parishioners are to choose the Church-wardens, and that the Archdeacon refused one, tho' he was chosen according to Custom; the Archdeacon returned, that *non sibi constat*, that there was any such Custom; adjudged, that this Return is ill, for 'tis not positive on which an Action might be grounded, if it was false; and tho' he farther returned, that by the Canon Law the Parson is to choose one Church-warden; yet adjudged, that Custom will prevail against the Canon, and that a Church-warden is a Lay Officer; that his Power is enlarged by several Acts of Parliament, and that he may execute his Office before he is sworn, and if sworn by a *Mandamus* from *B. R.* he ought not afterwards to be disturbed. 1 *Vent.* 267.

28. *Mandamus* to restore him to his Place of Common Council-Man in the Corporation of *Eye* in *Suffolk*; the Return was, that he was removed for speaking these opprobrious Words of one of the Aldermen, (*viz.*) *He is a Knave, and deserves to be posted for a Knave all over England*; it was moved, that this Return was insufficient, because Words are no Cause to remove him, unless spoken of a Mayor or Alderman, and which related to the Duty of his Place; but in this Case the Words had no Manner of Reference to the Corporation; therefore he was restored. 1 *Vent.* 302. *Jay's Case*. See Words *per totum*.

29. *Mandamus* was prayed to the Ecclesiastical Court to grant a Probate of a Will under the Seal of the Court; the Case was thus: An Executor had taken the usual Oath before a Surrogate, and afterwards finding a *Caveat* entered, he refused to take upon him the Executorship, and *T. P.* endeavoured to get Administration, &c. afterwards the Executor contested the Administration to *T. P.* and desired that he might be admitted to prove the Will, which the Ecclesiastical Court adjudged against him, supposing that he was bound by his Refusal; thereupon he appealed to the Delegates, and afterwards moved for this *Mandamus*, which was granted; for having taken the Oath he cannot afterwards refuse, and that Court had no farther Authority. 1 *Vent.* 335.

2 *Lev.* 18. 30. *Mandamus* to the Church-wardens of *Kings-clere* in *Hampshire*, to restore *John Isles* to the Place of Sexton there; the Court doubted at first, whether it was grantable, because a Sexton is rather a Servant than an Officer; but upon a Certificate from the Minister and several of the Parish, that the Custom there was to choose a Sexton, and that he held it for Life, and had 2 *d.* for every House there; it was granted; and so it hath been for a Parish Clerk, Church-warden, and even for a Scavenger; but it was denied to one who pretended to be Master of the Lord Mayor's Water-House, for that is not an Office, but a Service; but *Twisden* said, it did not lie to be restored to a Stewardship of a Court-Baron, tho' it did of a Court-Leet, for there the Steward is Judge; but of a Court-Baron the Suitors are Judges; which *Hale* Ch. Just. denied; for the Steward is Judge of that Part of the Court which concerns the Copyholds, and is Register of the other. 1 *Vent.* 143, 153. *Ile's Case*. See *Sid.* 40, 169, 112. *Raym.* 12, 211. 3 *Mod.* 334.

31. *Mandamus* to the Spiritual Court, because they refused to deliver a Will concerning Lands (which was proved in Common Form above fourteen Years since) to the Heir of the Devisee; they insisted to have a definitive Sentence before they would deliver it, which would cost 10 *l.* the Court doubted, whether it might be granted; that if the Party was grieved he might bring his Action. *Sid.* 443. *Sabine's Case*. See 4 *Mod.* 234.

32. *Mandamus* to swear one into the Office of one of the eight Men of *Ogborne-Court*, he being elected thereunto: *Sed per Curiam*, it was denied, because it did not appear what the Office was, that the Court might judge, whether it was for such an Office for which a *Mandamus* would lie. 2 *Mod.* 316. *Anonymous*.

33. *Mandamus* to the *Precentor and Canons of the Cathedral of St. David* to admit *Dr. Owen* to be a *Canon* there, setting forth a Custom for the *Precentor and Canons* to chuse one to succeed to the next Avoidance of a *Canonry*, and to enter his Name in the Registry by the Name of *Supernumerary, &c.* and that he was chosen *Supernumerary*, and a *Canon* died; it was objected against the *Mandamus*, that the Office of *Canon* was merely *Spiritual*, and of *Ecclesiastical Cognifance*; and on the other Side it was insisted, that the Party had no other Remedy to be admitted to the Vacancy, but by a *Mandamus*; this Point was not adjudged: But *per Curiam*, the *Mandamus* was denied, because it is a ridiculous Custom. *T. Jones* 199. *Dr. Owen versus Dr. Stainbow.*

34. *Mandamus* to the *Jurats of Rye* to swear *Turner Mayor*, there being an insufficient Return made by the lesser Number of *Jurats* on Purpose, &c. a peremptory *Mandamus* was granted and *Turner* was sworn; afterwards a *Mandamus* was prayed to swear one *Crouch*, he being lawfully chosen, but it was denied; for after a peremptory *Mandamus* granted and executed, the Court will intend him to be lawful Mayor till the Matter is tried in an Action. *T. Jones* 215. *The King versus Turner.*

35. *Mandamus* to restore him to his Fellowship of *Lincoln College in Oxford*, in which he had a Freehold: *Sed per Curiam*, it was denied, for the *Visitor* is the proper Judge; it was denied by my Lord *Hale* to *Dr. Roberts*, because in all Lay Corporations the Founder and his Heirs are *Visitors*, and in all Ecclesiastical Corporations the *Bishop of the * Diocese*, who is *fidei Commissarius*, and from whose Sentence there lies no Appeal; besides, a Fellowship is a Thing of private Design and doth not concern the Publick. 3 *Mod.* 265. In *Parkinson's Case*.

* *T. Jones*
174.
The Warden of All Souls College's Case.

36. *Mandamus* to restore him to the Office of *Clerk of the Peace* of, &c. The Return was, that the *Custos Rotulorum* of that County was displaced, and another constituted in his Room, to whom the Clerk of the Peace refused to deliver the Court-Rolls, for which Misbehaviour he was indicted and found guilty, and thereupon removed from his Office, &c. The Chief Justice *Holt* was for granting the *Mandamus*, because the Clerk of the Peace ought to make out all Procefs, which he cannot do, if he hath not the Rolls, therefore he ought not to deliver them so long as they are in Procefs; but the other three Judges *contra*, for the Clerk of the Peace is a ministerial Officer to the *Custos*, and ought to deliver the Rolls to him at the End of every Sessions, or soon after. 4 *Mod.* 31. *Evans's Case.*

37. By the Statute 1 *Will.* 3. 'tis enacted, That if any Governor, Head, or Fellow of any College or Hall in either of the Universities, shall neglect or refuse to take the Oaths, &c. for six Months after 1 August, &c. that then the Government, &c. and Fellowship shall be void; Several of the Fellows of *St. John's College in Cambridge* had not taken the Oaths pursuant to the Statute, and thereupon a *Mandamus* was directed to *Humphry Gower*, the Head of that College, setting forth the Statute, and that such Fellows had not taken the Oaths and that they still continued in their Fellowships; therefore by this Writ they were commanded to remove them, *vel causam nobis significetis*: They return, that the College was founded by *Margaret Countess of Richmond*; that the *Bishop of Ely* for the Time being was by her appointed Visitor, &c. It was objected, that this is a remedial Writ; that no Precedent can be produced where it hath been granted to expel Persons, but always to restore them to Places of which they had been deprived, and that it will not lie where there is a local and proper Visitor: *Sed per Holt Ch. Just.* the Visitor is made by the Founder, and is the proper Judge of the Laws of the College; he is to determine Offences against those private Laws; but where the Law of the Land is disobeyed (as 'tis in this Case) the Court of King's Bench will take Notice thereof notwithstanding the Visitor, and the proper Remedy to put the Law in Execution is by a *Mandamus*. 4 *Mod.* 233. *St. John's College's Case.*

38. *Mandamus* to the Dean and Chapter of *Westminster* to admit *Mr. Knipe* to the Office of *High Bailiff*, upon the Nomination of the *Duke of Ormond*, who is *High Steward*; it was objected, that 'tis the Dean and Chapter, and not the High Steward, who is to appoint a Person to this Office; for they have *Retorna Brevium*, and of common Right they who have such a Franchise, have Power to appoint an Officer for that Purpose, who is the *High Bailiff*, and when he is admitted, he is called *Ballivus Decani & Capitali*, &c. the Dispute is now between two Persons, whether the High Steward or the Dean and Chapter are to put in the *High Bailiff*; the publick Justice of the Nation is not concerned in this Matter; if *Mr. Edwin* hath any Prejudice, he may bring an Action: *Sed per Curiam*, such Action will not put him in Possession; so a *Mandamus* was granted. 4 *Mod.* 281. *Knipe versus Edwin.*

39. *Mandamus* to the Company of *Gunsmiths* to restore *W. R.* to the Place of *Approver of Guns*, and setting his Mark of *Approver* on Guns made by the Company; but it was denied, because it was not of any publick Concern, and there was no publick Law for it; 'tis true, they forfeit their Charter for selling Guns without being marked; but then the Plaintiff must petition the Queen, and she will order the Attorney General to bring a *Quo Warranto*. *Mod. Cases* 82. *Vaughan versus Company of Gunsmiths.*

40. *Mandamus* to the Official of, &c. to swear *W. R.* and *W. W. Church-wardens* of the Parish of, &c. the Return was, that they were not duly chosen; but a peremptory *Mandamus* was granted, because the Official should have complied with the first Writ as far as he could, and have sworn one of them, if the Truth was, that one of them was duly chosen; or else he should return,

that

that neither of them was chosen; for if the Parishioners claim a Right to chuse Two, he should have made a special Return of it, and that the Persons chosen had an equal Number of Votes; that the Parson had chosen one, and that he (the Official) could not swear either of them chosen by the Parishioners, because they had an equal Number of Votes. *Mod. Cases* 89. *The Queen versus Guy*.

41. *Mandamus* to the Archdeacon to swear a Church-warden, being duly elected, who returned, that he was *pauper luctuarius & servus minus habilis, &c.* adjudged, that a Church-warden is a temporal Officer, he has the Property and Custody of the Parish Goods, and as 'tis at the Peril of the Parishioners, so they may trust whom they please. 1 *Salk.* 166. *Morgan versus Archdeacon of Cardigan.* *Palm.* 50. *S. P. Balance Parijs in Kent.*

Raym.
211.
2 Lev.
18.

42. It was granted to the Church-wardens of the Parish of *Kingsclere*, to restore *John Iles* to the Place of a *Sexton* there, and so for a *Parijs Clerk*. 1 *Vent.* 143. *Iles's Case* 3 *Mod.* 335. *S. P.* but in this Case a Certificate was shewed from the Minister, that the Place of a *Sexton* was during Life, and had 2 *d.* *per Annum* of every House in the Parish.

43. *Mandamus* to deliver the Mace and other Ensigns of Mayoralty to the succeeding Mayor; the usual Clause, *vel causum nobis significes*, was left out; and upon a Motion to quash it, for that Reason it was denied; for this being a mandatory Writ, the Person to whom 'tis directed must either make a Return or obey; besides, these Words are not absolutely necessary, they were first introduced in *Bagg's Case*, and have been omitted in many subsequent Writs, and particularly in the Case of the King and *St. John's College*, where the Writ concluded *sicut informamur*. 5 *Mod.* 314. *The King versus Owen*.

44. *Mandamus* to the Spiritual Court to grant Administration to *W. R.* who, as he suggested, was next of Kin to the Intestate: This *Mandamus* being granted, was afterwards superseded, because *W. R.* being formerly cited, refused to come in, and another Person of Kin to the Intestate sued for Administration, but was opposed by *B. B.* pretending there was a Will, which Matter was still depending; and therefore the Judge could not obey this *Mandamus*, whereupon a *Superseate* was granted. 5 *Mod.* 374.

45. *Mandamus* to the Vice-Chancellor, Doctors of Divinity, and Proctors in *Oxford*, to restore one *Uher* to his Fellowship of *University-College*, who was expelled; and they being Visitors of this College, and he having appealed to them, his Appeal was refused; the better Opinion was, that a *Mandamus* should be granted. 5 *Mod.* 453. *Usher's Case*.

2 Salk.

512, 675.

See Tit.

Recusancy.

The

King ver-

sus Peat.

46. *Mandamus* to the Justices in Sessions in the County of *W.* to admit one *Peat* to the Oath of Allegiance, and to subscribe the Declaration according to the Act of * Toleration, in order to qualify him to teach in a dissenting Congregation, and it was granted; he ought to suggest whatever is necessary to entitle him to be admitted, and if that be not done, or if 'tis false, it will be good Matter to return on the *Mandamus*. *Mod. Cases* 310. *Peat's Case*. Justice of Peace. (A) 22. * 1 Will. 5. cap. 18.

47. Case, &c. in *C. B.* upon a false Return of a *Mandamus*, and upon a Demurrer to the Declaration the Plaintiff had Judgment; and now the Court of *B. R.* was moved for a *peremptory Mandamus*, but it was denied, because every such *Mandamus* recites the Fact *prout nobis constat per Recordum*, and the Court of *B. R.* cannot take Notice of the Records of *C. B.* 2 *Salk.* 428.

48. *Mandamus* to the Mayor, &c. of *Oxford* to restore *Slutford* to the Office of *Town-Clerk*; they return their Charter, by which they had Power to chuse a *Town-Clerk* to hold that Office at the Will of the Mayor, &c. they return the Statutes 13 *Car.* 2. cap. 2. and that of *W.* and *M.* about taking the Oaths, that the Office being void, they chose *Slutford*, and that he took the Oath of Office before the Mayor, *but did not take the Oath of Allegiance before him, per quod* the Office became void, & *ea ratione* they could not restore him; adjudged, that the Party is bound to take the Oaths without rendering them to him; that this Return was ill, for saying that he did not take the Oaths before the Mayor, &c. because two Justices have Authority to administer them; now, by this Return, the Corporation do not rely upon their Power to remove at Will, but a Return of a Misdemeanor in the Officer, and that being insufficient, a *peremptory Mandamus* was granted. *Salk.* 428. *The King versus Mayor of Oxford*. See *Serjeant Whitake's Case*, fo. 434. *S. P.* and pl. 52. *S. C.* Adjudged, that where an Action on the Case is brought for a false Return of a *Mandamus*, and the Plaintiff hath a Verdict, in such Case, the Return being falsified, a *peremptory Mandamus* shall go. 2 *Salk.* 430. *Buckley versus Palmer*.

49. *Mandamus* to the Bailiffs, &c. of *Malden*, reciting, *That whereas* they ought yearly to chuse two Bailiffs out of those who had not been Bailiffs for three Years before, *therefore* they were commanded to chuse, &c. they return their Charter to chuse two Bailiffs *ex Aldermanis*, and that they had chosen Two *secundum formam & effectum* of their Charter generally; and this was adjudged ill, for they should have denied their Constitution to be as set forth in the Writ, or have shewed their Compliance to it, but here they return what they had done according to a Constitution different from what is alledged in the Writ, without Denying the suggestion in the Writ. 2 *Salk.* 431. *The King versus Malten*.

50. Adjudged, that upon a *Mandamus* out of Chancery, no Attachment lies for not returning it till the *Pluries* issues forth, because 'tis in Nature of an Action to recover Damages for the Delay; but upon a *Mandamus* out of *B. R.* the first Writ ought to be returned; yet an Attachment is

never

never granted in such Case, without a peremptory Rule to return the Writ. *Salk. 429. Mayor of Coventry's Case.*

51. *Mandamus* to restore *Elias Chalke* to a *Burgess* of *Wilton*, the Mayor, &c. returned a Custom for them to remove for a Misdemeanor, and set forth several Misdemeanors, and that he being *fully heard* to all that was objected against him, and it being proved upon him, they turned him out; it was objected, that this Return was ill, because it doth not appear that he was *summoned*; but adjudged, that the Want of a Summons is no Objection where the Party hath been heard. 2 *Salk. 428. The King versus Mayor of Wilton.*

52. *Mandamus* to *Bailiffs, &c. Villæ de Gippo* to restore *Serjeant Whitaker* to the Office of Recorder; the Return was, *responsio Ballivorum, &c. Villæ de Gippico*; they return their Charter, and that the Recorder was amoveable for Misbehaviour, *per Ballivos* and Burgesses, or the greater Part of them, *Quorum Ballivos duos esse volumus*; that the Serjeant was chosen at Will, that at such a Sessions of the Peace he had Notice to attend, but did not, and that having Notice to answer, *he appeared and answered*, and by the Bailiffs and Burgesses, &c. *The Bailiffs being then present* he was turned out; and that the Inhabitants were never called by the Name of Bailiffs, *Villæ de Gippo*; adjudged, that this *Mandamus* was ill directed, for *Gippus* and *Gipnicus* are different Names, but then they should have relied on this Special Matter; but now they had admitted themselves to be that very Corporation to whom the Writ was directed, by returning *Executio, &c.* it was objected, that the Bailiffs are only said *to be present*; but adjudged, they shall be intended to be consenting, either actually, or as included in the major Part; and that the Non-attendance is a Forfeiture of the Office; that his Appearing and Answering supplied the Defect of Notice; but in this Case the Notice was to answer his Non-attendance at a *Sessions of Oyer and Terminer*, and the Charge against him in the Return, is his Non-attendance at a *Sessions of the Peace*, so that he answered to that, tho' he was not charged with it, which being an incurable Fault, a peremptory *Mandamus* was granted, but to be directed *Villæ de Gippo* as the former; and tho' it was objected against a peremptory *Mandamus*, because he was only Recorder at Will; yet since they did not return that Matter, but relied upon his Misdemeanors, and not upon their Power, a peremptory *Mandamus* was granted. 2 *Salk. 434. Serjeant Whitaker's Case.*

53. *Mandamus* to restore *T. P.* to be one of the *Common Council, &c.* The Return was, that *Coventry* is an antient Corporation, and that the King by a Charter, reciting their Customs, of which one was to remove a Common Council man *ad libitum*, did confirm all their Customs, and that by Virtue of the said Custom Time out of Mind used, &c. they did remove him; adjudged, that the Corporation thus constituted might remove him without shewing any Cause; and this differed from the Recorder of *Bath's Case*, where the Custom was to chuse a Recorder learned in the Laws; and they returned, that they removed the Lord *Hawley*, for that he was not a Person learned in the Laws, and held good, for he must be so qualified; but the Return in the principal Case was held ill, because it did not appear that the Corporation had Power to remove one *ad libitum*, but by Way of Recital, whereas they shall have returned positively, that they had that Power. 2 *Salk. 430. The King versus Mayor of Coventry.*

54. *Mandamus* to the Mayor, Bailiffs and Burgesses of *Abingdon*; the Mayor alone made a Return and brought it into the Crown-Office, and a Motion was made to stay the Filing it, for that the Return was made by the Mayor alone, or at least by him and the minor Part of the Bailiffs and Burgesses, and without the Consent of the major Part, who would have obeyed the Writ, but the Writ was filed; for where a *Mandamus* is directed to several, and to the Mayor, who is Chief, if he returns it, this Court will not examine upon Affidavits, whether the major Part consented; for if the Return be falsified, the Mayor will be fined, and a peremptory *Mandamus* will be granted; at the same Time Leave was given to file an Information against the Mayor. 2 *Salk. 431. The King versus Mayor of Abingdon.* 432. *The King versus Mayor of Norwich. S. P.*

55. *Mandamus* to the same Mayor, &c. setting forth, that *R. and S. were capital Burgesses* chosen by the Commonalty to stand and serve for Mayor for the Year ensuing, and that they were to chuse one of them, therefore they are commanded to chuse one of them accordingly; they return the Statute 13 *Car. 2. cap. 1.* and that *R. and S.* were chosen capital Burgesses, and that within a Year before their Election they did not receive the Sacrament, *per quod* the Election was void, & *non sunt principales Burgesses*; adjudged, this Return was ill, for by the *Mandamus* they are supposed to be Burgesses, and the Court must intend them so till it appear to the contrary, which it doth not by this Return, for that shews that they were once elected, and that Election was void, whereas they might afterwards qualify themselves and be chosen again, and there is nothing in this Return to exclude such an Intendment; therefore since a Return must be certain to every Intent, because the Party cannot interplead and traverse it, this Return was held ill; for if the Matter here returned had been pleaded in Bar to an Action, the Plaintiff might have replied a subsequent Election; therefore this Return is uncertain. 2 *Salk. 432. The King versus Mayor of Abingdon.*

56. *Mandamus* to the Mayor, &c. of *Rippon* to restore *Sir Jonathan Jennings* to the Place of *Alderman*; they return, that they were incorporated by another Name, and that *Sir Jonathan*, at such a Time, at an Assembly of the Corporation, came, and personally, freely, and *debito modo resignavit* his Office, declaring he would serve no longer; whereupon they chose another in his Room; adjudged a good Return, since the Corporation accepted the Resignation and chose another, but till such Election he had Power to waive his Resignation. 2 *Salk. 433. The King versus Mayor of Rippon.*

57. *Mandamus* to swear *T. P.* and *R. W.* Church-wardens, suggesting, that they were *debito modo electi*; the Return was, that they were not *debito modo electi*; it was objected, that it ought to be in the Disjunctive, *nec eorum alter electus fuit*; but adjudged well enough, because one cannot be sworn upon this Writ, for either both were lawfully chosen, or the Writ is ill, so that this Return is an Answer to the Writ; if it had been to swear one *electus* Church-warden, there a Return, that he was not *debito modo electus* had been ill, because evasive and out of the Writ. 2 *Salk.* 433. *The King versus Twitty and Maddicot.*

58. *Mandamus* to admit *Dunch* to be an Alderman of *Norwich*; they Return, that he was elected Alderman by the Ward, but refused by the Mayor, &c. because he had not received the Sacrament within a Year next before his Election, and that he was turbulent and factious and had procured his Election by Bribery, and that *non fuit electus*; adjudged, that several Causes might be returned, and that either not qualified or not elected had been a good Return, but that this Return was repugnant; for first, they admit that *Dunch* was elected, and then they avoid it by saying, he was not qualified, and at last they return, that he was not chosen at all; and as to the Bribery, it may be a Question, whether that will make the Election void, because this is not an Office which concerns the Administration of Justice. 2 *Salk.* 436. *The King versus Mayor of Norwich.*

59. Adjudged, that several Persons cannot have one *Mandamus* to restore them; for tho' the End of this Writ is to do Justice, yet the Foundation of it is the Wrong done in turning them out, and the Turning out one is not the Turning out another, for their Interests are several, and each of them may be removed for a different Cause; therefore there cannot be a joint Restitution, neither can several join in an Action on the Case for a false Return. 2 *Salk.* 433. *The Case of Andover* 436.

60. A dissenting Minister having qualified himself in one County, removed into another, supposing that he need not qualify himself for that County, and thereupon the Justices convicted him upon the old Penal Laws for Preaching in a Conventicle; the Attorney General moved for an Attachment against the Justices, but that being denied, he moved for a *Mandamus* to them to permit him to preach, which was likewise denied, for a *Mandamus* is always to do something in Execution of Law, but this would be in Nature of a Writ *de non molestando*. 2 *Salk.* 572. *The King versus Peach.*

61. *Mandamus* directed *Jacobo Courteen Majori, Ballivis & omnibus principalibus Burgensibus Burgi de Abingdon*, to chuse a Mayor; it was objected, that this Writ was ill directed, because it was but to Part of the Corporation, (*viz.*) *principalibus Burgensibus*, when they were incorporated by the Name of * Mayor, Bailiffs and Burgesses, and not *principal Burgesses*; but adjudged, that tho' 'tis true, that a mandatory Writ might be directed to the whole Corporation, yet 'tis not necessary to be directed to more than these, or that Part of the Corporation who are concerned in the Execution of the Thing required. 2 *Salk.* 609. *The King versus Mayor of Abingdon.* See 2 *Jones* 52. denied to be Law.

62. *Mandamus* to the Mayor and Aldermen of *Hereford* to admit one to the Office of Town-Clerk; it was objected, that it was ill directed, for the Mayor only was to admit, and for that Reason it was quashed. 2 *Salk.* 701. *The King versus Mayor of Hereford.* 3 *Bulst.* 190. denied to be Law.

63. *Mandamus*, &c. to the Company of Surgeons to chuse Officers; they made a Return under the Common Seal; and upon a Motion, a Rule was made to file an Information against some particular Persons of the Company, because it was a Matter which concerned publick Government, therefore they must proceed by Way of Information, for there was no other Way to try the Right, no particular Person being concerned in Interest, so as to maintain an Action; and if there is a Verdict for the King, a peremptory *Mandamus* shall go, but a small Fine on the Parties. 1 *Salk.* 374. *The Case of the Surgeon's Company.*

(B)

Where, and in what Cases it doth not lie.

2 Roll. Rep. 112. 1. IT doth not lie to restore one to be Common Council-man, and therefore a Return of a Custom to elect and remove one *ad libitum*, was held good, because a Common Council-man hath no Freehold in his Office as an Alderman hath. 2 *Cro.* 540. *Warren's Case.* *Style* 42. *Estwick and City of London.* See (C) *pl.* 5.

2. It doth not lie to restore a Constable chosen and sworn in a Court-Leet, and removed by the Justices. 1 *Bulst.* 174. *Constable of Stepney's Case.*

3. An Alderman of *Lincoln* was removed and another chosen, and upon a *Mandamus*, the Return being insufficient, it was ordered he should be restored, and that the new chosen Alderman should be removed; but before that was done another Alderman died, and then he who was removed, prayed to be restored to the Place of the dead Alderman; but adjudged, that he could not be restored to a new Place by Force of his former Election; for a *Mandamus* lies only to restore the Party to the Place from which he was removed by any bad or undue Means. 2 *Bulst.* 122. *Shuttleworth versus City of Lincoln.*

4. It doth not lie to restore a Barrister at Law, to the Society of the *Temple*, who was expelled the House, and his Chambers seized, for not paying his Commons; for 'tis a voluntary Society, and no Body Politick, and the antient Way is to appeal to the Judges, in such Cases where Differences happen between those of the Society and the Benchers. *March 177. Boreman's Case.*

5. It doth not lie to restore a *Parish Clerk* who was four Years in the Office, but never sworn, and therefore turned out by the succeeding Parson; but the Court granted a *Mandamus* to swear him, and then he might take his Remedy against the Parson, for 'tis a Temporal Office, and he hath no Authority to displace him. *March 101.*

6. It doth not lie to restore one to an *Usher of a Free-School*, where the Master and Fellows of a College were Visitors, for 'tis as reasonable that they should remove him, if he do not observe the Rules of Government in the School, as 'tis to admit him into the Place. *Style 457. Protector and Craford.*

7. The Plaintiff had a Verdict in Ejectment, and afterwards they came to an Agreement, that the Defendant should hold the Lands for the Remainder of the Term; and according to that Agreement he held it for two Years; but the Plaintiff within the Time agreed, brought an *Habeere facias possessionem*, and turned the Defendant out of Possession; and now he moved for a *Mandamus*, but it was denied; for he might have an Action on the Case against the Plaintiff, for not performing the Agreement. *Style 408. Wood versus Markham.*

8. It will not lie, &c. to restore a Man to be Master of the Lord Mayor's Water-House, because this is not properly an Office, but a Service. *2 Lev. 18. 2 Sid. 112. S. C.*

9. By the Opinion of *Twisden* it doth not lie to restore one to the Stewardship of a Court-Baron, because the Suitors are the Judges of that Court; but the Ch. Just. *Hale* was of another Opinion, because the Steward is Judge of that Part of the Court which concerns the Copyholds; 'tis true, he is no more than the Register of the other Part concerning the Freeholders. *1 Vent. 153. In Isle's Case.*

10. *Mandamus* to restore *Daniel Appleford* a Fellow of *New College*; they return, that the College was founded by, &c. who made Laws, that they should study for many Years, and then take Orders, and that the Master and Scholars may expel any Fellow for enormous Crimes, and that the Bishop of *Winchester* shall be Visitor, and that all Appeals shall be to him, and no other; that this Fellow was expelled for an * enormous Crime, that he had appealed to the Visitor, who had confirmed the Sentence; but adjudged, that the Writ would not lie, because the College is not a Spiritual Foundation, but a private Society, like the Inns of Court; 'tis a Foundation of Charity, and a Man may dispose his Charity as he pleases, and those who accept it, must take it on those Conditions which the Giver imposed; *Bagg's Case* was the first Instance of a *Mandamus* of this Kind; but it doth not appear by that Case, that a *Mandamus* was ever granted to restore a Man to a private Estate; for the Instances given in that Case are of Offices which concern the Publick; it appears by this Return, that a Visitor is appointed by the Founder, and he hath given Sentence, so this Court hath no Jurisdiction; and for that Reason, no Exceptions to the Return shall be allowed. *2 Lev. 14. The King versus New College.*

1 Mod. 82.
1 Lev. 23,
65.
Raym. 56, 94,
100.
Sid. 94,
152, 346.
* This is too general, but it was cured by the Sentence of the Visitor.

11. *Mandamus* was granted to restore a *Proctor* to that Office in the Court of Arches; and upon the Return thereof adjudged, that this was not such a Publick Office for which a *Mandamus* would lie to restore him. *3 Lev. 309. The King versus Lee.*

3 Mod. 332.

12. It was denied to grant a *Mandamus* to restore one *White* to the Place of Clerk of the Butchers Company in London; 'tis true, it hath been granted to restore an Attorney of an Inferior Court, because it is an Office which concerns the Publick, and is for the Administration of Justice; it hath been likewise granted for a Register in the Ecclesiastical Court; but *Holt Ch. Just.* said that it was against his Opinion; but the Clerk of the Butchers Company is a private Office, and if the Party have a Freehold in it, he may have an Affise. *Mod. Cases 18.*

(C)

Of Returns to it, good.

1. THE Return that he was a Common Drunkard is a good to disfranchise an Alderman, because 'tis a Personal Offence, and goes to the Point of Government. *3 Bulst. 189. Poph. 134. S. C.*

2. *Mandamus* to restore the Plaintiff to be a Burgess of *Colchester*; the Return was, that Time out of Mind the Burgesses were chosen by the Commonalty every Year, and that the Plaintiff was chosen one Year, which was expired, but not the next Year; so that his Office of Burgess was determined; & per Curiam, if that hath been the Usage, this Court will not alter it. *1 Roll. Rep. 335. Colchester Town versus Northen.*

3. *Mandamus* brought by one *Parker*, to restore him to an Attorney's Office in the Court of Exchequer, in the County Palatine of *Chester*; the Return was, that at Court held there before the Deputy Steward, &c. he commanded *Parker* to be silent, who refused, and told him, he did not care a Straw for what he could do; and for this Misdemeanor he suspended him from his Practice in that Court, and this was held a good Return. *1 Vent. 331.*

4. Man-

4. *Mandamus* by *Bernardiston* to be restored to his Office of Recorder of *Colchester*; they Return, that he was not learned in the Law; and that one being indicted before him upon the Statute 1 Jac. of *Bigamy*, and convicted for having two Wives, he denied him the Benefit of Clergy; and that he absented himself for nine Months; and adjudged, that he should be restored. *Bernardiston's Case. Anno 1655. 1 Vent. 143. Lord Hawley's Case. S. P.*

5. *Mandamus* to restore him to the Office of Town-Clerk of *Stratford upon Avon*; the Corporation returned their Letters Patents, whereby they were empowered to choose a Town-Clerk *durante beneplacito*, and that they removed him from his Office; the Court could not grant a *Mandamus*, because their Authority by the Charter was absolute, (*viz.*) to choose one *Beneplacito durante*; if it had been to choose one generally, they would have intended it for Life. 1 Vent. 77, 82. *Dighton's Case. 1 Lev. 291. S. C. 1 Vent. 461. S. C. Sid. 461. S. C. Raym. 188. See (B) pl. 1. Warren's Case*, where the Return was the same with this, but that was in the Case of an Alderman, who is Part of the Corporation, and continuing, and therefore cannot be displaced *ad libitum* of the Rest.

6. Upon a *Mandamus* to restore one *Blagrove* to the Office of Steward in *Reading*; he was restored, and about a Month afterwards was turned out again by the Corporation; and thereupon he moved for another *Mandamus*, and had it; and the Corporation returned, that they were a Borough Time out of Mind, and that they were incorporated by Letters Patents *Anno 17 Car. 1.* by which they had Power to choose a Steward, &c. and that they might under their Common Seal determine their Pleasure, and turn him out when they will, or at the Pleasure of the greater Number of them for the Time being; and this was held a good Return. 2 Sid. 6, 49, 74. *Blagrove's Case.*

7. *Mandamus* to restore him to the Office of Town-Clerk of *Guilford*; the Mayor of that Town for the Time being had Power to choose a Town-Clerk, who ought to hold a Court of Frank-pledge there upon Monday, the Day after Hock-Day, and to make Warrants, and to attend the Mayor; that the Defendant was elected Town-Clerk by the Mayor of the Town, but that he departed from thence, and neglected his Office; whereupon he being Mayor, chose another, who was admitted, and so could not restore the Defendant; it was objected against this Return, that it was too general to say, that he neglected his Office; for some particular Fact ought to be returned, that the Court might judge, whether it was sufficient or not; besides he ought to be summoned before the Mayor in Court, to answer for himself, before he shall be deprived of his Office, for he may have something material to alledge in his Excuse; but adjudged, that the Defendant shall not be restored, because it appears by the Return, that the Mayor for the Time being hath Power to choose a Town-Clerk; and if so, then it follows, he may remove the old one at Pleasure. 2 Sid. 97. *The King versus Campion. 1 Sid. 14. S. C.*

8. *Mandamus* to restore *Tidderly* to the Place of a Burgess of the Corporation, &c. the Mayor returned, that he removed *Tidderly* from being a Burgess, for that it was at his own Desire and Request; it was objected, that the Return should have set forth, whether the Corporation commenced by Grant or Prescription, and what Power the Mayor had to disfranchise him; but adjudged, that tho' the Return may not be good, yet there was no Cause to restore the Party, because he voluntarily resigned, and therefore he had estopped himself to say the Mayor had not Power to remove him, and that 'tis incident to every Corporation to accept a Resignation. Sid. 14. *Tidderly's Case.*

9. *Mandamus* to restore *Dr. Witherington* to the Fellowship of a College in *Cambridge*; the Return was, that such a Person was Founder of the College, that he appointed a Visitor, and several local Statutes, &c. without shewing, for what Cause they expelled the Doctor; it was objected against this Return, that it was insufficient to bar B. R. of Jurisdiction; and they denied what is said in *Kenn's Case*, that they are the sole Judges in this Matter; but it was said on the other Side, that this Gift and Foundation was Eleemosynary, upon Condition they obeyed the Laws of the Founder, and if B. R. had a Jurisdiction, they ought to come thither by Appeal, and not *per saltum* by this *Mandamus*; adjudged, that the Doctor was well removed, and that B. R. could not grant Restitution; that *Kenn's Case* was Law; for whether the Expulsion was right or wrong, they cannot intermeddle, because the Visitor is *fidei Commissarius*; that Restitution was never granted to a Monk or Prior, and yet many Monks were Lay; for tho' they were Regulars, they were not in Orders; but the Dr. was restored by the Lords in Council. Sid. 71. *Dr. Witherington's Case.*

10. *Mandamus* to the Mayor, &c. of *Norwich*, to restore him to the Place of an Alderman, &c. they return, that he being elected, took the Oaths, and made the Declaration, but did not subscribe it; it was objected, that he was not required to make any Subscription, or that the Declaration was tendered to him to subscribe; but adjudged, that he ought to subscribe it at his Peril; for the Act makes the Office void, if he doth not subscribe. 2 Jones 121. *The King versus Thacker.*

11. *Mandamus* to restore *Elias Chalke* to be a Burgess of *Wilton*; the Return was, that he being Mayor, &c. and having taken an Oath to employ the Rents of the Corporation, to and for the Profit thereof, and that in all Matters of Moment, he would consult his Brethren, and conclude on nothing without their Consent; did afterwards discharge in an arbitrary Manner one *Robert Paine* and others, from the Office of Common Council-Man; that he had received several Sums of Money due to the Corporation, and converted the same to his own Use; that he

made undue Entries in the Lieger-Books of Elections of Members, &c. for which, and other Crimes by him committed, he being heard in *Communi concilio* of the Mayor, &c. and upon Proof thereof, they ordered, that he should be disfranchised, and by that Order he was removed and made incapable of acting as a Member of that Corporation: adjudged, that this Return was ill, because 'tis not said he was heard * *apud Commune Concilium*, but only in *Communi Concilio*, and that might be when they were assembled in the Council-House to feast; besides the Return is, that the Crimes were proved, but did not say before whom, or upon what Proof; therefore it must be by Jury, which it was not; neither can they remove one by Virtue of an Order, for it must be by a corporate Act under the Common Seal. 5 Mod. 257. *The King versus Chalke*. * Tayl. 101's Case. 3 Bulst. 189. Poph. 133. 1 Roll. Rep. 409.

12. *Mandamus* to restore him to the Place of Alderman of the City of Excester; the Substance of the Return was, that *recessit, elongavit & habitationem suam reliquit & deseruit*, &c. and that several Courts of Common Council were held, and that *licet summonitus*, he did not attend, &c. for which he was removed, &c. three Judges of Opinion, that this Return was good, for that 'tis the Duty of an Alderman to be resident where he is chosen; that *deseruit & reliquit habitationem*, must be intended a total Desertion; and tho' he might return again, 'tis incertain when; but if he doth return, that will not purge the Forfeiture after a Disfranchisement; but *per Holt Ch. Just.* the Return is ill, because there was no particular Summons, returned for the Defendant to appear to answer what should be objected against him, and therefore they proceeded against him without hearing him, and by Consequence the Disfranchisement was against Right and Justice; this is the express Resolution in *James Bagg's Case*: 'Tis true, the Return is *licet summonitus* he did not appear, but that is too general, and he might not be prepared to answer the Charge; therefore he ought to be particularly summoned to answer a particular Charge. 4 Mod. 37. *Glide's Case*.

13. By the Statute 5 *Annæ* made for the Amendment of the Law, all the Statutes of *Jeofails* are extended to Writs of *Mandamus*, and to the Proceedings thereon.

And by the Statute 9 *Annæ* 'tis enacted, that a Return shall be made to the first *Mandamus*, which may be traversed, and Issue may be joined on the Traverse, or the Party may demur, and if the Person suing it shall have a Verdict or Judgment, he shall have Costs, to be levied by *Ca. fa. Fi. fa.* or *Elegit*, and a peremptory *Mandamus*; but if Judgment shall be for the Defendant, then he shall have Costs.

(D)

Of Returns to it, not good. See pl. 17.

1. *Mandamus* to restore him to the Place of an Alderman, directed to the Mayor and Burgesses of Gloucester, who returned, that their Common Council did consist of thirty Burgesses, and that they had Power to remove an Alderman; and that they called him before thirty of them in *Domo Concilii*, to answer the Matters objected against him, for being a common Drunkard, and because he did not give sufficient Answers, they removed him; but did not say, that a Council was assembled *apud Domum Concilii*, and for this Cause the Return was held ill 3 Bulst. 189. *Taylor's Case*. Poph. 134. S. C. 1 Roll. Rep. 409.

2. *Mandamus* to restore him to the Office of Recorder of Colchester; several Causes were returned of his Removal, some of which were sufficient Causes to deprive him; yet because it did not appear by the Return, that they had summoned him to appear before the Bailiff and Common Council to answer what should be objected against him; therefore he was restored. Style 447. *Bernardiston versus Town of Colchester*. If the Party hath been heard, there needs no Summons. 5 Mod. 259. In *Chalk's Case*.

3. Upon a *Mandamus* to restore five Persons to their Freedom of a Corporation; the Return was, that after the Court was adjourned by the Bailiff, the Persons disfranchised staid and affirmed they were a Court, and made several Orders, which they caused to be entered in the Court-Book; and then set forth, that for such Offences Persons have been used to be removed and discharged, &c. adjudged, that since Custom is the Chief Cause of Disfranchising any Person, for thereby the Party looseth his Freehold, there appears no such Custom on this Return; for 'tis only an Usage to remove, &c. which is returned, and that is not a direct Affirmation of any Custom so to do. Style 477. *Yates versus Kingston on Thames*.

4. *Mandamus* to restore *Braithwaite* to the Office of an Alderman in Northampton, &c. the Mayor returned the Letters Patents of Incorporation Anno 16 Car. by which they had Power to amove one for just Cause, (*viz.*) that the Mayor, and such Burgesses who had been Mayors, might amove; and they return, that *Braithwaite* was amoved *per Majorem & Burgeses secundum Chartam præd'*, which might be by the Mayor and such Burgesses who had never been Mayors; and to say *secundum Chartam*, that is not good, without shewing a Cause, and the Manner of his Removal, that the Court may judge, whether they had pursued their Authority. 1 Vent. 19. *Braithwaite's Case*.

5. *Mandamus* to the Lord President and Council of the Marches, &c. to admit Clapham to the Office of Deputy Secretary, &c. they return *quod tempore receptionis Brevis*, he was not constituted Deputy Steward; which might be very true, that he was not made Deputy at that Instant, but he might be made before. 1 Vent. 110. *The King versus Clapham*. 1 Lev. 306. S. C.

6. *Mandamus* to restore him to the Place of Town-Clerk of Hereford; the Mayor, &c. of Hereford returned, that *H. nunquam fuit debito modo admissus*, to that Place, &c. adjudged this Return was ill; it should have been *non fuit admissus* generally, omitting *debito modo*. Sid. 209. *Hereford's Case*. See 5 Mod. 10. S. P.

7. *Mandamus* to the Mayor of Rippon to restore H. R. to be a Burgess, &c. the Return was, That he refused to pay 2 l. which was his Share towards the Charge of renewing their Charter, and therefore he was deposed; adjudged an ill Return, for this was no Cause either to depose or imprison him; they may bring an Action of Debt upon a By-Law. Sid. 282 *Rippon Mayor's Case*.

8. *Mandamus* to restore Bassett to the Recordership of Barnstable; they Return, that they did not know that Bassett was ever chosen Recorder; this being an ill Return, it was ruled by the Court, that Bassett should be restored; but this was opposed by Serjeant Maynard, for that a *Mandamus* restored a Man to his Right, but gave none where there was none before; and if Bassett had none before, then he will soon be turned out again, and therefore it would create new Disturbances to restore him; therefore they directed, that an Action should be brought, and the Right tried at the next Assises. Sid. 286. *Bassett versus Mayor of Barnstable*.

9. *Mandamus* to restore nine Persons to their Places of Common Council-Men in Chester; the Return was, that by Virtue of their Charter Anno 20 H. 7. they had Power to choose forty Common Council-Men yearly, and that *ante unum annum* before the Coming of this Writ, these nine Persons were chosen Common Council-Men, and so continued for a Year, and then *debite amoti fuerunt*, &c. it was objected, that this Return was uncertain, for the Return may be true, and yet they may be chosen forty Years *ante adventum Brevis*; beside, it ought to be *amoti fuerunt*, and not *debite amoti*; and nine Men cannot be joined in one *Mandamus*; it was quashed. 5 Mod. 10. *The King versus Chester City*.

10. *Mandamus* to the Mayor of Oxford, to admit Statford to be their Town-Clerk; they return, that he had not taken the Oaths according to the Statute 13 Car. 2. cap. 1. before the Mayor; it was objected against this Return, that it was ill, because they did not return, that they * tendered the Oaths, and no Man can take them by himself; and the very Words of the Act are, that the Oaths shall be administered; which is very true; but yet he ought to take them at his Peril; and probably, if he demand, and they refuse to administer them, an Action will lie against the Mayor, for the Loss of his Place; but this Return was adjudged ill, because by the Statute he may take the Oaths before two Justices of the Peace, as well as before the Mayor, and they have only returned, that he did not take them before the Mayor, &c. 5 Mod. 316. *The King versus Statford*.

11. By the Statute 7 & 8 Will. 3. cap. 34. 'tis enacted, that Quakers, who upon any lawful Occasion shall be required to take an Oath, &c. shall instead of the usual Form be permitted to make their Solemn Affirmation; Proviso, that no Quaker by Virtue of this Act shall be qualified to give Evidence in a Criminal Cause, &c. or to bear any Office or Place of Profit in the Government: Upon a *Mandamus* to the Mayor of Lincoln, to admit one Morrice to his Freedom of that City, he having served an Apprenticeship there; they return amongst other Things, that Morrice offered to take the Solemn Affirmation and Declaration, but refused to take the usual Oath according to the Custom of the said City, which they set forth in *hæc verba*, that to be a Freeman of that City is an Office and Place of Profit in the Government; and that there is a Custom there for every Freeman to vote in the Election of two Citizens to serve in Parliament, and to have Pasture for three Horses in the Common, &c. The Question was, Whether the Freedom of this City was a Place of Profit in the Government; it was insisted, that it was, because it entitles him to vote for Representatives in Parliament; but it was answered, that was not a Place of Profit in the Government, 'tis only a Qualification or Privilege to agree or consent, that such a Person shall be his Representative; they admit Quakers in London upon their Solemn Affirmation, and so it was done in this Case. 5 Mod. 402. *The King versus Lincoln Mayor*.

12. The Countess of Clare founded Clare-Hall in Cambridge, and put the Master and Fellows under the Power of the Chancellor of that University for the Time being, whom she appointed Visitor; afterwards one Mr. Dickins added a Fellowship to the Foundation, to which one Jennings being chosen Fellow, and the Master refusing to admit him to it, he brought a *Mandamus* to the said Master and Fellows, who return the local Statutes, one of which was, that the Majority of the Fellows and the Master should choose a Fellow; and that the Master (Dr. Blythe) did not consent to choose Mr. Jennings; then they return several Offences mentioned in those Statutes, and that the Foundress did appoint the Chancellor to be Visitor in omnibus, &c. It was insisted, that this Return was good, and that Mr. Jennings was never duly elected, because by the Statutes of the Place, the Master's Consent was absolutely necessary, and here he never consented; besides the Examination of this Matter doth not belong to B. R. because the Foundress hath appointed a Visitor: All which is very true, in Respect to the old Foundation,

* See (C)
pl. 10.

by the Countess of *Clare*, (*viz.*) that the Fellows shall be subject to such Restrictions and Limitations as she hath prescribed by her Statutes; but the new Fellowships erected by Mr. *Dickins* shall not be subject to those Restrictions imposed by the Foundress; therefore the better Opinion was, that a peremptory *Mandamus* should go. 5 *Mod.* 421. *Jennings's Case*.

13. *Information* against the Defendant, late *Mayor of the Bath*, for a false Return to a *Mandamus* for electing a Town-Clerk in the Room of *Bushel*; the Return was, that before the Coming of the Writ, *I. S.* had been duly chosen and sworn into the Office; it appeared upon Evidence at the Trial, that the Right of Election was in thirty of the Common Council-men, that they were summoned by the Mayor, and that twenty-eight did meet; that there were three Candidates, that one of them had two Votes, that another had *thirteen Votes*, and that the Third had the *Mayor and twelve more Votes* for him; and that the Mayor pretending he had a casting Vote, declared his Man duly chosen, and at another Court swore him; it was ruled by *Holt Ch. Just.* that the Copy of the Writ and Return of it in the *Crown-Office*, is sufficient Evidence to prove this to be the Mayor's Return; that tho' 'tis requisite to deliver the Writ to the Mayor, as being the Head of the Corporation, yet 'tis not necessary to prove the Delivery of it to him, no more than 'tis to prove the Delivery of a Writ to the Sheriff; that the Mayor, or any other Officer of a Corporation, hath of common Right no casting Vote; 'tis true, such a Thing may be either by Prescription or Charter; that if there is an Equality of Votes, and they cannot agree, they must be brought up in Contempt, and be committed till they do agree, that is, till a Majority do agree; that an Action for a false Return may be brought against all the Corporation, or against any particular Member thereof: The Mayor was found guilty. *Mod. Cases* 152. *The Queen versus Chapman*.

14. *Mandamus* to swear *W. R.* into the Office of *Town-Clerk of Hereford*; the Mayor returned, that at the Election, *&c. B. B.* had eighteen Voices and *W. R.* had seventeen Voices, and no more, and that he swore in *B. B.* adjudged a bad Return, because 'tis only argumentative, that *W. R.* was not elected, when it should have been positive and express, that *W. R.* was not chosen: The Case in 2 *Jones* 177. *per Holt Ch. Just.* is contrary to many Resolutions. *Mod. Cases* 309. *The Queen versus Mayor of Hereford*.

15. *Mandamus* to restore one *Morris* to the Place of a capital Burgefs of the *Devizes in Wilts*; they return the Causes of his Removal, but did not mention that he was particularly summoned to answer the Causes for which he was displaced; and for that Reason the Return was adjudged ill; and this was according to the Opinion of the Chief Justice *Holt* in *Glide's Case*. 4 *Mod.* 37. *Morris's Case*.

16. *Mandamus* to admit *Mr. King* to the Place of a Scholar in *St. John's College in Oxford*, being nominated by the Mayor of *Bristol*, to whom that Right *pro hac vice*, &c. doth belong; the Substance of the Return was, that the College was founded by *Sir Tho. White*, that the Bishop of *Winchester* for the Time being was the *local Visitor*; that after the Nomination of *Mr. King*, by the Mayor of *Bristol*, the President of the College and ten Fellows assembled to consider of his Qualifications; and that upon Proof, it was their Opinion, that he had committed several Facts inconsistent with good Manners; he was therefore refused as incapable, &c. The better Opinion was, that this Return was too general, for there was no particular Fact returned, so that it was impossible to try the Truth of it in a collateral Action. 4 *Mod.* 368. *The King versus St. John's College in Oxford*.

Manoꝝ. See Copyhold. (b) per totum.

Marches of Wales. See Wales.

Marriage.

Cases and Covenants concerning Marriage in general. (A)

Where the Marriage is an absolute Gift of the Chattels to the Husband. (B)

Where the Marriage is not an absolute

Gift of the Chattels to the Husband. (C)

Of Marriages prohibited. (D)

Of Conditions annexed to Marriage, and other Things concerning Marriage and Portions. (E)

(A)

Cases and Covenants concerning Marriage in General. See *Clergyman: Fry versus Porter.*

1. **M**arriage is to be considered at *Common Law*, either in *Right* or in *Possession*; Marriage in *Possession* is sufficient in personal Things, especially where the Possession of the Wife is in Question; and where such Marriage is averred, it shall not be tried by the Certificate of the Bishop; but where the Marriage of the Husband is in Question, there Marriage in *Right* ought to be, and that shall be tried by *Certificate*. *Pasch. 29 Eliz. 1 Leon. 53.*

2. In Writs of Dower, if Issue be joined, that the Parties were never lawfully joined in Marriage, the Trial must be by Certificate of the Bishop, (*viz.*) by Inquisition taken before him, and Examination of Witnesses, which he certifies to the Court where the Issue is joined, and this is *Copulata, vel non Copulata fuit in legitimo matrimonio* as the Case appears to be, which Certificate shall be conclusive to all Parties. *14 Eliz. Dyer 303.*

3. He who had the Custody of an Heiress, assigned his Interest to *L. E.* who covenanted with the Assignor, that his Son and Heir should marry the said Heiress before they were severally of the Age of twelve Years, if she would consent to it; and afterwards, he being twelve Years and nine Months old, and she being nine Years old, they married, the Husband survived and attained to his Age of fourteen Years, and then *disagreed* to the Marriage; adjudged, that this was a sufficient Marriage in Performance of the Covenant; the Defendant was not bound that the Marriage should continue. *1 Leon. 52. Lee versus Hamner. 2 Brownl. 36. Blaeden's Case.*

4. The Father covenanted, that his Son, who was then *infra annos nobiles*, should, before such a Day, marry the Daughter of *W. R.* who married her accordingly, and afterwards, at the Age of Consent, he disagreed to the said Marriage; adjudged, that the Covenant was performed, for it is a Marriage, and such a Marriage as the Covenantee could have until the Disagreement. *Owen 25. Fenner's Case. Pasch. 29 Eliz. 1 Leon. 52. * Leigh versus Hammere. S. P.*

5. Covenant, that the Defendant should assure such a Copyhold to the Plaintiff, if he married with his Daughter *secundum leges Ecclesiasticas*, and he alledged, that he *rite & legitime* married the Daughter, upon which they were at Issue; adjudged, that where the Marriage is only in Issue, it shall be tried by a Jury, but where 'tis that he was lawfully married, that she shall be tried by Certificate, &c. *2 Cro. 102. Fletcher versus Dinfield.*

6. The Father being seised of a Manor held *in Capite*, had Issue a Daughter, who married *Sir Arthur Gorge*, who had Issue *Ambrosia*; then her Mother died in the Life-time of her Grandfather, and then he died, all which was found by Office, and that *Ambrosia* was Heir apparent of her Father, and within the Age of seven Years; afterwards she was married about that Age to one who was also *infra annos nobiles*, (*viz.*) under ten Years; then her Husband died; adjudged, that the Queen shall have the Marriage of *Ambrosia*, because her first Marriage was not compleat, for there could be no Agreement or Consent to it, both Husband and Wife being *infra Annos nobiles*, for in such Case they cannot consent. *6 Rep. 22. Ambrosia Gorge's Case. Moor 737. S. C.*

7. The Plaintiff and his Wife brought an Action of Debt on a Bond; the Defendant pleaded, that the Wife had another Husband now living; the Plaintiff replied, that his Wife *ad annos nobiles* disagreed to that Marriage; and upon Demurrer to the Replication, the Question was, whether the Disagreement should be before or at *annos nobiles*, or at what Time 'tis to be made; but because it appeared upon Proof, that she * lived with her second Husband always after she was of the Age of Consent, therefore Judgment was given for the Plaintiff. *Moor 575. Warner & Un' versus Babington.*

One who was an *Idiot* from his Birth married; they are Husband and Wife in Law, and their Children legitimate, for he may consent. *Sid. 112. Stile versus West.*

* Antea
3. S. C.

* That did
affirm the
Disagree-
ment; ad-
judged on
a Writ of
Error.

8. Debt upon Bond, conditioned to pay the Plaintiff so much Money at his Age of twenty-one Years or Day of Marriage; the Defendant pleaded, that the Plaintiff had not attained twenty-one Years, and that he was not *lawfully married*; the Plaintiff replied, that he was lawfully married, upon which they were at Issue, and the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that the *Lawfulness* ought not to be tried by a Jury, but by the Certificate of a Bishop, which is very true, if the Right of Marriage had come naturally in Question, as in Dower, &c. but in this Case the Trial by Jury is well enough, it being in a personal Action where the Right of Marriage is not in Question; and the Plaintiff might have demurred to the Plea, for that Word *Lawfully* ought not to have been put in. 1 Lev. 41. *Bassett versus Morgan*.

9. Libel against *Hutchinson* and his Wife for Fornication; they suggested the Statute 1 Will. & Maria, for a Prohibition, by which, amongst other Things, 'tis enacted, *That all Marriages between Dissenters (taking the Oaths of Allegiance and Supremacy, and subscribing the Declaration mentioned in the Statute 30 Car. 2.) solemnized before Witnesses in the Face of their Congregation, licensed according to that Statute, shall be good and valid in Law, and that no Person should be presented in the Ecclesiastical Court for Nonconformity to the Church of England in such Marriages*; that the Interpretation of Statutes belonged to the Common Law; that the said *Hutchinson* and his Wife, being Dissenters, had taken the Oaths, &c. and were married in the Face of their Congregation, in the Presence of Witnesses, according to the Statute; and after Banes published, according to the Discipline of the said Congregation; yet that the Defendant had libelled against them in the Ecclesiastical Court for Fornication, and compelled them to answer there, where they had pleaded all this Matter, which that Court refused to admit; it was ruled, that a Prohibition should go, and that the Plaintiffs should declare upon it; so that upon a Demurrer the Law might be tried. 3 Lev. 376. *Hutchinson & Ux' versus Brookbanke*.

10. In an Action for Suing in the Spiritual Court after a Prohibition; and upon a Demurrer to the Declaration the Case was, that the Father had Issue two Sons *Robert* and *Bartholomew*, that *Robert* the eldest Son had Issue *Mary*, who married *Thomas Harrison*, and by him had Issue *Thomas*; that *Bartholomew* married one *Jane Brown*, and died without Issue; that after his Death *Thomas* married his Widow, and he and his Wife were now Plaintiffs in this Action; the Question was, whether his Marriage with the Widow of his Great Uncle was lawful or not; it was objected, that it was not, because 'tis within the *Levitical Degrees*; for in the 18th Chapter of *Leviticus*, v. 14. the Words are, *Thou shalt not uncover the Nakedness of thy Father's Brother, Thou shalt not approach to his Wife, she is thy Aunt*; 'tis true, here is an express Prohibition to marry the Wife of his Father's Brother, because she is his Aunt, but that is not this Case, for here the Marriage was with his Great Aunt; therefore if 'tis prohibited in *Leviticus*, it must be by the 20th Chapter, and in Verse 20, where the Words are, *If a Man shall lie with his Uncle's Wife, he hath uncovered his Uncle's Nakedness*; now here the Word was *Uncle* in general, and a Great Uncle is an Uncle as well as an immediate Uncle; but adjudged, that by the Word *Uncle* in this Chapter and Verse, no other Person can be meant but the Father's Brother in the 18th Chapter of *Leviticus*, ver. 14. and that 'tis no Manner of Prohibition, but serves only to declare the Punishment of such a Marriage, which is plain from the Words that immediately follow, (*viz.*) *He shall die childless*; besides, there is no Prohibition at all in the 20th Chapter, and therefore this cannot be taken for one; upon the whole Matter, this Marriage was adjudged lawful by all the Judges of England. 2 Vent. 9, *Harrison & Ux' versus Burwell*. Vaugh. 206. S. C.

11. A Man and a Woman intending to intermarry, he entered into Articles with her, by which he agreed to settle such Lands upon her before their Marriage, and upon the Heirs of their two Bodies, &c. and in Pursuance of those Articles she married him, and afterwards he died before any Settlement made; and the Widow exhibited a Bill in Equity to have the Articles executed; and it appearing that the Lands were mortgaged to one who had no Notice of these Articles, it was decreed against the Heir at Law of the Husband, that the Widow should redeem the Mortgage and hold the Lands for her Life; and that after her Decease her Executors should hold the same till so much Money was raised out of the Profits, which she had paid to redeem the Land from the Mortgage. 2 Vent. 343. *Haymere versus Haymere*.

12. The Case upon Bill and Answer was thus: *Thomas Goylmore* being seized of Lands in Fee of the yearly Value of 14*l.* upon a Treaty of Marriage between his Brother, the now Plaintiff, and *Anne Wells*, did execute a Writing to this Effect, that if the Marriage took Effect, and that if he died without Issue, he would give his Lands to his said Brother and his Heirs, or leave him 180*l.* which was as much as the Portion of the said *Anne Wells*; and for the true Performance of this he bound himself, his Executors and Administrators; afterwards they married, and so did *Thomas Goylmore* himself, and settled these Lands before Marriage on his intended Wife for Life, Remainder to his own right Heirs, and afterwards devised the Lands to her and her Heirs, and died without Issue; and then the Widow devised it to the Defendant and her Heirs; and now the Brother exhibited his Bill to have the Lands conveyed according to the said Agreement; it was insisted for the Defendant, that if *Thomas Goylmore* had made a Settlement according to the Purport of this Agreement, it might have been destroyed by him; and if so, he could not be compelled to execute this Agreement; and therefore the Execution of a Trust of a Reversion in Fee, shall not be regarded in Equity: But the Lord Chancellor *Fynch* decreed the Land for the Plaintiff, because the Marriage was had in Expectation of the Performance of this Agreement, by which he was obliged to leave the Land to the Plaintiff in Case he himself died without Issue. 2 Vent. 354. *Goylmore versus Paddison*.

13. The Father wrote a Letter signifying his Assent to the Marriage of his Daughter with *T. P.* and that he would give her 1500 *l.* and upon a farther Treaty concerning the said Marriage, he wrote another Letter, wherein he went back from his former Proposals; and not long afterwards he declared he would agree to what was proposed in his first Letter; the Marriage took Effect; and upon a Bill and Answer it was decreed, that this Letter was a sufficient Promise in Writing within the Statute 29 Car. 2. of Frauds, &c. and that this Declaring his Agreement to the first Proposals, had set up the Terms in his first Letter again. 2 Vent. 361. *Bud versus B'offe.*

14. *Mr. Bennett* having two Daughters, devised to each of them 20000 *l.* a-piece, provided, that if they, or either of them married before the Age of Sixteen, or without the Consent of such Persons (naming them) that they should lose 10000 *l.* of the Portion, and that the same should go to his other Children; the Lord Salisbury married one of the Daughters under the Age of Sixteen, but with the Consent of all Parties; and it was insisted for him in Chancery, that the Marriage being with the Consent of all Parties, it might be at any Age; but my Lord Keeper North decreed, that both the Clauses in the Will must be observed. 2 Vent. 365. *The Lord Salisbury's Case.*

T. Jones 191. 15. Libel in the Spiritual Court against the Defendant for marrying the Daughter of his own Sister; the Defendant moved for a Prohibition, suggesting, that this was not within the Levitical Degrees; but the Prohibition was denied, because this was a Case of Ecclesiastical Consuance, and tho' Prohibitions have been granted in matrimonial Causes, yet if it was now *Res integra*, they would not be granted. Raym. 464. *Watkinson versus Mergatrou.*

1 Mod. 25. 16. Prohibition to the Spiritual Court, upon a Suggestion, that they proceeded there to excommunicate the Plaintiffs, for that the Plaintiff Heyward had married a Woman, who was the Daughter of the Sister of his first Wife, (viz.) his Niece; it was granted; and the Defendant demurred on the Suggestion, because the Marriage was not lawful. Sid. 434. *Heyward & Ux' versus Foine.*

17. In a Declaration upon a Prohibition, and a Demurrer to it, the Question was, that admitting the Temporal Courts can now by Virtue of the Statute 32 H. 8. cap. 38. prohibit the Spiritual Court from impeaching a Marriage without the Levitical Degrees; then, whether a Man, after the Death of his Wife, might lawfully marry her Sister, and the Chief Justice Vaughan held such Marriage unlawful, for that 'tis expressly prohibited by the 18th of Leviticus; but if it was not, yet notwithstanding the Statute 32 H. 8. it ought to be impeached in the Spiritual Court, for that Statute enacts, that no Marriage (God's Law excepted) shall be impeached without the Levitical Degrees; but this is a Marriage against God's Law; and first as to the Levitical Degrees, these are to be reckoned by the Persons whose carnal Knowledge is forbidden to Men by the Law of Moses in respect to Consanguinity, (viz.) the carnal Knowledge of the Mother, of the Father's Wife, of the Son's Wife; and in respect of Affinity, the carnal Knowledge of the Wife's Daughter, her Daughter's Daughter, her Mother; and 'tis plain the Wife's Sister is prohibited in some Degree of Affinity by these Words, Neither shalt thou take * a Wife to her Sister, to vex her, to uncover her Nakedness besides the other during her Life, so that this Marriage is within the Levitical Degrees, and so agreed on all Sides to be unlawful, if during the Wife's Life, but doubted if unlawful after her Death: But admitting that 'tis not within the Levitical Degrees, yet 'tis prohibited by God's Law, for where ever an Act of Parliament declares a Marriage to be against God's Law, it must be admitted to be so in all Courts in this Kingdom; now, by the Act 28 H. 8. entitled, *An Act for the * Establishment of the Imperial Crown of this Realm*, 'tis amongst other Marriages declared, that no Dispensation shall be made of a Marriage of a Man with his Wife's Sister, because 'tis against God's Law, and therefore there should be a Separation, if any were, and the Children are declared to be illegitimate; 'tis true, it was objected, that this Statute was repealed by 1 & 2 Ph. & Mar. cap. 8. but the Chief Justice tells us, that the Act 28 H. 8. cap. 7. was revived by 1 Eliz. cap. 1. which see at large in the Book, fol. 324. Besides, this Marriage is declared to be against God's Law by the 99th Canon of those made Anno 1603, and confirmed by Act of Parliament, (viz.) No Person shall marry within the Degrees prohibited by God's Law, and expressed in a Table set forth by Authority in the Year 1563, and all Marriages so made and contracted shall be adjudged incestuous, which is the same Thing as to say, No Person shall marry within the Degrees prohibited by God's Law, which Degrees are expressed in the Table, &c. and therefore this Marriage must be admitted to be against God's Law: The Chief Justice delivered the Resolution of the Court, that they were all of the same Opinion, and thereupon a Consultation was granted. Taugh. 302. *Hill versus Good per totum.*

* 18 Leviticus. 18.

* 28 H. 8. cap. 7.

18. Prohibition to the Dean of the Arches, suggesting, that Collett had settled his Lands on his Children by his Wife now living, and that the Suit in the Arches was for a Divorce, he having married his first Wife's Sister, the Consequence whereof would be, to make his Children Bastards, and draw the Settlement of his Lands in Question; but at first, the Prohibition was denied, because, if it should be granted, then every incestuous Marriage might be sheltered under the like Pretence; and the Matter being proper to the Jurisdiction of the Spiritual Court, shall be tried there, tho' a temporal Inheritance may in Consequence come in Question: But it appearing afterwards to the Court, that this Divorce was prosecuted by Contrivance, that Collet might have Power to dispose his Estate; for at the first Instance, he confessed his former Marriage with his Wife's Sister, upon which Confession the Court was ready to give Sentence without any farther Evidence; the Court ordered a Trial at Common Law in a feigned Action, in which the Issue should be, whether

whether *Collett* was ever married to his Wife's Sister ; which being refused, a Prohibition was granted. *T. Jones* 213. *Collett's Case*.

19. Libel against a Woman in the Spiritual Court *causa jactitationis maritagi*; she suggested for a Prohibition, that the Person who libelled against her was indicted at the *Old Bailey* for marrying her *contra* * *formam Statuti*, having another Wife then living, that he was convicted and burned in the Hand ; so that the Marriage being found by a proper Court, she prayed a Prohibition ; it was objected, that the *Legality* of Marriage cannot be tried in a Temporal Court ; which *per Curiam* is very true ; but a Marriage *de facto* may, and therefore a Prohibition was granted ; tho' the Civilians say, that the Spiritual Court ought not to be prohibited when the Marriage is *de facto*, because all Marriages ought to be *de jure*, of which their Courts have the proper Jurisdiction. 3 *Mod.* 164. *Boyle versus Boyle*. * 1 Jac. 1. cap. 11. Sid. 171.

20. Information against *Thorpe* and others, for that they did unlawfully *conspire* to take one *Edward Mitchell* (being under the Age of eighteen Years) out of the Custody of his Father, being his only Son and Heir, and to marry him to one *Cornelia Holton*, a Person of ill Fame ; and that they did assemble themselves together, &c. to accomplish the said Conspiracy ; and that they, and *quilibet eorum*, by deceitful Insinuations did maliciously and deceitfully persuade the said *Edward Mitchell* to marry the said *Cornelia Holton* ; and that by the Abetting and false Means of the Defendants, he did marry her, &c. Upon Not guilty pleaded, all the Defendants were acquitted, except *Thorpe* ; and it was insisted for him in Arrest of Judgment, that this Information being laid by Way of Conspiracy, and one only being found guilty, there can be no Judgment against him, because one alone cannot conspire ; which is very true ; but here the Conspiracy is laid by way of * Aggravation in the Beginning of the Information ; but when the particular Facts are set forth, 'tis said, that *quilibet eorum* did persuade, &c. Then it was objected, that here is no Offence laid in this Information, because a young Man, upwards of fourteen Years, may dispose himself in Marriage ; and this is allowed by Law ; 'tis no Misdemeanor to persuade him to marry, tho' it be to a Woman of no Fortune, and without the Consent of his Father ; for he cannot have an Action for the * Loss of his Marriage, excepting where he is taken away by Force and married ; the Court held, that tho' 'tis lawful to marry, yet 'tis an Offence, if obtained by unlawful Means, and inclined, that the Father hath the Guardianship of his Son and Heir apparent, till the Age of twenty-one Years, as he had when the Tenure of Knights-Service was in Being ; for he hath such an Original Right vested in him by Nature, that he might have an Action of Trespass against the Lord *Quare filium & heredem suum rapuit*, &c. 5 *Mod.* 221. *The King versus Thorpe*. * See Skinner v. Gunton. Ac. Case, (G) * Cro. Eliz. 53. 1 Leon. pl. 63. Jones 411.

21. Libel, &c. against the Defendant, for marrying and cohabiting with his *Wife's Sister's Daughter* ; it was suggested for a Prohibition, that this is not within the Levitical Degrees, for a Man may marry his *Niece*, tho' he cannot marry his *Aunt*, because of the Superiority between a Nephew and the Aunt, who is *in loco parentis* ; but the Court held, that this Case was within the Degrees of *Affinity*, and if it had been within the same Degree of *Consanguinity*, it would have been unlawful ; for a Man cannot marry *his own Sister's Daughter*. 5 *Mod.* 448. *Clement versus Beard*.

22. Upon a Prohibition to stay a Suit in the Spiritual Court, upon a Contract of Marriage *per verba in presenti*, the Defendant suggesting a Contract of Marriage *per verba in futuro* ; as *I will marry you, or I promise to marry you* ; and that for such a Marriage the Party hath a Remedy at Common Law ; it was held, that tho' it was *per verba de futuro*, yet the Spiritual Court hath Jurisdiction, as well as if the Marriage had been *per verba de presenti*, as *I marry you, you and I are Man and Wife* ; the Difference is, that a Marriage *per verba de futuro*, is releasable, because it refers to a future Act ; and as 'tis releasable, the Party may aver a Breach of Promise, and demand Satisfaction by an Action to recover Damages, and by that Means he waives the Remedy that might be had in the Spiritual Court ; but here the Party had libelled upon a Contract *per verba de presenti*, which is equally cognisable in the Spiritual Court ; and therefore a Prohibition was denied. 2 *Salk.* 437. *Feston versus Collins*, and 438. *Wigmore's Case*, S. P. Mod. Ca. 155.

23. Libel against the Defendant for Incest, in marrying his Wife's Sister ; he suggested for a Prohibition, that his Wife was dead, and that he had a Son by her, to whom an Estate was descended, as Heir to his said Mother ; and that tho' he pleaded this Matter, that Court proceeded to annul the Marriage, and to bastardise the Issue ; a Prohibition was granted quoad the Annulling the Marriage and Bastardising the Issue, but that they might proceed to punish the Incest. 2 *Salk.* 548. *Harris versus Hucks*. 4 Mod. 182.

(B)

Where the Marriage is an absolute Gift of the Chattels to the Husband.

1. **A** Woman possessed of a Lease for Years, married, and then she and her Husband mortgaged the Term, and before the Day of Payment the Wife died, and afterwards the Husband paid the Mortgage-Money; adjudged, that he shall hold the Remainder of the Term against the Administrator of the Wife; for tho' he was possessed in her Right, yet by the Intermarriage he had full Power to alien; therefore if he survive, he is to enjoy it against her Executors. *Hob. 3 Young versus Hudford.*

(C)

Where the Marriage is not a Gift of the Goods to the Husband.

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stration.
(K) 8. S.
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1. **A** Debt upon Bond was due to the Husband, who made his Wife Executrix, and died; afterwards she married the *Obligor*; adjudged, this was only a Suspension of the Debt during the Life of the Obligor, her Husband; for it was not extinguished or released by her Intermarriage with the Obligor, because she was entitled to it by Act in Law, and in the Right of her first Husband, and not in her own Right; but if the Obligee had made the Obligor Executor, there the Debt had been extinct, because it was his own Act. 8 Rep. 136. a. In *Sir John Needham's Case*.

2. Promise in Consideration of Marriage to leave the Woman 100 l. if she survived; they married, and the Wife survived, but he did not leave her worth 100 l. upon which the Wife sued the Executors of the Husband; the Court was divided, whether the Duty survived, or was extinguished by the Marriage. *Godb. 271. Hall versus Stafford. Hunt. 17. S. C.*

3. The Husband had a Term of thirty Years, in Right of his Wife, and made a Lease thereof for ten Years, rendring Rent to himself, his Executors and Assigns, and died within the Term; adjudged, that the Executors of the Husband should not have the Rent, but the Wife. *Godb. 279. Blackston versus Heap.*

4. A Feme sole, who was made Executrix, afterwards married the Debtor of her Testator; then her Husband, who was the Debtor, as aforesaid, died; and in an Action of Debt brought against her as Executrix, by the Creditor of her Testator, she pleaded *Riens inter maines*; the Question was, whether the Debt was extinguished, or released by her Intermarriage with the Debtor; for if it was, then she committed Waste; but adjudged, that it was neither extinguished nor released, because it was not her proper Debt, but she was entitled to it in the Right of another, and as Executrix to him; therefore it was only *suspended* for a while, and that upon the Death of her Husband, who was the Debtor, the Action would revive, and then she might bring it against his Executor or Administrator. *Cro. Eliz. 114. Crossman versus Read. Moor 236. S. C. 1 Leon. 320. S. C.*

5. One *Rennington* was questioned in the High Commission-Court, for marrying his Wife's Niece, and was sentenced to Penance, and to abstain from her Company, but was not divorced *a vinculo*, tho' my Lord *Hobart*, who Reports the Case, saith there was Cause; and therefore the Wife had her Dower; there was no Prohibition granted. *Hob. 181. In Howard versus Bartlett. Rennington's Case.*

6. But in another Case of the like Nature it was adjudged, that the Marriage was only a Suspension of the Promise. *Hetl. 12.*

7. The intended Husband being possessed of a Term of Years, promised, that if *S. E.* would marry him, and if they had a Son, he should have the Term; and if a Daughter, that she should have a Moiety of his Goods; they married, and had only a Daughter, and then the Father died, and the Daughter brought an Action against his Administrator, for the Moiety of the Goods; adjudged, that it did not lie, but in the Name of the Wife, or as Administratrix to her. See *Hetl. 12. and Jenkyn's Case. Hetl. 50.*

8. The intended Husband in Consideration of a Marriage, did covenant, promise and agree to and with the intended Wife, that if she would marry him, and she should happen to survive, that he would leave her worth 500 l. the Marriage took Effect, the Wife survived, and he did not leave her worth that Money; she married a second Husband, and he brought an Action of Debt against the Administrator of the first Husband for this 500 l. it was objected upon a Demurrer, that this being a Personal Action, it was suspended by the Intermarriage, which was a Release in Law, and so 'tis extinct; but the Plaintiff had Judgment, for the Action is not suspended, because during the Coverture there was no Cause of Action. *Palm. 99. Thompson versus Clerke.*

9. But if the Obligee her self marries the Obligor, this is an Extinguishment of the Debt, because it would be impossible for a Husband to pay his Wife Money in her own Right; 'tis true he may pay it to her as Executrix. 1 *Salk. 306.*

(D)

Of Marriages prohibited. See (A) pl. 9. (C) pl. 5.

1. **A** Man married his *Wife's Sister's Daughter*; adjudged upon Consideration of the Statute 32 H. 8. cap. 38. that the Marriage was lawful, and not prohibited by the *Levitical Law*. Trin. 2 Jac. C. B. Rot. 1032. *Parson's* or *Peirson's Case*. 1 Inst. 235. 4 Leon. 16. S. C. See 3 Lev. 364. *Honour* versus *Bradshaw*. S. P.

2. But tho' this is not mentioned in the Degrees of the *Levitical Law*, yet because Degrees more remote are prohibited; therefore Anno 33 Eliz. in the like Case, the Parties were divorced. Cro Eliz. 228. * *Man's Case*. Moor 907. S. C. contra. that 'tis not prohibited, because not within the *Levitical Degrees*; which, as my Lord Ch. Justice Vaughan tells us, is no Manner of Reason, for some Marriages must be prohibited which are not mentioned in those Degrees; as the *Father* from marrying his *Daughter*, the *Grandson* from marrying his *Grandmother*, and the *Uncle* with his *Brother* or *Sister's Daughter*; therefore *Man's Case* was held to be within the *Levitical Degrees*; for a Consultation was granted, and the Parties were divorced.

* 4 Lev.
16. S. C.
Vaugh.
Rep. 321.

3. The Law in the 18th of *Leviticus*, ver. 17th, is, *Thou shalt not uncover the Nakedness of a Woman and her Daughter; neither shalt thou take her Son's Daughter, or her Daughter's Daughter, to uncover their Nakedness, for they are her near Kinswomen*: Now 'tis plain, that none of the *Wife's Kindred* are mentioned in this Prohibition, but her *Daughters*, and yet her *Mother* and her *Sister* are both comprehended within the Reason of this Prohibition, for they are likewise her near *Kinswomen*.

4. Prohibition was prayed to the Consistory-Court of the Archbishop of York, where the Suit was to dissolve a Marriage between the Man and his *Wife's Sister's Daughter*; Serjeant Lewinz tells us, it was with his *Wife's Daughter*; and Just. Raymond tells us, it was with his *Sister's Daughter*; and the Serjeant tells us, that a * Prohibition was granted, because this was not within the *Levitical Degrees*; 'tis true, 'tis not so in Words expressly, but 'tis within the same Reason; for in the 14th Verse, the *Nephew* is expressly prohibited to marry his *Father's Brother's Wife*, because she is his *Aunt*, a *pari ratione*, the Man in the principal Case must be prohibited to marry his *Wife's Sister's Daughter*, because he is her *Uncle*. 2 Lev. 254. *Wortley* versus *Watkinson*. 2 Lutw. Rep. 1075. *Snowling & Ux'* versus *Nursey*, S. P. 1 Mod. 25. S. P. 2 Vent. 9, 10.

Raym.
464.
T. Jones
118.
* T. Jones
118. says
a Consultation was
granted.

5. In *Wortley* and *Watkinson's Case*, Justice Twisden cited *Allington's Case*, where it was held, that it was incongruous for the *Nephew* to marry the *Aunt*, because she, who is Superior to her Husband in Point of Parentage, must be then Inferior to him in Point of Marriage; but the Reason is not the same where the *Uncle marries the Niece*, for he is Superior to her in both Respects; therefore, tho' there is the same Propinquity in both these Marriages; and tho' the one is forbidden, yet, for the Reason before mentioned, it doth not follow, that the other must be unlawful, per Twisden. *Allington's Case*.

6. In a Prohibition to a Suit in the Ecclesiastical Court, against a Man for marrying his *Sister's Bastard Daughter*; it was insisted for the Prohibition, that a *Bastard Daughter* was not within any of the *Levitical Degrees* of Consanguinity or Affinity; 'tis true, that Law forbids a Man to approach to any near of Kin; but that can never be intended of *Bastard*, because she is *filia populi*, and by Consequence of Kin to none; to which it was answered, that at the Time when the *Levitical Law* was established, there was no Difference amongst the *Israelites* between a Child born in Adultery, and in lawful Marriage; and therefore amongst them a *Bastard* was esteemed to be *proxima sanguinis*; that 'tis morally as unlawful to marry a *Bastard*, as one born in Wedlock; for 'tis so in Nature, and the *Levitical Law* is founded on the Law of Nature, as well as on a politick Reason to enlarge their Kindred, and to unite their Families; therefore if a *Bastard* doth not fall under the Prohibition *Ad proximum sanguinis non accedas*, a Mother may marry her *Bastard Son*; the Court inclined not to grant the Prohibition. 5 Mod. 168. *Hunnes* versus *Jescott*.

(E)

Of Conditions annexed to Marriage, and other Things concerning Marriage and Portions, &c. See *Action on the Case*. (Q) per totum. *Limitation*. (B) 11.

1. Conditions against marrying generally are void in Law; as where a Legacy of 500 *l* is given to a Woman, *If she doth not marry*, and only 300 *l*. if she doth marry; afterwards she married, yet she shall have the 500 *l*. because the Condition annexed to that Legacy was void.

2. The Father devised 500 *l*. to his Daughter, upon Condition, that if she should not marry *T. P.* then it should be taken from her, and given to the said *T. P.* the Daughter died before she was capable of Marriage, or to give her Consent to marry; adjudged, that this Condition was only *in terrorem*, and that *T. P.* shall not have the 500 *l*. tho' it was devised over to him, because there was no Default in the Daughter. *Godolph. 11.*

3. A Feme sole devised her Lands to *T. P.* and his Heirs; afterwards she married him, and died without Issue; adjudged, that the Marriage was a Revocation of her Will, for that being her own Act, amounts in Law to a Countermand; but *Gould* who reports the same Case, tells us, that the Marriage was not a Revocation of her Will. 5 *Rep.* 61. *Force versus Hembling*. *Gould.* 109. S. C.

4. An Action was brought against a single Woman, who married before the Plaintiff could recover against her; adjudged, that the Action was not *abated* but that the Plaintiff might still proceed to Judgment and Execution against her, and take her likewise in Execution by that Name in which the Action was commenced, notwithstanding it was now changed by her Marriage. *Leak versus Randall*, cited in *Vernon's Case*. 4 *R. p.* 4. See *pl.* 10. S. P.

5. The intended Husband promised, that in Consideration *M. W.* would marry him, that if she survived, he would leave her worth 500 *l*. they married, and the Husband died, but did not leave his Wife 500 *l*. and thereupon she brought an Action against his Executor; it was objected, it did not lie against an Executor, upon a collateral Promise of his Testator; or if the Action would lie, yet it was released by the late marriage; and this was the Opinion of the Lord Ch. Justice *Hobart*; but adjudged, that it was not a Duty whilst the Husband lived, therefore it could not be released by the Intermarriage; so the Action did lie against the Executor. 2 *Cro.* 571. *Clerke versus Thompson*. * *Hob.* 227. *Smith versus Stafford*. S. P. *Postea placito* 8. S. P. *pl.* 11. S. P.

6. The Surrogate to the Archdeacon or Official of *Berks*, cited *Matingley* and *Joan* his Wife into the Archdeacon's Court, being Parishioners of *Cockham* within the Archdeaconery, for living suspiciously as Husband and Wife, not being married, or at least not publicly known, or probable, no Banes being asked in that Parish; neither had they any lawful License so to do; the Defendants appealed to the Audience, and afterwards to the Delegates, and obtained a Prohibition, upon which they declared, that the Construction of Acts of Parliament belongs to the King in his Temporal Courts; then they set forth the Statute 25 *H.* 8. by which the Archbishop is enabled to grant Dispensations in certain Cases, and that on such a Day he had granted them a License to marry without Banes, &c. and so set forth the License in *hac verba*, and bring themselves within the Letter and Meaning of such License; that by Virtue thereof they were on such a Day married by a Curate in *St. Martin's in the Fields*, and that by Virtue thereof they cohabited as Man and Wife, &c. The Surrogate pleaded, that every Ordinary and Official, within their Jurisdiction, might by the Ecclesiastical Laws *ex officio*, and without any Presentment, enquire, and had Consuance of all Adulteries, Fornications of Persons who lived suspiciously in Adultery, &c. and to cite them to answer such Crimes, or to acquit them thereof, or to punish them by the Ecclesiastical Censures, if found guilty; and that by the Ecclesiastical Laws none ought to marry without Banes being asked, unless lawfully licensed by the Ordinary; and if any Person should do to the contrary, then the Ecclesiastical Judge, in whose Jurisdiction the Offenders lived, might cite them to answer, &c. and if they had a License, then to enquire whether it was sufficient, or whether the Marriage was had pursuant to such License; and that the Archbishop in his Province, and every Ordinary, within his Jurisdiction, might grant Dispensations in such Cases; and that the Plaintiffs were Parishioners of *Cockham*, within the Jurisdiction of the Archdeacon of *Berks*, and not married, &c. and that they lived and cohabited as Husband and Wife suspiciously, no Banes being published of their Marriage there, nor any Certificate, that they were married with a License elsewhere, (if they had any such License) and to shew Cause why they so cohabited *prout et bene licuit*; and therefore he prayed a Consultation; the Plaintiffs replied, that the Surrogate, after the said Marriage, had Notice thereof, as well by Certificate, as by the Testimony of several Persons on Oath, *cujus pretextu* they cohabited as Husband and Wife, and traversed, that they cohabited suspiciously. To this Plea the Plaintiffs demurred, and a Consultation was granted, *Ita quod non agatur de potestate Archiepiscopi* to grant Licenses pursuant to the Statute; and in this Case it was adjudged, that where any Persons marry without publishing the Banes, or without License, they may be cited in the Ecclesiastical Court; that the Consu-

fance of the Sufficiency of Licenses, and the Provisoes and Conditions therein, and whether sufficient Notice thereof was given, or not, are examinable only in the Ecclesiastical Court; and that no Prohibition lies in such Case; but the Remedy is by Appeal, if they are adjudged to be irregular; but a Prohibition will lie if they adjudge there, that the Archbishop has not a Power to grant Licenses; but if they allow the License in Point of Power, and disallow it as to the Form, no Prohibition will lie; for tho' the Power to grant a License is given by the Statute, which is temporal, yet the License it self is still an Ecclesiastical Thing, and the Examination of the Circumstances thereof, as to the Form and Notice, &c. are examinable in that Court. *W. Jones* 257. *Matingley versus Martin*.

7. *Sir Edw. Greaves* made a Settlement in Marriage to the Use of himself and his Wife for Life, Remainder to the first Son of that Marriage in Tail Male, Remainder to Trustees for forty Years, Remainder to himself in Fee; the Trust of this Term was declared to be, that in Case *Sir Edward* should die without Issue Male of his Body on the Body of his Wife, then the Trustees should raise 500 *l.* for Daughters Portions, payable at the Age of twenty-one or Days of Marriage, with a Provision for their Maintenance in the mean Time; the Wife died without Issue Male, but leaving two Daughters; and by three Judges in *B. R.* it was resolved, that the Right to the Portions was vested in the Daughters by the Death of their Mother without Issue Male, and this in the Life-time of their Father; for otherwise he might live so long that the Portions would be of little Use to them to advance them in Marriage. *T. Jones* 201. *Greaves versus Mat-tison*.

8. A Man intending to marry such a Woman, covenanted, that if she would marry him, and should sur-vive, that then he would give 300 *l.* to her next of Kin, and he entered into a Bond to a third Person for the Performance of this Covenant; it was insisted for the Defendant in an Action of Debt brought against him for this 300 *l.* that tho' this was a future Covenant, which could not be broken in the Life-time of the Parties, yet it might be released; and if so, then the Marriage was a Release in Law, and by Consequence the Debt was extinct; but adjudged, that the Marriage is not a Release, nor so much as a Suspension of the Debt, because nothing is due during the Coverture, for the Debt arises by the Death of the Husband. 2 *Sid.* 58. *Lupart ver-sus Hoblin*. See *Het.* 12. *S. P.* See *pl.* 5. *S. P.* *pl.* 11. *S. P.*

9. Debt upon Bond of 1000 *l.* against the Executors of *Thomas Thinn* Esq; conditioned, that *Mr. Thinn* should pay the Oblige 500 *l.* within three Months after he should be married to the Lady *Ogle*, she being a Widow of great Fortune and Honour, being the Daughter and Heir of *Joseline Peircy*, the late Earl of *Northumberland*; the Plaintiff had a Verdict, whereupon a Bill in Chancery was brought by the Defendants, suggesting, that the Bond was void, it being made for procuring the said Marriage; and at the Hearing of the Cause, it was insisted, that nothing was done by *Mrs. Potter*, the Oblige, but advising *Mr. Thinn* to apply himself to one *Brett*, who had a great Interest in this Lady, and some small Matter laid out in treating *Mr. Thinn*, and so no Consideration for this Bond; or if it was, yet, it being a Contract for procuring a Marriage, 'tis of dangerous Consequence, and ought to be set aside in Equity, and several Precedents were produced for that Purpose; but those were where Fraud and some Circumventions have been used, which was not in the least pretended in this Case; besides, the Marriage was suitable in every respect, both for Birth and Fortune; and a Case was cited between *Foster* and *Ramsay*, tried before *Holt* Ch. Just. where the Defendant promised the Plaintiff 50 *l.* if he would procure *Ramsay* a Widow to marry him, and the Plaintiff recovered the 50 *l.* in Damages; and so the Lord Keeper in this Case dismissed the Bill, and discharged an Order made by the Master of the Rolls to the contrary; but upon an Appeal to the House of Lords, that Decree of Dismission was reversed, and the Bond was decreed to be void, for that such Contracts concerning Marriages are not to be allowed. 3 *Lev.* 411. *Hall & al* versus *Potter*.

10. A Feme Sole gave a Warrant of Attorney to confess a Judgment, and then marries, the Plaintiff may file a Bill, and proceed to Judgment against Husband and Wife. *Shower Rep.* 91. See *pl.* 5. *S. P.*

11. The intended Husband gave Bond to the intended Wife, conditioned, that if he married her, then his Heirs, Executors, or Administrators, should pay to her 500 *l.* after his Death; afterwards he married her, and she survived; two Judges against the Opinion of the Chief Justice *Holt*, that the Action was not released by the Marriage; there was no Cause of Action whilst the Coverture continued, for that did not arise till after the Death of the Husband, and then his Bond remained in Force to the Widow; but a Writ of Error being brought in the Exchequer-Chamber, upon the Opinion of the Chief Justice; and the Plaintiff in Error perceiving that the Court inclined to affirm the Judgment, proceeded no farther. *Mich.* 11 *Will.* 3. *Acton* versus *Gage*. 1 *Salk.* 325. See *Moor* 855. *Dyer* 140. *Telv.* 156. 2 *Cro.* 222. *Hob.* 216. 2 *Cro.* 571. 170. *Hutt.* 17, 171. *Palm.* 99. 5 *Rep.* 70. *B. Litt. Rep.* 32. *Hutley* 12. *Nov* 26.

12. Warrant of Attorney given to a Feme Sole to confess Judgment; she married; adjudged, that this Authority given to her is not altered or revoked by the Marriage; but she may enter up Judgment, because 'tis for the Benefit of her Husband; but if she had given a Warrant of Attorney, and afterwards married, 'tis a Countermand of it, because 'tis to charge her Husband. 1 *Salk.* 117.

13. A Man had three Daughters, *Margaret* married to *Gould*, *Elizabeth* married to *Franklyn*, and *Rebecca* married to one *Heydon*; this *Rebecca* left 180 *l.* in the Hands of her Brother-in-law *Gould*, and took his Bond payable to her other Brother-in-law *Franklyn*, but for her Use, and

died; afterwards her Husband administered, and *Gould* and his Wife sued to repeal it, suggesting, that he was never married to *Rebecca*, for they were *Sabbatarians*, and married in their own Congregation, by one who was a meer Layman and not in Orders, but they lived together as Man and Wife as long as she lived, which was seven Years after this Marriage; and now this Administration to her Husband was repealed, and a new Administration granted to *Margaret Gould*, which was affirmed upon an Appeal to the Delegates; for since the *Husband* demanded a Right due to him by the Ecclesiastical Law as *Husband*, he must prove himself a *Husband* according to that Law, to entitle him to it; and tho' the Wife, who is the weaker Sex, and the Children of this Marriage, who are in no Fault, might entitle themselves to a temporal Right by such Marriage; yet the Husband, who is actually in Fault, shall never entitle himself by the bare Reputation of a Marriage, unless he hath a real and substantial Right; for this Marriage is not a meer Nullity, because by the Law of Nature the Contract is binding; and tho' the positive Law of Man ordains Marriage to be made by a Priest, yet that Law only makes this Marriage *irregular*, but not void, unless the positive Law of Man had expressly ordained it to be void. 1 *Salk.* 119. *Heydon versus Gould.* See Stat. 3 Jac. 1. cap. 5.

14. Feme Sole seised in Fee upon her Marriage with *T. S.* made a Lease to Trustees for 100 Years, in Trust to him for Life, then to her for Life, Remainder to the Issue of that Marriage, Remainder to her self, her Executors and Administrators; the Husband died without Issue, the Widow married again, and then she died; the Question was, whether this Term should attend the Inheritance, or should go to the second Husband as a *Term in Gros*s; adjudged, that it shall attend the Inheritance, because the Trust for which it was raised was absolutely determined by the Death of the first Husband, without Issue. 1 *Salk.* 154. *Best versus Stamford.*

15. Husband and his Wife exhibited a Bill against her Father for raising her Portion out of a reversionary Interest of a Term for Years expectant upon the Father's Death: The Case was, the Father made a Settlement on his Marriage to the Use of himself for Life, &c. Remainder to Trustees for 500 Years, Remainder to the Heirs Males of his Body on his intended Wife; and for Default thereof, and if there should be one or more Daughters of their two Bodies, which should be unmarried, or not provided for at the Time of his Death, such Daughter, if but one, should have 2000 *l.* and 20 *l.* per Annum out of the Profits, &c. for her Maintenance till the Portion became due, which was payable at the Age of eighteen Years, or Day of Marriage; and a Power to the Trustees to raise it, either by Mortgage or Sale of the Term for 500 Years; afterwards the Wife died without Issue Male, leaving one Daughter, and no more, who was above the Age of twenty-one Years, and married to the Plaintiff; and the Question before the Lord Chancellor *Cowper* was, whether the Trustees could raise this Portion in the Life-time of the Father; and it was resolved, that tho' a Term is limited in Remainder to commence after the Death of the Father generally, or in Case he die without Issue Male of his Wife, and she dies first without such Issue, leaving a Daughter, that the Term is saleable in the Life-time of the Father, when the Daughter is eighteen Years old, or married, because every Thing happened and is past, which is contingent in the Case, for 'tis impossible that there should be Issue Male of the Wife, because she is dead; and as to the Father's Death, that is not contingent, but certain, because all Men must die; thus far the Court have gone for the Conveniency, that young Women may have their Portions when they most want them: But in the principal Case, the Daughter must be unmarried, or not provided for at the Time of her Father's Death, which is a Contingency not yet happened, therefore it doth not come within the Reason before-mentioned; and as for the 20 *l.* Maintenance, that must be intended in Case the Father die without Issue Male, leaving a Daughter under the Age of eighteen, and unmarried, for otherwise she must have it in the Life of her Father, out of the Profits of a Term for Years, which doth not commence till he is dead, which would be very absurd. 1 *Salk.* 159. *Corbett & Un' versus Maidwell.*

16. Articles in Marriage, and amongst the rest one was, that the intended Husband should, within two Days after his Marriage with the intended Wife, release her Guardian of all Accounts of the meane Profits of her Estate; it was decreed by the Lord Chancellor *Cowper*, that this Covenant shall be set aside, being extorted from the Husband, who could not have the Daughter but upon these Terms, for where-ever a Parent or Guardian insists upon private Gain or Security for it, and obtains it, 'tis wrong, for they ought not to use their Power for any such indirect Purpose; that 'tis now a settled Rule in Equity, if the Father, on the Marriage of his Son, rake a Bond to pay so much, 'tis void, being taken by Compulsion whilst under his Awe. 1 *Salk.* 158. *Duke of Hamilton versus Lord Mohun.*

17. 'Tis likewise a Rule in Equity, that where the Son, without the Privity of the Parent treating of a Match for him, gives a Bond to return any Part of the Marriage-Portion, 'tis void. 1 *Salk.* 156. *Kemp versus Coleman.*

18. Devise to his eldest Daughter, upon Condition she marry his Nephew (naming him) on or before she was of the Age of twenty-one Years: The Nephew died very young, and the Daughter never refused to marry him, nor was ever required; but afterwards, about seventeen Years old she married *T. S.* adjudged, this Condition was not broken, because it was impossible to perform it, being made so by the Act of God; and *B. R.* affirmed this Judgment. 1 *Salk.* 170. *Thomas versus Howell.*

19. By the Statute 29 Car. 2. cap. 3. An Executor or Administrator shall not be charged upon any Agreement in Marriage, unless put in Writing.

Marshal and Marshalley.

(A)

1. **T**HE Marshal of the King's House had a Special Authority to hear and determine all Suits between those of the King's Household and others within the Verge; and this he did in a Court, which from his Name of Office was called the *Marshalsey*; and therefore where an Action of Trover was brought in that Court and Judgment obtained, and afterwards a Writ of Error brought, that Judgment was reversed, because neither of the Parties were of the King's Household; 'tis a Court which may hold Plea in *Trespafs*, *Contracts* and *Covenants*, but not in any Thing which concerns the Freehold or Inheritance; and in Actions of Trespafs within the Verge, 'tis sufficient if one of the contending Parties is of the King's Household; but in Actions founded upon Contracts or upon Covenants, both Parties ought to be of the Household; and therefore where Trespafs was brought in the *Marshalsey*, no other Error was assigned on the Judgment, but only, that none of the Parties were of the King's Household, and for that Reason the Judgment was reversed. 6 Rep. 21. *Mitchelborne's Case*.

2. In an Action on the Case upon *Assumpsit* brought in the *Marshalsey*, where neither of the Parties were of the King's Household, the Plaintiff had Judgment; and by Virtue of a Precept, in the Nature of a *Capias ad satisfaciendum*, the Defendant was taken in Execution, who thereupon brought an Action of False Imprisonment against the Officer; and adjudged, that it was well brought, because, where all the Proceedings are *coram non judice*, as they were in this Case, where none of the Parties were of the King's Household, there the Officer is not bound to obey them, for they are no more Judges of the Cause than a Stranger; but where the Court hath Jurisdiction of the Cause, and they proceed *inverso ordine*, there an Action will not lie against the Officer; but 'tis otherwise where they had no Jurisdiction, as in the principal Case. 10 Rep. 68. *Case of the Marshalsey*.

1 Brownl.
199. S. C.
2 Brownl.
186. S. C.

3. As to the Antiquity and Dignity of the Court of *Marshalsey*, the old Books tell us, 'tis one of the most antient Courts of the Kingdom, it followeth the Person of the King, tho' in *alieno Regno*; for our King being in *France*, did Justice upon his Subjects who committed Offences within the Verge of his Court; and the Difference between the Court of King's Bench, which is superior in Dignity, and this Court, is, that the one is *coram Domino Rege*, and the other *sequitur personam Regis*. Hill. 5 Jac. *Cox versus Grey*. 1 Bullst. 208.

Godb.
184. S. C.

4. In an Action on the Case for Disturbing the Plaintiff to execute the Office of Marshal of the King's Bench, granted to him by Patent for Years; the only Question was, whether such a Patent was good, and adjudged that it was not; for it being an Office of Trust and Confidence, and of Attendance in Court, several Inconveniencies would follow, if it should be granted for Years; and as to the Objection, that it may be as well granted for Years as it may be granted in Fee or in Tail, for even in such Case there may be a greater Inconvenience than in the other, for it may descend to an Infant; to which it was answered, that the Court might put in a fit Person till the Infant came of Age. Mich. 16 Car. Cro. Car. 425. *Mead versus Sir John Lenthall*. See *Sir Geo. Reynolds's Case*. Office. (B) S. P.

W. Jones
463.

Master and Servant.

Where the Master shall be charged for his Servant, and for the Acts of his Servant. (A)

Where the Master shall not be charged by the Act of the Servant, nor have an Action for his Work; and where

the Servant shall have an Action against his Master. (B)

Where the Master shall have an Action against his Servant, and for a Wrong done to his Servant, & *econtra*. (C)

(A)

Where the Master shall be charged for his Servant, and for the Act of his Servant.

1. **I**N *Assumpsit*, &c. against the Master, the Evidence was, that where there is a Factor to a Merchant to buy Tin, and he hath usually bought that Sort of Ware, and nothing else, and afterwards he buyeth other Sort of Commodities for his Master, and promisseth to pay for them, the Master shall be charged. *Goldf.* 137. *Petty versus Soan*.

2. The Master having counterfeit Jewels, sent his Servant with them to *B. G.* in *Barbary* to sell, who sold them to the King of *Morocco*, and the Cheat being discovered, the said *B. G.* was imprisoned in *Barbary*, and afterwards *B. G.* brought an Action on the Case against the Master, and adjudged, that it lies. 2 *Cro.* 468. *Southern versus Howes*, *Poph.* 143. *S. C.* *Bridgman* 128. *S. C.* See *Davenport versus Simson*. *Bridgman* 127. *Cro. Eliz.* 520. *S. C.*

3. The Master having covenanted to teach his Apprentice, and to keep and employ him in the Art of Surgery *sent him beyond Sea*, &c. and adjudged, that an Action did lie against him. *Hob.* 134. *Coventry versus Woodhall*. 1 *Brownl.* 67. *S. C.*

4. The Master delivered Money to his Servant to buy Provisions for the House, which were afterwards bought by the Servant in the Master's Name, but he did not pay the Money; and the Action was brought against the Master, who would have waged his Law; but adjudged he could not safely do it, because the Provisions came to his Use, and therefore he is chargeable for them, and must take his Remedy against his Servant; but if a Master forbids a Tradesman to deliver any Goods to his Servant, without Money, in such Case, if the Action is brought against the Master, he may wage his Law, as it was adjudged in *Sir Henry Compton's Case*. *Pasch.* 10 *Jac.* 1 *Brownl.* 64.

5. If a Bailiff sells Corn for the Master, he, (*viz.*) the Master shall have an Action of Debt for the Money; so if he sell a Horse with Warranty, 'tis the Sale of the Master, but the Warranty of the Servant. *Godbolt* 360. *Signior versus Woodmore*.

6. *Assumpsit* by the Plaintiff against a Master of a Ship, setting forth a Custom, to have of every Master, &c. 8 *d. per Tun* for every Tun of Cheese brought to the Port of *London*, &c. and so brings himself within the Custom; after a Verdict and Judgment for the Plaintiff, and a Writ of Error brought, it was assigned for Error, that this Action did not lie against the Master, for the Duty arises from the Owners; but adjudged, that it lies against the Master; for he being intrusted with the Goods, hath a Reward from the Owners for carrying them, and is responsible for them, and therefore shall be charged with the Duty, especially since the Goods are in his Possession; and it would be very inconvenient to seek for every Owner. 3 *Lew.* 37. In the Mayor of *London* and *Hunt's Case*.

7. In *Trover*, the Case was, Sheep were sold to one *Mires*; and one *Marwood* pretending a Property to them, brought a Replevin, and the Defendant, who was his Servant, did, by his Order and Command, drive the Sheep into *Marwood's* Grounds and there left them, and *Mires* demanded the Sheep of the Defendant (the Servant) who refusing to deliver them, brought an Action of *Trover* against him; and the Question was, whether this Action would lie against the Servant: *Et per Curiam*, In *Trover* 'tis necessary to prove a Property in the Plaintiff, and a *Trover* and Conversion in the Defendant; but this Action will not lie against the Defendant, being a Servant; for what he did was in Obedience to his Master's Commands; and tho' he had no Property in the Sheep, yet he shall be excused; besides, 'tis not found by the Verdict, that the Servant converted the Sheep to his own Use; 'tis true, they found a Demand and Refusal, but that will not amount to a Conversion; but in this Case there could be no Conversion, unless the Driving the Cattle by Virtue of the Replevin will make it so; but at that Time the Sheep were *in custodia Legis*, and the Law will preserve the Changing of any Property; and if no Property was changed, then there could be no Conversion. 2 *Mod.* 241. *Mires versus Solebay*.

8. Debt upon Bond, conditioned to deliver forty Pair of Shoes *within a Month*, at *Holborn-Bridge*, to *Henry Knight* a Common Carrier, for the Use of (the Plaintiff) the Obligee; the Defendant pleaded, that in all that Space of a Month *Henry Knight* did not come to *Holborn-Bridge*, but that on such a Day, he (the Defendant) did, at *Holborn-Bridge*, deliver forty Pair of Shoes to the Carrier's Porter; and upon a Demurrer to this Plea, it was insisted, that it was ill, because the Condition being to do an Act to a Stranger, the Obligor at his Peril ought to perform it: *Sed per Curiam*, the Delivery to the Servant is a Delivery to the Master himself; and if after such Delivery the Goods are lost, an Action lies against the Master, (*viz.*) against the Carrier. Cro. Eliz. 716.

2 Mod. 309. *Staples versus Alden*.

9. Case, &c. against two Part-Owners of a Ship, a Special Verdict was found, that the Defendants, and two more, were Part-Owners of this Ship, which was under the Care of a Master, to whom the Goods were delivered, and in his Default were spoiled; it was insisted for the Plaintiff, that this being an Action grounded on the Wrong, it may be brought against all, or any of the Proprietors; but adjudged, that this was an Action *quasi ex contractu*, and that it was not the Contract of one, but of all the Owners, and that there was no other Wrong but a Breach of Trust, for which all are answerable; and this in Respect of the Freight, and as employing the Master; for whoever employs another is answerable for his Care or Neglect; all the Owners are equally entitled to the Freight; 'tis true, either the Master or the Owners may bring the Action; but if 'tis brought by the Owners, they must all join; therefore when 'tis brought against them, they must all be joined. 2 Salk. 440. *Boson versus Sandford*. 3 Lev. 258. 3 Mod. 321.

10. The Servant of a Pawn-Broker took a Pawn; afterwards he who pawned the Goods tendered the Money to the Servant, who replied, that the Goods were lost, and thereupon the Owner brought on Action of Trover against the Master; and adjudged good. 2 Salk. 441. *Jones versus Hart*.

11. Adjudged, that where the Servant of *T. P.* with his Cart run against another Cart, and overturned it, and staved a Pipe of Sack, the Action lies against the Master; so where a Servant run the Cart against a Boy, and hurt him, the Boy shall have an Action against the Master; so in *Lane and Cotton's Case*, a Letter with Bills in it, was delivered in the Post-Office to a Servant, the Action lies against the Post-Master, if the Letter miscarry. 2 Salk. 441. In the Case of *Jones versus Hart*.

12. An Order was made for Payment of Wages, reciting, that *T. P.* and *W. R.* were retained by *London* the Gardener, who was *Overseer of the Works in the Garden in Hampton-Court*, at so much by the Day, and that they had worked there so many Days; therefore it was ordered, that *London* should pay them; adjudged, that if the Order had been general, to pay so much to two Labourers, or to two Servants, the Court would have intended them Servants in Husbandry; but that the Statute did not extend to Gentlemens Servants, nor to Journeymen and their Masters. 2 Salk. 442. *The King versus London*.

13. An Order was made on the Master, reciting, that whereas 42 s. was due from him to *T. P.* for Work and Labour in Husbandry, they order him to pay the same; it was objected, that this doth not appear to be Statute Wages, and in such Case only the Justices have Power; adjudged, that tho' the Statute gives them only Power to set Rates for Wages, and not to order Payment; yet grafting upon that Power, they have also ordered Payment of Wages, and the Courts of Law are favourable in Point of Remedy for Wages; as in suffering the Court of Admiralty to proceed for Seamen's Wages; and therefore in this Case they will intend it such Wages as are within the Statute. 2 Salk. 441. *The King versus Gouche*.

14. The Master sent his Servant to receive 50 l. upon a Note of one *B.* who went with the Servant to *Sir Stephen Evans*, a Goldsmith, who endorsed off 50 l. upon another Note which *B.* had upon him, and then gave a Note of 50 l. to the Servant, who carried it to the Master; but this Note being drawn on *Wallis*, another Goldsmith, the Servant went to him the next Day, and he refused to pay it, and broke on that very Day; and *Sir Stephen Evans* refusing the Note, and to pay the Money, an Action was brought against him by the Master; adjudged, that *Sir Stephen Evans* received the 50 l. and that the Act of the Servant in receiving the Note of him, instead of Money, did not bind the Master, unless he acted by his Authority; now in this Case the Servant did not Act by the Authority of the Master, for he received a Bill instead of Money, and as soon as the Master knew it, he disagreed to it; but Acquiescence, or a small Matter, would have proved him consenting: Now a Goldsmith's Note is no Payment, 'tis only Paper, and received conditionally, if paid, and 'tis not otherwise, unless there is an express Agreement to receive it as Money, and that the next Day is a reasonable Time to demand it. 2 Salk. 442. *Ward versus Evans*. Mod. Ca. 36.

(B)

Where the Master shall not be charged by the Act of his Servant, nor have an Action for his Wrong; and where a Servant shall have an Action against his Master, &c.

1. **A** Servant gave a Bill under his Hand, but not under Seal, reciting, the buying Goods for the Use of his Master, by which Bill he bound himself to pay the Debt, but the Money being not paid, the Plaintiff brought an *Action of Debt* against the Servant; but adjudged, that it did not lie, but an *Action on the Case*; for it was the Debt of the Master, and the *Assumpsit* only of the Servant. *Trin. 6 Eliz. Dyer 23. Alford's Case.*

2. The Master declared upon an Agreement with B. G. that he should retain his Servant to work *capiendo inde pro salario suo* so much, & after Judgment for the Plaintiff, and Error brought, it was assigned for Error, that the Master could not have an *Indebitatus Assumpsit* for the Retainer of his Servant to work with the Defendant; for 'tis not alledged, that he did the Service for his Master, but rather for himself; for the Declaration was, that the Servant should have so much *pro salario suo*, and the Retainer and Contract was made with him; but if it had been the Retainer of the Master, to do the Work either by himself, or Servant, then he ought to have declared accordingly, (*viz.*) that the Defendant retained the Master by himself, or Servant, to work. 2 Cro. 653. *Trefwell versus Middleton.* See Verdict. (C) 15. S. C. 2 Roll. Rep. 269. S. C.

3. The Master borrowed Money, and the Servant gave the Receipt thus, ff. *Memorandum*, I have received of L. E. to the Use of my Master T. IV. the Sum of 40 l. to be paid at Michaelmas next, and the Action was brought against the Servant; and adjudged, that it did lie, for tho' the first Part of the Bill mentions the Receipt to the Use of another, yet, when it says, *to be paid*, 'tis general, and doth not say to be repaid by my Master. *Yelv. 137. Talbot versus Godbolt.* Mich. 6 Jac. 1. *Browl. 103. S. C.* This was Serjeant Gawdy's Servant.

4. By the Statute of Labourers, Anno 5 Eliz. several Persons were compellable to serve by the Head Officers of Towns Corporate, or by the Justices of the Peace; now where such a Person is voluntarily retained by a Master, by and with the Consent of the Servant, who might otherwise be compelled to serve; there an Action of Debt will lie against the Executor of the Master, for the Wages, because in such Case the Master himself could not have waged his Law if he had been living. *Moor 698. Gomersfull versus Watkinson.*

5. In a Prohibition to the Admiralty, the Case was, That the Plaintiff in the Prohibition being Owner of a Ship, fitted her out to Sea with Letters of Marque, to take the Goods of the Spaniards, who were then Enemies to the Queen; afterwards the Sailors without the Direction of their Master and Owner, took a French Ship, the French then being in Alliance with us; and thereupon they prosecuted the Master in the Court of Admiralty, for Restitution of their Goods; and upon a Demurrer to the Prohibition, the Ch. Jult. held, that where a Master sends his Servant to do what is not lawful, he shall answer for him, tho' he mistakes in doing the Act; but where he sends him to do what he lawfully may, there, if he mistakes, the Master shall not be answerable. *Moor 776. Waltham Mulgar. Moor 786. Lady Ruffel versus Earl of Nottingham, S. P.*

(C)

Where the Master shall have an Action against his Servant, and for a Wrong done to his Servant, and econtra. See *Ac. Case.* (H)

1. **T**HE Servant having a Sum of Money of his Master's in his Hands, B. G. by a counterfeited Letter from the Master, got the Money paid to him by the Servant; for which Deceit the Master brought the Action, and adjudged good. See *antea Tit. Action on the Case, in Tit. Deceit. Tracy versus Veale.*

2. The Servant was robbed of his Master's Money in an Inn, and the Master brought the Action against the Inn-keeper; and adjudged good, and the Judgment affirmed in the Exchequer-Chamber. 2 Cro. 224. *Beedle versus Morris.* *Yelv. 162. S. C. Co. Entries 347. S. C.*

3. The Servant was robbed of his Master's Money, and some of his own, and the Servant sued the Hundred alone, and had a Verdict for his own Money; but it was Specially found for the Money of his Master. 1 *Browl. 155. Needham versus Inhabitants of Stoke.*

4. In Trespas *Quare vi & armis cepit & abduxit* his Servant at L. in the County of Surrey, and that having Notice that he was the Plaintiff's Servant, retained him; adjudged, that the Declaration was ill, for the Receiving and Retaining of a Servant cannot be *vi & armis.* *Winch 51.*

5. In Trespafs of Affault and Battery, the Defendant justified in Defence of his Servant ; and upon Demurrer adjudged, that the Plea in Bar was good, for the Master may defend his Servant. *Owen* 15. *Seaman* versus *Cuppledick*.

6. Trespafs by the Matter for an Affault on his Servant, by giving him a box on the Ear ; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration was ill ; for the Plaintiff had not alledged *per quod servitium amisit*, and for this Cause the Judgment was stay'd. 1 *Bull.* 163. *Trin.* 9 *Jac.*

7. Trespafs brought by the Master against his Seavant, who was entrusted to sell Cloth in his Shop, but he converted some of it to his own Use ; adjudged, that the Action would lie, for the Servant had only the *Possession for the Use of the Master* ; he had neither a general or special Property by the Delivery of it, to deliver over to another, and therefore the Master might maintain the Action for Taking it out of his Possession. *Moor* 248.

8. Debt upon Bond conditioned for quiet Enjoyment, &c. the Breach assigned was, That the Obligor entered, and cut down 5 Trees, upon which they were at Issue, and the Jury found, that the Servant of the Obligor entered, but in his Presence, and by his Command, and cut the Trees ; adjudged for the Plaintiff, for the Master was the principal Trespasser. 4 *Leon.* 123. *Seaman* versus *Browning*.

9. Case by a Master against his Servant, in which he declared, that by a Charter-Party, he covenanted to sail from *England* to *India*, and that he nor his Servants should bring from thence any Callico ; that he retained the Defendant in his Service for this Voyage, and acquainted him with his Covenants, and that he intending to make the Plaintiff forfeit, &c. did *false & fraudulenter* bring from *India* in the said Ship, certain Callicoes, &c. after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that an Action would not lie against a Servant for the Breach of his Master's Command ; which is very true ; but if the Servant will *false & fraudulenter* be guilty of a Breach of Trust, an Action will lie against him. *Sid.* 298. *Hussey* versus *Pusey*. 1 *Lev.* 188. S. C.

Delius Inquirendum. See *Inquest of Office*.

Merchants.

(A)

1. **B**Y the Civil Law *Average* is not due, unless the Goods were lost to preserve the rest in the Ship ; as where the Goods of one Merchant are thrown into the Sea, *causa Levandi navis*, in such Case all the other Merchants shall pay *Average* ; or if Part is given to a *Pyrate*, by way of Composition to save the rest. *Moor* 297. *Hicks* versus *Palington*.

Merger. See *Leases for Years.* (E) per totum.

Miscasting, where it shall not vitiate. Bonds. (I) Covenant. (O)

Misnomer.

In the Names of the Parties. (A)
In the Name of Dignities. (B)
In the Name of Jurors. (C)

In the Name of the Places and Possessions of a certain Person. (D)
In the Name of Corporations. (E)

(A)

In the Names of the Parties.

1. **T**HE Brother brought an Appeal of the Death of his Brother against *John Edmonds of Lambeth*, as Principal, and *L. E.* as Accessary, whereas in Truth the Christian Name of the Principal was *Thomas*, and not *John*; the Accessary appeared, and pleaded, that there was no such Man as *John Edmonds in rerum natura*, at the Time of the Writ brought, or after; adjudged, that the Plea is good. *H. 13 Eliz. Dyer 349.*

2. If *William Abbot of Worcester* purchaseth a Writ by the Name of *Thomas Abbot of Worcester*, the Writ shall abate; but if he, with the Consent of the Convent, make a Grant by the Name of *Thomas Abbot of Worcester*, when his Name is *William*, 'tis good, because there is a sufficient Certainty of the Name of the Grantor, viz. *Abbot of Worcester*, & nil facit Error nominis cum constat de persona.

3. A Feoffment was made to *Joan*, and she made a Lease by the Name of *Jane*; adjudged, that *Joan* and *Jane* are the same Name. 1 *Leon. 146. Head versus Challoner. See pl. 4. S. P. pl. 8. S. P.*

2 Roll.
Rep. 144.
Becken-
fall v.
Western.

4. Husband and Wife made a Lease by the Name of *Sybel*, reserving Rent; and Debt was brought against her by the Name of *Isabel*; and upon an Execution the Sheriff returned, that he had extended a Moiety of the Rent due to *Isabel*; adjudged, that the Recovery against *Isabel* was void against *Sybel*. *Cro. Eliz. Walsall versus Heath. Palm. 71. Skelsal versus Westmorland, S. P.*

5. Indenture was made between the Plaintiff of the one Part and *Robert Pitman* of the other Part, in which there were mutual Covenants to be performed on each Side; in an Action of Covenant the Defendant pleaded, that *Thomas Pitman* had executed a Release to him of all Actions, and so mistook *Thomas* for *Robert*; adjudged ill, and that it could not be mended. *Cro. Eliz. 57. East versus Steven.*

6. The Name of the Plaintiff was *William*, who brought an Action against *John* as Executor of *L. E.* the Defendant pleaded *plene Administravit*; the Plaintiff replied, *quod prad' Willielmus habet Bona, &c. & prad' Johannes similiter*; it being found for the Plaintiff, it was adjudged, that this was only a Misprision of the Clerke, and amendable. 2 *Cro. 67. Britton versus Mawdale.*

7. *George Greisly* entered into a Recognisance by the Name of *George Greisly, Esq;* and was afterwards created a Baronet, and a *Capias* was issued out against him by the Name of *George Greisly*, as it was in the Statute; but adjudged ill, for it should be *Capias Corpus Georgii Greisley Mil' & Baronetti qui per nomen Georgii Greisley Ar' recogn'*. *Hob. 109. Sir George Greisley's Case.*

8. Adjudged, that *Peter* and *Peirs* are one and the same Name. 2 *Cro. 425. Griffith versus Middleton. See antea pl. 3. S. P.*

Palm.
286.

9. Debt upon a Bond against *Edmund Sheppard*, who was bound by the Name of *Edward*, but had subscribed his true Name *Edmund*; adjudged, that tho' 'tis subscribed by his true Name, yet that is no Part of the Bond. 2 *Cro. 640. Maby versus Sheppard*; and *Watkins versus Olliver, 558. S. P. Godb. 382. S. P. Dyer 279. S. P.*

10. *Assumpsit, &c.* in Consideration the Plaintiff would be Bail for one *W. R.* in a Suit in the Sheriffs Court in *London*, commenced there against him by one *Adderby*, the Defendant promised to give him harmles, &c. Upon *Non Assumpsit* pleaded, the Jury found a Special Verdict, that the Defendant *Assumpsit* by the Name of *Adderby*, and that the Suit against *W. R.* was commenced against him by *Adderby*, and that the Plaintiff was Bail to that Suit, but that the Declaration was by the Name of *Adderley*, and so were all the Proceedings afterwards, and the Judgment against *Adderley*; so that the Plaintiff was not damnified by being Bail for *W. R.* at the Suit of *Adderby*. *Moor 407. Adderby versus Boothby.*

11. In Ejectment, the Issue was, whether *Jemet*; the Wife of the Defendant, was living on such a Day, or not; and the Jury found, that *Julian*, the Wife of the Defendant, was then living; adjudged, this could not be intended the same Person, unless they had also found a Custom in that Country to call Women *Jemet* who were baptised by the Name of *Julian*. *Moor* 411. *Huntbage* versus *Sheppard*.

12. The Defendant was taken upon a *Capias Excom'* and moved to be discharged, for that it was against one *Bromfeild*, but his Name was * *Bonnifeild*; ruled, that he had no Day in Court to plead this Matter, and that he could not be bailed, he must bring an Action of False Imprisonment. 1 *Mod* 70. *Bonnifeild's* Case. * See 2 Roll. Rep. 168.

13. *Indebitatus Assumpsit* against two Defendants, one of them was outlawed, and the other pleaded a *Misnomer* of his Companion, who was outlawed, (*viz.*) that there are in *London* two *Whitfeild Hayters*, and both of them Goldsmiths, and that the *Whitfeild Hayter*, who was outlawed and named in the Writ, was the *Junior* of the Two; and he averred his Plea *unde ex quo* it doth not appear by the Writ against which of them it was brought; the Defendant *petit judicium de brevi illo*; and upon a Demurrer to this Plea the Plaintiff had Judgment, that the Defendant should answer over, because a *Misnomer* must be pleaded by the Party himself, who is misnamed, and not by another, as in this Case. 1 *Lutw. Rep.* 35. *Shovell Mil'* versus *Evanoe & Hayter*.

14. Debt against the Defendant by the Name of *Sir William Hicks Knight and Baronet*, who pleaded in Abatement, that he was never knighted, and having put in Bail by the Name of *W. H. Baronet*, the Plaintiff could not amend his Declaration, but must arrest him again. 1 *Vent.* 154. *Sir William Hicks's* Case. 4 Leon. 102. Barlow & Peirson.

15. Case for Words against *Benjamin Walden*, who pleaded in Abatement, that he was baptised by the Name of *John*, and was always called and known by the Name and Surname of *John Walden*; and traversed, that he was called or known by the Name, &c. of *Benjamin Walden*, and concluded to the Country; and upon a Demurrer to this Plea it was adjudged, that the Defendant alledging he was baptised by the Name of *John*, was no more than an Inducement to the Traverse of *Benjamin*, which he afterwards waived by his Traverse, so that the Effect of his Plea was, that he was never called by the Name of *Benjamin Walden*, which may be true, and yet his Name might be *Benjamin*; Judgment to answer over. 1 *Silk.* 6. *Walden* versus *Holman*. Mod. Cases 115.

16. *Assumpsit, &c.* against the Defendant by the Name of *Elizabeth Gerrard*; she pleaded in Abatement, that her Name was * *Hannah* and not *Elizabeth*; the Plaintiff replied, that she put in common Bail by the Name of *Elizabeth*, and prayed Judgment, if she shall be admitted to plead her Name is not *Elizabeth*; and upon Demurrer it was adjudged, that Putting in Bail is the Act of the Court, and that shall not hinder her from pleading *Misnomer*; but Putting in Bail is an Appearance, and therefore if the Plaintiff will take any Advantage of it, he must plead it as an Appearance, and not that he *imposuit commune Ballium*; for if Debt is brought on such a Bond, the Defendant cannot plead, that *imposuit Ballium, &c.* but *comperuit ad diem*. 1 *Silk.* 8. *Stroud* versus *Lady Gerrard*. 2 *Salk.* 710. *The Pleadings*. * Oyer. (A) 3.

(B)

In the Name of Dignity.

1. IN a Writ of Partition against the Duke of *Suffolk* and others, brought by *Ralph Howard Esq;* and the *Lady Anne Powes his Wife*, when she ought to be named according to the Name of her Husband; and for this Reason the Writ was abated. *Hill.* 7 *Ed.* 6. *Dyer* 76. *Trin.* 4 *Mar.* *Bendl.* 37. *S. P.*

2. *William Dethick*, King at Arms, was indicted on the Statute 5 *Ed.* 6. for Striking in *St. Paul's Church-yard*, he pleaded, that he was created and crowned by Letters Patents *Principal King of Arms*, and that he should be called *Garter*; adjudged, that by the Word *Coromamus* in the Letters Patents, a Dignity was implied, and by the Words *Nomen tibi imponimus Garter*, that is Part of his Name; and it being omitted in the Indictment, it was therefore void. *Leon.* 148. *Dethick's* Case.

3. An Action was brought against *Sir Francis Fortescue Knight and Baronet*, when in Truth he was *Knight of the Bath*; but he appearing and Pleading to the Action, by the Name of *Knight and Baronet*, had concluded himself. 2 *Cro.* 482. *Fortescue* versus *Markham*. 1 Roll. Rep. 459.

4. Bargain and Sale made to one by the Name of a Knight, who is not a Knight, is good, especially when the Person is sufficiently described before. *Ewre* versus *Strickland*. 1 *Balt.* 21. and 2 *Cro.* 240. *S. C.*

5. In Debt, the Defendant pleaded, that after the last Continuance the Plaintiff was made a Baronet; it was a Question, whether the Statute 1 *Ed.* 6. which recites the Dignities of Earls, Barons, &c. but doth not mention Baronets, should extend to them, which was a Dignity created long afterwards. *Cro. Car.* 74. *Sir Simon Bennet's* Case.

6. *Sir Henry Ferrers* was indicted by the Name of *Sir Henry Ferrers Knight*, who pleaded, that he never was knighted; he was indicted *de novo* by the Name of *Baronet*; adjudged, that this

this was such a material Variance in the Name, that the Officer who had a Warrant to arrest *Sir Henry Ferrers Knight*, could not arrest him who was then a Baronet. *Cro. Car.* 271. *Sir Henry Ferrer's Case*.

7. In Ejectment upon a Lease of Lands made by the *Earl of Rutland* and *Geo. Sutton Lord Lexington*; upon Not guilty pleaded, it was moved upon Evidence at the Trial at Bar, that *Sutton* was no Peer of *England*, but an *Irish* Baron, and so not the same Demise; but adjudged, that the Issue is not, whether *Geo. Sutton, Lord Lexington*, did demise, as 'tis in *Dyer* 300. a. but 'tis Not guilty, so that whether 'a Lord, or not, is not Parcel of the Issue, therefore 'tis sufficient, if 'tis the same Person who demised, tho' misnamed. *Allen* 58. *Bernard versus Bonner*.

1 Lev. 1.
S. C.

8. In Assise, the Tenant pleaded, that the Demandant was made a *Knight of the Bath* pending the Writ: The Demandant replied, that by the Statute 1 Ed. 6. cap. 7. 'tis provided, that the Writ shall not abate where the Plaintiff is made a *Knight*; and the Question being, whether a *Knight of the Bath* was within this Statute; adjudged that it was, but not a Baronet, unless he is also a *Knight*. *Sid.* 40. *Heath versus Paggett*.

9. The Defendant pleaded in Abatement, that *suscepit ordinem militarem, & jam miles existit*; and upon a Demurrer to this Plea it was adjudged, that this was very proper to express, that he was a *Knight Bachelor*, and that there needs no *Venue* where he was knighted, because any Thing which concerns his Person shall be tried where the Action is brought; but this Plea is ill, because he did not say, that he was a *Knight, antea or die impetrationis Billa, &c.* 1 *Salk.* 6. *Lett versus Mills*.

10. An Indictment was preferred against two Chair-men for a Battery on *Thomas Lord Marquess of Caermarthen*, who is called up to the House of Lords by the Name of *the Lord Osborne*; and it was held, that there was no such Person as the *Marquess of Caermarthen*: So where one was indicted at the *Old Bailey* for Stealing the Goods of the *Earl of Kingston*, the Defendant was acquitted, because there was no such Person; for the eldest Son of the *Marquess of Dorchester* was *Mr. Peirpoint*. 2 *Salk.* 451.

11. *Certiorari* to remove all Orders concerning the Inhabitants of the Parish of *Barking, Needham-Market* and *Darmesden* Hamlets, and the Orders mentioned *Barkham* and *Needham* and *Darmesden*, without saying *Needham-Market*; it was insisted, that the Parish of *Needham* and *Needham-Market* shall be intended the same; like as where a Writ was directed to the *Justice of Chester*, and it was returned by the Chief Justice; but adjudged, that if *Needham* and *Needham-Market* is the same Hamlet, it should have been so returned, and this Court cannot intend that there is no such Hamlet as *Needham-Market*; and as to the Writ directed to the *Justice of Chester*, there was but one Justice there till the 18 *Eliz.* cap. 8. which gave the Queen Power to make another, and she by her Patent called him *Justiciarius alter*, or the first *Justiciarius*, and Writs are directed to him as *Justiciario*, without regarding that he calls himself *Chief Justice*. 2 *Salk.* 452. *The King versus Inhabitants of Barkham*. See 10 *Rep.* 28. b. 30. 123. *S. P.*

5 Mod.
297.

12. In a *Quare Impedit*, the Plaintiff declared, that *Queen Elizabeth*, 14 *Feb.* in the twelfth Year of her Reign, was seised of the Advowson of *Bedell*, *ut de uno grosto*, and presented one *Simms*, and so derives a Title from her to *King Charles*, who presented *Wickham*, and that one *Peirce* usurped upon the King's Title and presented *Metcalf*, and so derives a Title to *King Charles* the Second: The Defendant pleads, that after the Presentation of *Wickham*, *King Charles* by Letters Patents granted the Advowson to one *Thackstone*, *adunc Armigero, postea Militi*, and that *Peirce*, by Usurpation upon *Thackston*, presented *Metcalf*, &c. and that *Thackston* released his Right to *Peirce*, and traversed, that *King Charles* died seised: The Attorney General replied, and craved *Oyer* of the Letters Patents of *King Charles*, which were *Sciatis, &c. nos dedisse & concessisse Willielmo Thackston Militi advocacionem, &c.* and Judgment for the King in *C. B.* and upon a Writ of Error brought, the Judgment was affirmed, that this Grant was void, because *William Thackston Esq;* mentioned in the Plea, could not be *William Thackston Knight* mentioned in the Letters Patents, for *Knight* is a Name of Dignity, and Parcel of a Man's Name, and the Name of an *Esquire* is drowned in the Name of *Knight*; and therefore the Identity of the Person must appear in the Grant it self, otherwise the Grant will be void. 2 *Salk.* 560. *The King versus Bishop of Chester and Peirce*.

13. Case, &c. in which the Plaintiff declared against the Defendant by the Name of *Symonds*; he pleaded in Abatement, &c. that he was known by the Name of *Symms*, and traversed, that he was known by the Name of *Symonds*; the Plaintiff replied, that he (the Defendant) was known as well by the one Name as by the other; and upon Demurrer per *Holt Ch. Just.* the

* Raft.
Ent. 716.
Old Entr.
27.

* Precedents are both Ways upon such a Traverse, therefore the Defendant was advised to accept a new Declaration, but without paying Costs. 4 *Mod.* 347. *Allen versus Symonds*.

(C)

In the Name of Jurors. See *Jeofails* and *Error*.

1. **I**N Attaint, one of the Jurors was returned by the Name of *Alexander Prescott*; and in the Return, which is in Nature of a *Disfranchisement*, it was *Alexandrus Prescott*, and he was sworn by that Name, and the Verdict of the Petit Jury was affirmed by them; it was moved in Arrest of Judgment, that this was not aided by the Statutes 18 *Eliz.* or 21 *Jac.* for these extend to the *Surnames* of Jurors mistaken, and not the Christian Names. *Cro. Car.* 147. *Downs versus Winterflood*.

(D)

In the Name of the Place, and in the Possession of a certain Person.

1. **T**HE King granted to *L. E.* all those Messuages in the Tenure of *C. D.* situate in *Wells*, when in Truth they were in *L.* and not in *Wells*; now, tho' they were in the Tenure of *C. D.* yet the Grant was void, as well in the Case of a common Person as of the King, because it was restrained to a certain Village. 2 *Rep.* 35. *Doddington's Case*.

2. The Bargainor having five Messuages in the Parish of *St. Spulchre*, in the Tenure of *L. E.* bargained and sold his Tenements in the Parish of *St. Andrew*, in the Tenure of the said *L. E.* now, tho' in Truth the Messuages were in the Tenure of *L. E.* yet because that which was intended for the first Certainty, (*viz.*) the Certainty of the Parish, was mistaken, therefore the Bargain and Sale was void. 3 *Rep.* 9. *Downtie's Case*.

3. The Queen granted a Portion of Tithes in *L.* in the Occupation of *L. E.* when in Truth *L. E.* never had any Tithes in his Occupation in *L.* adjudged, that the Grant was void. 4 *Rep.* 34. *Bozoun's Case*.

4. An Executor possessed of a Farm containing several Parcells of Land, made a Lease of all the Farm (except *Hobsfeild*) to *L. E.* for twenty-three Years, and the said *Hobsfeild* he demised to *W. R.* for twenty-three Years, and demised the Residue of his Term in the whole Farm to the said *L. E.* and *W. R.* and he in the Reversion granted a Rent-charge in Fee, issuing out of the whole Farm, some Time in the Tenure of the Testator, and then in the Tenure of *L. E.* or his Assigns; adjudged, that *Hobsfeild* was not charged with the Rent, for tho' it was Parcel of the Farm, and tho' *L. E.* and *W. R.* had the Reversion of the Term, and so it may be said to be in their Tenure; yet because *L. E.* had not then *Hobsfeild* in his Occupation, that shall not be charged with the Rent. 4 *Rep.* 50. *Oguel's Case*.

(E)

In the Name of Corporations. See *Corporations*. (C) per totum.

1. **T**HE Dean and Chapter of *Windfor* were incorporated by Act of Parliament, Anno 22 *Ed.* 4. by the Name of Dean and Canons of the King's free Chapel of *St. George the Martyr*; and they made a Lease by the Name of the Dean and Canons of the King and Queen's free Chapel of *St. George*, omitting the Martyr; adjudged, that the Lease was void, for the Name of the Corporation ought to be such as was given by the Founder; and therefore the Addition of the Word *Queen's* free Chapel made it ill, tho' the Omission of the Word *Martyr* did not, for *St. George* implies *St. George the Martyr*. *Mich.* 30 *Eliz.* *Hall versus Wingate*. *Moor* 71. *S. C.* See *pl.* 17.

2. The Provost, Fellows, and Scholars of *Queen's College Oxon*, are *Guardiani* of an Hospital 4 *Leon.* in *Southampton*, and they leased Parcel of the said Hospital by the Name of Provost, Fellows and 85. *S. C.* Scholars, *Guardianus* of the Hospital, when it should be *Guardiani*; adjudged, that the College is as one Body, and as one Person. 1 *Leon.* 134. *Queen's College Oxon*.

3. In Ejectment, the Plaintiff declared on a Lease made by the Master of the House or College of *St. Thomas de Acons*; and the Lease given in Evidence was a Lease made by the Master of the House or Hospital; adjudged, this was no material Variance, for *College* and *Hospital* are the same. 1 *Leon.* 215. *Cheney versus Smith*.

4. *Henry 7th* founded an Hospital by the Name of the Master and Chaplains of the Hospital of 1 *And.* *King Hen. 7. de le Savoy*, and they made a Lease by the Name of the Master and Chaplains, &c. 202. of *H. 7. vocat le Savoy*; adjudged, that the Lease was void, for there is a great Difference between the Words *De le Savoy* and *vocat Le Savoy*. 1 *Leon.* 159. *Mariott versus Paschall*. *Moor* 228. *S. C.* by the Name of *Fanshaw's Case*.

5. In the Case last mentioned, the Lord Treasurer *Burleigh* said, that the Guild of *Boston* in *Lincolnshire* was incorporated by the Name of *St. Nicholas* and the *Virgin Mary*, and because the *Virgin*

Virgin Mary was the greater Saint, they named her first in the Lease, and it was adjudged void for that Reason.

6. The *Cordwainers of London* were incorporated by the Name of the *Master, Warden and Community, &c.* and a Devise was made to them by the Name of the *Master and Wardens of the Mystery of Cordwainers*; adjudged good. *Cro. Eliz.* 106. *Foster versus Walters.* Intention. (A) 11. S. C.

7. *Corpus Christi College in Oxford*, was incorporated by the Name of the *President and Scholars of Corpus Christi College in Oxford*, and they made a Lease by the Name of the *President and Scholars of Corpus Christi in Oxford, in Com. Oxon*; adjudged, that the Lease was good, notwithstanding the Addition of the Words *in Com' Oxon.* *Cro. Eliz.* 815. *Dumper versus Symms.* 4 Rep. 119. S. C.

8. In Ejectment, the Plaintiff declared on a Lease made to him by the *Warden and College of All Souls of Oxford*; upon Not guilty pleaded, the Jury found the Lease to be made by the *Warden and College of All Souls of Oxford in the County of Oxford*; it was objected, that this could not be the Lease on which the Plaintiff had declared, because it varied from that Lease, the one being made by the *Warden, &c. of All Souls of Oxford*, and the other by the *Warden of All Souls of Oxford in the County of Oxford*: But per Curiam, the Plaintiff had Judgment, for the Verdict having set forth, that the *Warden, &c.* was seised, and being so seised made the Lease, &c. and sealed it with their common Seal; all this is the same as in the Declaration, and the Words, (*viz.*) (*In the County of Oxford*) are not added as Part of the Name of the Corporation, but only to shew in what County *Oxford* is. 1 And. 248. *Carter versus Cromwell.*

9. *Queen's College in Oxford* was incorporated by the Name of the *Hall of Scholars of the Queen in Oxon*, and they confirmed a Lease by the Name of *Provost and Fellows*, and *Scholars of the Queen's Hall, &c.* when it should be the *Hall of the Scholars of the Queen*; adjudged, that the Confirmation was good, for the College is named by such Names as may be distinguished from any other College, and if so, the Omission or Misprision of their true Names shall not make their Acts void. 11 Rep. 18. *Dr. Ayrie's Case.* Pasch. 4 Mar. Bendl. 2. contra.

10. *H. 8.* incorporated the Town of *Lynn*, by the Name of *Mayor and Burgesses of the Borough of the King of Lynn Regis*, and a Bond was made to them by the Name of the *Mayor and Burgesses*, omitting the Word *Borough*; adjudged good, because 'tis the same in Substance, tho' not in Syllables. 10 Rep. 122. *Mayor of Lynn.*

11. *Sir Richard Abberbury*, in the Reign of King *R.* founded *Donnington Hospital in Berks*, by the Name of *Minister Dei pauperis Domus de Donnington*, and they made a Lease by the Name of *Minister pauperis Domus Dei de Donnington*; now here the Word *Dei* was misplaced, which made some Alteration in the Sense; yet adjudged, that the Lease was good. *Goldsb.* 121. *Sherborne versus Lewes.* Moor 539. S. C. The Court divided. Moor 865. S. C. Trin. 12 Jac. Pitts versus James. S. P. Hob. 121.

12. *Queen Elizabeth* incorporated the Inhabitants of *Gravesend and Milton*, by the Name of *Portreeve, Jurats and Inhabitants of Gravesend, Possessors of Ships*; and they made a By-Law by the Name of *Portreeve, Jurats and twelve of the Inhabitants, &c.* omitting these Words *Possessors of Ships*; so that the By-Law was not made by the same Name by which they were incorporated; and for that, amongst other Reasons, it was held ill. 2 Brownl. 177. *Mayor of Gravesend versus Edmonds.* Antea By-Laws. (B) 1. S. C.

13. The Case of *Donnington Hospital* came in Question again; the Incorporation being *Minister Dei pauperis domus*, and the Lease was made by the Name of *Minister pauperis domus Dei*; adjudged, that tho' the Words were inverted, yet there was no Variance in Substance. Hob. 121. *Pitts versus James.*

14. *Christ-Church in Oxford* was incorporated by *H. 8.* by the Name of the *Dean and Chapter of the Cathedral Church of Christ in Oxford*, and they made a Lease by the Name of the *Dean and Chapter of the Cathedral Church of Christ in the University of Oxford*; and it was found by Verdict, that the *City of Oxford and University* were one and the same; adjudged, that in the Case of a Corporation, 'tis sufficient to have a Demonstration of the Place where 'tis, tho' not in the precise Words of the Name by which it was incorporated. Poph. 56. *Button versus Wrightman.* See pl. 19. S. C.

15. *H. 8.* incorporated the Scholars of *Trinity-College in Cambridge*, by the Name of *Master, Fellows and Scholars Collegii Sanctæ & individuae Trinitatis, in the Town and University, &c.* and they made a Lease by the Name of the *Master and Fellows of Trinity-College in Cambridge*, leaving out the Word *University*; the Court was divided whether the Lease was good. 2 Brownl. 243. *Trinity-College's Case.*

16. A Lease was made by the *Dean and Chapter of the College of Eaton*, when they were incorporated by the Name of the *Dean and Chapter of the College of St. Mary of Eaton*; and for this Reason the Lease was adjudged void, &c. Moor 13. *Eaton College's Case.* 4 Leon. 11. *Clerk's Case.*

17. *Merton-College in Oxford* was * incorporated by the Name of the *Warden and Scholars of the House or College of Merton in the University of Oxford*; and they made a Lease by the Name of *Warden of the House or College of Merton, and the Scholars of the said House in Oxford*, leaving out the Word *University*, and the Word *Scholars* was misplaced; for in the Name of the Corporation, that Word referred to the College, (*viz.*) *Scholars of the College*; but in the Lease it

it referred to *Merton*, (viz.) *Scholars of Merton*, and the Question was, Whether this Lease was void for the Misnomer; and adjudged * not, for the the Variance was not material, where both agreed in Substance. *Moor* 266. *Fisher versus Boys*.

18. King *H. 7.* Anno 12 of his Reign, gave License by Letters Patents to *John Isbury*, to found an Hospital at *Lamborne* in *Berks*, who 4 May Anno 18 *H. 7.* did accordingly found an Hospital there for ten poor People, by the Name of *Pauperum Domus Eleemosinar' Johannis Isbury apud Lamborn fundat'*, &c. and ordered, that after his Death they should be removed for Misbehaviour, by the Warden of the College *Beatae Mariae de Winton* in *Oxon*, and his Successors; afterwards, Anno 9 *Eliz.* they made a Lease to the Defendant Clerke, by the Name of *Thomas White Dr. of Laws*, Warden of *New College* in *Oxford*, and Overseer *Domus Eleemosinar' Johannis Isbury apud Lamborne & pauperum, Anglice the Poor Men ejusdem domus*; adjudged, that this Lease was void by Reason of the Addition of these Words to the Name of the Corporation, (viz.) *Thomas White Dr. of Laws*, as if he had been the Head of the Body Corporate; for if so, then there was no such Foundation by *John Isbury*; besides, this Lease varies from the Name of the Corporation, for that is *Domus Eleemosinar' Johannis Isbury, apud Lamborne fundat'*, and the Lease hath no such Word as *fundat'*, for 'tis wholly omitted. *Moor* 285. *Hobbs versus Clerke*.

19. *Christ-Church* in *Oxford* was incorporated by the Name of the *Dean and Chapter of the Cathedral Church of Christ of Oxford*, and they made a Lease by the Name of the *Dean and Chapter of the Cathedral Church of Christ in the University of Oxford*; so that the Word *University* was added to the Name of the Corporation; yet this was held good, tho' the Verdict found, that the Liberties of the University extended farther than the Liberties of *Oxford City*, because the Substance of the Incorporation was continued in those Words. *Moor* 361. *Lord North's Case*.

20. The *Dean and Chapter of Norwich* were incorporated by the Name of the *Dean and Chapter Sanctae & individuae Trinitatis Norwici*; they surrendered their Charter to *Ed. 6.* and afterwards were incorporated by him by the Name of the *Dean and Chapter Sanctae individuae Trinitatis Norwici ex fundatione Regis Ed. 6.* and in the same Year they made a Lease by the old Name of Incorporation, leaving out *ex fundatione Regis Ed. 6.* and adjudged, that the Lease was good. *Palm.* 491. *Heyward versus Fulcher*. See *Dean and Chapter of Norwich's Case*.

21. *Queen Eliz.* Anno 31 of her Reign, incorporated the City of *Wells* by the Name of *Mayor, Masters and Burgeses*; and now in an Action of Debt brought against them by the Name of *Mayor, Masters and Burgeses, alias dict' Mayor, Aldermen and Burgeses*, they appeared by their first Name, and plead *Non est factum*, upon which they were at Issue, and the Jury found they were incorporated by *Queen Eliz.* as aforesaid; and that Anno 35 *Car. 2.* they were incorporated by the Name of *Mayor, Aldermen and Burgeses*; that by Virtue of the said Charter one Day was chose Mayor, who was not a Member of the old Corporation, and that he, with the greater Number of the new Corporation put the Common Seal to this Bond; adjudged, that the Corporation being sued by the Name of *Mayor, Masters and Burgeses*, were sued by a wrong Name, for the old Name was changed by the new Charter into *Mayor, Aldermen and Burgeses*, and the *Alias dict'* will not help in this Case, because a Corporation by Charter cannot have two Names, tho' a Corporation by Prescription may; as by the Name of *Burgeses*, and *Ballivus & Burgeses*, &c. 1 *Lutw. Rep.* 508. *Knight & Ux' versus Corporation of Wells*.

22. Debt was brought by the College of Physicians in *London*, upon the Statute 14 *H. 8. cap. 5* Mod. 15. for 5 *l.* per Month against *Dr. Salmon*, for practising Physick in *London* without a License; 327. and this Action was brought in the Name of the * *President and College of Physicians, &c.* and upon a Demurrer to the Declaration, it was objected, that it ought not to be brought in the Name of the President and College only, for the Words of the Incorporation are, that they may sue per nomina Praesidentis seu Communitatis facultatis, &c. But adjudged, that since they are incorporated by the Name of the President and College of Physicians, by Consequence they have Power to sue in that Name; and tho' it is said afterwards, that they may sue per nomina Praesidentis seu Communitatis facultatis, &c. yet that additional Clause doth not alter that Power which they had before. 2 *Salk.* 451. *College of Physicians versus Salmon*. * *Dr. Loughton* brought an Action as President of the College of Physicians in *London*, and of the Corporation of Physicians there. 2 *Cro.* 121, 129. *Dr. Loughton versus Gardner*.

Miscital.

(A)

1. **T**HE Abbot of *Wesminster*, with Consent of his Convent, made a Lease to *Sir Tho. Moor*, who was afterwards attainted of Treason, and his Lease forfeited to the King, and upon the Dissolution the Reversion came to the King, who made a Lease to one *Philpott*, *Habendum after the Determination of the Lease to Sir Tho. Moor*, for thirty Years; adjudged, that this Lease to *Philpott* was void, because the Lease to *Sir Thomas Moor* was determined before it was granted to him, the said *Philpott*; and the Statutes of Recital and Miscital extend only where Leases in Being are miscited. 1 *And. 6. Holt versus Roper.*

2 Brownl.
341.

2. In a Writ of Right the Case was, *King H. 8.* by Letters Patents granted all his Lands in the Tenure of *T. S. & super dimissus to G. D.* situate and being in the *Parish of W.* when in Truth they were never let to *G. D.* and were not in the *Parish of W.* but in the *Parish of S.* adjudged, that this Grant was void, and not aided by the Statute of Miscitals. 1 *And. 148. Heyward versus Ilgrove.*

3. Adjudged, that where there is a Lease in Being, and the Lessor grants the Lands to another after the End of the former Lease, and in this Grant the former Lease is miscited; in such Case the Grant or second Lease commences immediately in Point of Time, but not in Interest, till the first Lease is determined. *W. Jones 354. In Miller and Manwaring's Case.*

4. Tenant by the Curtesy, &c. made a Lease for Years to *T. S.* and died, leaving a Son and Heir; this Lease is void without Entry; and if the Heir, reciting this void Lease, and that the Reversion is in him, grants the said Reversion to another after the Expiration of the said Lease; this is likewise void, because he had not the Reversion; for the Lease which he recited being void, he hath the Possession; so adjudged. *W. Jones 354. In Miller and Manwaring's Case.*

5. The Plaintiffs were seised of the Rectory and Appropriate of *Chesterton*, and made a Lease thereof for forty-two Years; afterwards they granted to *Humphrey Petoe, &c.* all the Tithes of *Piggs, Geese, Lambs, &c.* and also seventy-eight Acres of Glebe; all which were lately in the Tenure of *Margaret Petoe*, when in Truth they were never in her Tenure, &c. yet *per Curiam*, the Tithes will pass, because the Grant of all Tithes, and naming them in particular, is certain enough. *W. Jones 435. Vicars Choral of Litchfield versus Ayres.*

6. Debt upon Bond for Performance of an Award; upon *Nullum Arbitrium* pleaded, the Plaintiff replied, and set forth an Award, reciting the Bond of Submission to be dated 7 Feb. when in Truth it was dated 10 February, and for this Miscital the Defendant demurred; adjudged, that it did not make the Award ill. 1 *Ven. 184. Toll versus Dawson.*

Mis-trial. See Trial.

Money.

(A)

Of Money in General, and of bringing it into Court. See Bonds. (F)
Tender. (A) 3. 12.

1. **I**Ndebitatus *Assumpsit* on several Promises; there was a Verdict for the Plaintiff, and entire Damages; and it was moved in Arrest of Judgment, that one of the Promises was ill laid, for it was, that the Defendant was indebted to the Plaintiff in 13 l. 10 s. for nine Guineas, &c. and did not say *ad valorem*, for the Value was never ascertained by Proclamation; but adjudged, that any Piece of Money coined at the Mint is of that Value as it bears in Proportion to other current Money, and that without Proclamation; that there are Guineas of 40 s. a-piece, and that the Court will intend those mentioned in the Declaration was such; and that for so much as they exceeded 13 l. 10 s. in Value, the Plaintiff had been satisfied, but not for that; and that it was not necessary to set forth the Number, for in an *Indebitatus Assumpsit*,

fit, the Consideration is only set forth to shew, that it is not a Debt on Bond. 2 *Salk.* 446. *Dixon versus Willoughby.*

2. Where an Action is brought by an Executor or Administrator, the Defendant cannot bring the Money into Court, because if a Verdict should pass against the Plaintiffs, in such Cases they pay no Costs. 2 *Salk.* 596. *Gregg's Case.* *Pasch. 5 Annæ B. R.*

3. In *Covenant, &c.* where the Breach is assigned for Non-payment of Rent, the Defendant may bring the Rent due into Court; for this is an Action of Covenant, and doth not differ from an Action of Debt for Rent, because both are for the Payment of a Sum certain. 2 *Salk.* 596.

4. In a *Quantum meruit* it hath been denied; but *Pasch. 5 Annæ* it was granted even in such Case, to bring the Money into Court. 2 *Salk.* 597.

5. In *Trover* for an Horse, Bridle and Saddle; it was moved to bring the Bridle and Saddle into Court, but denied. 2 *Salk.* *Wilcock's Case.*

6. In *Replevin*, when the Defendant avows for so much Rent arrear, the Plaintiff hath been admitted to bring it into Court. 2 *Salk.* 597.

7. Concerning these Rules of bringing Money into Court; the first was upon a *Bond* to bring the *Principal and Interest* into Court; after that it came to an *Indebitatus Assumpsit*; it hath been done, and is still upon an Action of Debt for Rent; and in Ejectment upon an Entry for Non-payment of Rent, and Accepting a new Lease, and Sealing a Counterpart, because this Action entirely subsists upon the Rules of the Court. 2 *Salk.* 597. *Downes versus Turner.*

8. The Defendant brought 10 *l.* into Court, and had it struck out of the Declaration; the Plaintiff was nonsuited; ruled, that he shall take the Money out of Court, because by paying it into Court, the Defendant admitted that so much was due; but if the Defendant brings Money into Court upon a *Tender & uncore prift*, and the Plaintiff takes Issue upon the Tender, and 'tis found against him, then the Defendant shall have the Money out of Court. 2 *Salk.* 597. *Elliott versus Callow.*

9. The Defendant may at any Time pending the Action, bring the Money and Charges into Court. See Statute 4 & 5. *Annæ*, for Amendment of the Law.

Monopolies.

See *Grants of the King.* (A) *Trade.* (A) 7.

(A)

1. **T**HE Company of Merchant-Tailors had Power by their Charter to make By-Laws, &c. and they made an Order, that every Brother of the Society who should put any Cloth to be dressed, should not put it to any Clothworker, not being a Brother of the same Society, under the Penalty of 10 *s.* adjudged, that this Order was against Common Law, in restraining the Liberty of the Subject, who by Law may put his Cloth to be dressed by what Clothworker he pleaseth; and so a Monopoly. *Trin.* 41 *Eliz.* *Davenant versus Hardres.* *Moor* 576. See the Pleadings there.

2. *Queen Elizabeth* granted to certain Patentees the sole Coinage and Transportation of all the Tin in *Cornwall* and *Devonshire*, for 21 Years, under the yearly Rent of 2000 *l.* per Ann. to be paid at the *Exchequer*; adjudged, that this Patent was a Monopoly. 13 *Jac.* in the *Exchequer.* *Heydon versus Levingstone.*

3. *Case, &c.* against the Defendant, in which the Plaintiff declared, for disturbing him in his Office granted to him for the Lives of three Persons, and it was for the sole making of all Bills and Informations to be preferred or exhibited before the Council of *York*, in the North, and of all Letters missive, &c. per Curiam, this Patent is void; for 'tis unreasonable, that one Man should have the Making all Bills and Informations in *partibus Borealibus*, and 'tis a Monopoly within the Statute 21 *Jac.* cap. 3. tho' not within the Penalties of that Statute. *W. Jones* 231. *Mounson versus Lister.*

4. By the said *Statute, all Monopolies and all Grants for any Penalties or Forfeitures limited by any Statute before Judgment, are void; and the Party grieved by any Monopoly may recover treble Damage, and double Costs. *21 *Jac.* cap. 3.

But Letters Patents for new Inventions not used in *England* are excepted; and all Grants for Printing, and for making Gun-Powder and Ordinance, and shot for them.

Adjudged, that a By-Law which makes a Monopoly is void ; and so is a Prescription for a sole Trade to any Company, or to any one Person exclusive of all others. *Moor* 591.

5. Adjudged, that a Grant of a Monopoly may be to the first Inventor, by the Statute 21 *Jac.* tho' the same Thing was practised before beyond Sea, because the Statute mentions new *Manufactures within the Realm* ; for the Act intended to encourage new Devices useful here, and that 'tis the same Thing, whether acquired by Experience or Travel abroad, or by Study at Home. 2 *Salk.* 447. *Edgbury* versus *Stephens*.

Mortgage.

See *Chancery*.

(A)

1. **U**PON a Bill and Answer in Chancery, the Case was, One *Engliſh* being ſeiſed in Fee of the Manors of *Wickſall* and *Monfield*, mortgaged Part of the Manor of *W.* to *Burrell* for 1000 *l.* and about ſix Years afterwards he acknowledged a Statute to *Burrell*, for the Payment of 400 *l.* and ſeven Years afterwards he mortgaged both theſe Manors to *Mrs. Duppa* for 7000 *l.* and about three Years after, he mortgaged the Manor of *Wickſall* for 200 *l.* to one *Lee*, who had no Notice of the former Mortgages, but as ſoon as he had Notice, he bought in the Mortgage and Statute, by paying the Money to *Burrell* ; and now *Maſb* the Plaintiff, who was Executor to *Mrs. Duppa*, exhibited his Bill againſt *Lee*, who pleaded all this Matter ; and it was decreed by the Lord Keeper *Bridgman*, aſſiſted with the Lord Ch. Baron *Hale* and other Judges, that *Lee* had both Law and Equity on his Side, to make Uſe of thoſe Incumbrances to protect his own Mortgage. 2 *Vent.* 337. *Maſb* verſus *Lee*.

2. A Mortgage was made in Fee, which being forfeited, it deſcended to the Heir of the Mortgagee, and about ten Years afterwards the Money was paid to the ſaid Heir, and then the Executor of the Mortgagee exhibited his Bill, and had a Decree for the Money, but without Intereſt ; for tho' by the Proviſo in the Mortgage 'tis to pay the Money to the Mortgagee, his Heirs or Executors ; yet when the Day is paſt, 'tis as if no Perſon had been expreſſed, and in ſuch Caſe *æquitas ſequitur legem* ; and the Law directs it to the Executor. 2 *Vent.* 348. *Turner's* Caſe.

3. The Anceſtor died indebted by Mortgage, Judgments and Statutes, to ſeveral Perſons ; the Heir at Law bought in ſome of thoſe which were firſt made, and then thoſe who had the ſubſequent Securities prefer a Bill in Equity againſt him ; the Lord Chancellor ſaid, that it was the Courſe of the Court, that thoſe Incumbrances ſo bought in by the Heir, ſhall not ſtand in the Way againſt the other Creditors, for more than the Heir really paid. 2 *Vent.* 353.

4. Upon a Bill and Answer in Chancery, the Caſe was, That there was a Proviſo in the Mortgage-Deed, that if the Intereſt was not paid, but was behind ſix Months, then it ſhould be accounted and carry Intereſt as Principal : *Per Cowper* Lord Chancellor, this Proviſo is void, becauſe being made at the ſame Time with the Mortgage, and before any Intereſt was due, for then, and not before, the Intereſt may be made Principal. 2 *Salk.* 449. *Oſulſton Lord* verſus *Lord Tarmouth*.

5. Where a Man mortgages his Land, and covenants to pay the Money, and dies, his Perſonal Eſtate ſhall be firſt applied in Diſcharge of this Mortgage, and this in Favour of the Heir ; and ſo it ſhall, if there was no Covenant to pay the Money, if the Mortgagor had it ; becauſe by receiving it he made it his Debt ; but if the Grandfather mortgages and covenants to pay, and dies, and leaves the Lands to deſcend to his Son, and he dies, leaving a Perſonal Eſtate, that ſhall not go in Aid of his Father's Mortgage. 2 *Salk.* 449. *Cope* verſus *Cope*.

3 Lev.

387. S. C.

6. On a Trial at Bar, the Caſe was, There was a Mortgage for a Term of Years to *W. R.* who without the Mortgagor's Joining, aſſigned it to *T. S.* who likewiſe aſſigned it to *M. R.* under whom the Plaintiff in Ejectment claimed ; it was admitted, that *W. R.* the Mortgagee, might make an Aſſignment, without making any Entry, and without the Mortgagor joining in the Aſſignment, becauſe he is but Tenant at Will to the Mortgagee ; but he by his Aſſignment had determined his Will, and then the Mortgagor was Tenant at Sufferance, and his Continuance in Poſſeſſion had deſtroyed the Term, and turned it to a Right ; ſo that it could not be aſſigned by *T. S.* without his entering, or the Mortgagor joining ; but adjudged, that tho' by the Covenant for Quiet Enjoyment, &c. till Default of Payment, &c. the Mortgagor is

is *Tenant at Will* to the Mortgagee, and by his Assignment of the Mortgage he is become Tenant at Sufferance, yet his Continuing in Possession will not make a Disseisin, and the Bringing this Ejectment doth not admit an actual Disseisin so as to turn the Term to a Right, because 'tis not brought to recover the Term it self, but the actual Possession of the Lands, for which the Assignee of the Mortgagee hath no other Remedy. 1 Salk. 245. *Smartle versus Williams*.

Mortuary.

(A)

1. **A** Mortuary before the Statute 21 H. 8. cap. 6. was payable only in *Beasts*, (*viz.*) the best Beast of the dead Man was due to the Lord for a Heriot, and the next best was due to the Parson of the Parish where the Deceased was an Inhabitant, for a Mortuary; but as this was by *Custom*, so likewise by Custom other Things may be paid, and to a Parson of another Parish for a Mortuary; and Custom by the Canon Law is an Usage for twenty, thirty or forty Years. *Cro. Eliz.* 151. 3 *Mod.* 286. 1 *Vent.* 274.

2. Therefore in a Prohibition upon a Libel in the consistory Court of *Chester*, before the Commissary there, for a Mortuary, setting forth a Custom, that he ought to have a Mortuary after the Death of every Priest dying within the Archdeaconry of *Chester*, the best Beast or Mare, his Saddle, Bridle, Spurs, his best Gown or Cloak, his best Hat, his best upper Garment under his Gown, his best Signet or Ring, as to the Bishop of *Custom belonging*; the Plaintiff suggested, that there was *no such Custom*, and that she had paid a Mortuary to the Parson of *B. &c.* the Court was moved for a Consultation, for tho' there was a Custom alledged to have such Things for a Mortuary, which Custom was denied, yet Mortuaries are only triable in the Spiritual Court, and not elsewhere; and if so, then a Consultation ought to be granted without answering the Prohibition; but the Court being divided in these Points, it was ordered, that the Defendant should either plead or demur to the Prohibition, and then they would give Judgment upon the Record before them. *Mich.* 7 *Car.* *Cro. Car.* 172. *Hinde versus Bishop of Chester*.

3. The Vicar libelled for a Mortuary, and the Impropiator suggested for a Prohibition, that the Mortuary was not due to the Vicar *by Custom*, but to himself, and that all *Customs* are triable at Common Law, &c. but a Consultation was granted, because the *Custom* was not controverted, but the Person to whom the Mortuary was due, for they both agreed in the Custom, but differed in the Person. *Sid.* 263. *Marke versus Gilbert*. See 3 *Mod.* 268.

4. Libel for a Mortuary; the Defendant suggested for a Prohibition the Statute 21 H. 8. which prohibits the Taking any Thing for a Mortuary, where *by Custom* it hath not been usually paid; and avers, that there is no such Custom in the Parish of *M. &c.* and a Prohibition was granted. 2 *Lutw.* 1066. *Johnson versus Wrightson*.

5. Libel for a Mortuary, the Defendant suggested for a Prohibition the Statute of 21 H. 8. and that a Mortuary ought not to be paid but in such Places where it had been usually paid before the Making the Statute, and that there was no Custom in this Parish to pay a Mortuary; 'tis true, a Prohibition was denied in *Marke and Gilbert's Case*, the Reason was, because it was admitted on both Sides, that a Mortuary was due there by Custom, but they differed in the Person who had a Right to it, (*viz.*) whether the Impropiator or Vicar: *Per Curiam*, the Plaintiff was ordered to declare upon his Prohibition, and to try the Custom. 3 *Mod.* 268. *Froud versus Piper*.

Negro. See **Crober**.

Nobility.

See *Honour* per totum.

(A)

4 Leon. 1. **A** *Drian Stokes Esq;* married the Dutchess of *Suffolk*, and afterwards they brought a *Quare Impedit* against the Bishop of *Excester* and the Incumbent, by the Name of *Adrian Stokes Esq;* and *Dame Frances Dutchess of Suffolk*, his Wife: The Defendants pleaded, that the said *Dutchess* had lost her Name of Dignity by the Marriage with *Stokes*, and that she should be called *Francisca Uxor prædict' Adriani*, and not *Domina Francisca Ducissa de S.* thereupon they discontinued their Suit, and would not venture to proceed. *Trim. 4 & 5 Mar. Bondl. 37.*

2. A Countess or Baroness cannot be arrested for Debt or Trespass; for tho' in Respect of their Sex they cannot sit in Parliament, yet they are Peers of the Realm, and shall be tried by their Peers; but if a Baroness by Marriage doth, after the Death of her Husband, marry one under the Degree of Nobility, she loseth her Dignity; 'tis otherwise if she be noble by Birth or Descent, because that is *Character indelibilis*. 6 Rep. 52. *Countess of Rutland's Case*.

3. The King, by Letters Patents, may create an Earl for Life, in Fee, or in Tail, for he is always created of some Place, and therefore 'tis an Honour which may be entailed. 7 Rep. 33. *Newill's Case*. 8 R.p. 16 & 17. In the *Prince's Case*.

4. *Thomas la Warre*, the Great Grandfather, was summoned to Parliament by Writ Anno 3 H. 8. and *William* his Son was Anno 3 Ed. 6. disabled to claim any Dignity during his Life, but was afterwards called to Parliament by *Queen Elizabeth*, and sat there as *puisne* Lord, and died; then *Thomas*, the Son of the said *William*, petitioned the Queen in Parliament to be restored to the Place of his Grandfather; and all the Judges to whom it was referred were of Opinion that he should, because his Father's Disability was not absolute by Attainder, but only personal and temporary during his Life; and the Acceptance of the new Dignity by the Petitioner shall not hurt him, so that when the old and new Dignity are in one Person, the old shall be preferred. 11 Rep. 1. *Lord La Warre's Case*.

5. Debt upon Bond against the Earl of *Lincoln*; upon *Non est factum* pleaded, the Plaintiff had a Verdict and Judgment, *Ideo capiatur*, &c. and upon a Writ of Error brought, the Error assigned was, that a *Capias* doth not lie against a Peer; but adjudged, that this Plea being found against him, there is a Fine due to the Queen, therefore a *Capias pro Fine* lies against him. *Mich. 39 Eliz. Cro. Eliz. 503. Earl of Lincoln versus Flower*.

6. Where a Peer is Plaintiff and a Commoner Defendant, and there are not two Knights returned of the Jury; the Question was, whether the Defendant might challenge the Array as well as the Plaintiff; it was insisted, that he could not, because 'tis in Favour of a Peer that two Knights must be of the Jury: *Sed per Curiam*, the Law shews no Favour, and Knights are not returned of the Jury for that Purpose, but because the Law presumes they will not so easily incline to Partiality as meaner Persons, therefore the Defendant may challenge the Array. 1 And. 272.

7. The Lord *Norris* was indicted for the Death of one *Piggott*, and coming into Court to plead his Pardon, *Coke Ch. Just.* said, that a Peer may be indicted in *B. R.* for Treason or Felony, and that Court are Judges of the Cause till he pleads Not guilty, and then the Lord High Steward and the Peers are Judges: He pleaded his Pardon, and tho' it varied from the Indictment, it was allowed, (*viz.*) The Indictment was against him by the Name of *Francis Lord Norris of Ricaut in the County of Oxon*, and these Words of the County of Oxon were left out of the Pardon; but yet *constabat de persona*, for there is but one Lord *Norris*. 1 Roll. Rep. 297. *Lord Norris's Case*.

8. In an Action of Assault against *Sir John Savile*, and Damages 300*l.* he brought a Writ of Error, and procured a Writ out of the Chancery, reciting, that his Father was created a Baron for Life, and that the Barony was entailed on him, and that he is a Peer of Parliament, and commands, that no Process be awarded against him but what ought to be awarded against a Peer, and moved, that this Writ might be recorded, which was done, and then he offered to plead it; but because there never was such a Plea, and for that he was not Defendant in the Action, but Plaintiff in a Writ of Error, and by Consequence having no Day to plead, it was rejected and the Judgment affirmed. *Cro. Car. 149. Lord Savill's Case*.

9. Anno 2 Car. 1. All the Judges and the Lords of the Privy Council, in all twenty-eight, being assembled in the Star-Chamber, the Solicitor General proposed this Question, whether upon a Bill in Chancery exhibited against a Peer, he ought to put in his Answer upon Oath, and not upon his Honour, and they all agreed that it must be upon Oath, and thereupon an Attachment was awarded against the *Earl of Lincoln*, who had put in his Answer on Honour; and this was

to make a better Answer; that in our Law there are several Oaths, (*viz.*) *Juramentum promissionis*, and that is where Oath is made either to do or not to do such a Thing, and such an Oath a Peer must make; as for Instance, to do Homage to the King; so where he is made Lord Chancellor, Treasurer, President of the Council, &c. or a Justice of Peace, &c. for in such Case the Statute 2 *Eliz.* requires, that he must take the Oath of Supremacy: There is likewise *juramentum purgationis*, and that is where a Person is charged with any Matter by Bill in Chancery, Exchequer, &c. in such Case there are many Precedents where Peers have put in their Answers on Oath: There is *Juramentum probationis* where any Person is produced as a Witness to prove or disprove a Thing; and in such Case likewise a Peer must be on his Oath, of which there are also many Precedents in the Courts of Chancery and Exchequer; and there is a *Juramentum trialionis*, and that is where any Person is sworn to try a Thing in Issue: But 6 May 1628. A Vote passed the House of Peers, that the Nobility of this Kingdom, and Lords of the upper House of Parliament, are of antient Right to answer in all Courts as Defendants, upon Protellation of Honour only, and not upon Oath. *W. Jones* 152. *The Earl of Lincoln's Case*.

10. Ruled, that if a *Knight* be returned of the Jury where a *Nobleman* is concerned, 'tis not material whether he appear and give a Verdict, or not; and if there is no *Knight* in the County, a *Serjeant at Law*, who is a *Knight*, may be returned, and shall not have his Privilege. 1 *Mod.* 226. 2 *Mod.* 182.

11. *The Lord Morley* was tried by his *Peers* for the Murder of one *Hastings*, and the Lord Chancellor *Hyde* was Lord High Steward, who sent Letters to all the Judges to be present, and assisting to the twenty-eight Peers who were summoned; he was found guilty of Manslaughter; and in such Case he is to be discharged without Clergy by the Statute 1 *Ed. 6. cap. 12. Sid.* 277. *The King versus Lord Morley*.

Nolle Prosequi.

(A)

1. **T**HE Parties were at Issue upon an Information for Extortion; and afterwards, the Jury appearing, the King sent a Writing under his Sign Manual, to the Clerk of the Crown to enter a Cesser of the Prosecution; and *Palmer* the Attorney General affirmed, that the King might do it; but the Court proceeded to swear the Jury, and thereupon the Attorney General entered a *Nolle prosequi*. 1 *Vent.* 33. *The King versus Benson*. Sid. 420. S.C.

2. *Assumpsit*, in which the Plaintiff declared, that in Consideration he and his Wife would, at the Defendant's Request, convey their Estate in such Lands to C. L. in such Manner as the said C. L. should appoint, the Defendant promised to pay the Plaintiffs 50*l.* And that whereas the Plaintiffs, at the Defendant's Request, had promised to convey the said Lands to the said C. L. the Defendant promised to pay them another Sum of 50*l.* The Defendant pleaded, that at that Time the Plaintiffs had not any Estate in the Lands; to this Plea the Plaintiffs demurred and entered a *Nolle prosequi* as to the second Promise, and had Judgment upon the first; and this was held well enough, tho' the *Nolle prosequi* was entered before the Judgment on the first Promise, upon the Authority of *Walsh* and *Bishop's Case*. 2 *Lev.* 33. *Woolnough versus Verden*.

Nomine Pene.

(A)

1. **I**N Replevin, &c. the Defendant avowed and conveyed a Title to himself of 5 *l.* Rent due on such a Day, and for Non-payment of the said Rent 80 *l.* *Nomine Pænæ*, and that for the said 85 *l.* he had distrained, and so avowed; adjudged, that the Avowry was ill, because he had laid no actual Demand of the *Nomine Pænæ*, which cannot be forfeited by Law unless the Rent is demanded; but he had a lawful Cause to distrain for the 5 *l.* and so he had * Judgment for that. *Hob. 133. Howell versus Sambach. Trin. 5 Jac. Godb. 154. Sir John Spencer versus Sir John Poynts. S. P.*

* See
Judg-
ment.
(C) 17.

2. Debt brought for the Arrears of 300 *l.* *Nomine Pænæ*, in which the Plaintiff declared on a Lease for Years made by him to *W. R.* rendring Rent on such a Day; and if not paid, &c. then the Lessee, his Executors or Assigns to pay 3 *s.* 4 *d.* for every Day until the Rent in Arrear be satisfied; and then he sets forth, that the Rent was in Arrear for two Years, but did not say, that it was demanded; adjudged, that this Action will lie against an Assignee for the *Nomine Pænæ* incurred after the Assignment, but not before. *Hill. 43 Eliz. Goldsb. 129. Thinn versus Cholmely. Moor. 357. S. C. Cro. Eliz. 383. S. C.*

3. The Father, by a Deed, in which his Son and Heir was joined (but he did not seal it) granted an Annuity to another Life, issuing out of such Lands; and if it should happen that the said Annuity should be in Arrear, then, that it should be lawful for the Grantee to enter as well for the same, as for 6 *s.* 8 *d.* *Nomine Pænæ*, and to distrain as often as it should be in Arrear: The Father died, and an Action of Debt was brought against his Executors, as well for the Arrears of the Annuity as for the *Nomine Pænæ*; and upon Demurrer it was doubted, whether the Action would lie against the Executors for the Penalty, because the Person of the Grantor was not charged with it, for the Words *If it should happen*, &c. are not Words of Grant. *Hill. 6 Eliz. Dyer 227. Sir Geo. Capell's Case.*

4. Lease for Years, rendring Rent, in which the Lessee covenanted, that if the Rent was behind on any of the Days on which it ought to be paid, that then he would pay to the Lessor 20 *s.* *Nomine Pænæ* for such Default, the Rent was behind, &c. and the Lessor brought Debt for the *Nomine Pænæ*; adjudged, that it would not lie without a Demand. *Trin. 5 Jac. Sir John Spencer versus Poynts. Godbolt 154. Style 4. Remington versus Kingerby. S. P. See Hob. 82. 208. 7 Rep. 28. Cro. Eliz. 383. 1 Saund. 33. S. P.*

5. A Rent-charge was granted for Years with a *Nomine Pænæ*, and a Clause of Distress, if it was not paid on the Day; the Rent was behind, and the Term of Years expired; and now the Court was moved that he might distrain for the *Nomine Pænæ*; but adjudged that he could not, because the *Nomine Pænæ* depended on the Rent, and the Distress was gone for that, and by Consequence for the other. *Pasch. 19 Jac. Winch 7. Tatter versus Fry.*

6. In a Special Verdict in Debt for 333 *l.* the Case was, A Feme Sole who had an Estate for her Life, made a Lease thereof for Years, rendring Rent at Michaelmas and Lady-day, &c. and also 40 *s.* *Nomine Pænæ* for every Day it shall be in Arrear after thirty Days next after the Days on which it ought to be paid: The Woman married and afterwards lived separately from her Husband with the Lessee, and when the Rent became due she demanded it of the Lessee, who paid it to her without any Disagreement of the Husband, and before he had any Notice of the Marriage; afterwards the Husband demanded the Rent, and 40 *s.* for every Day incurred after it became due, which amounted to 333 *l.* and one Question was, whether one Demand was sufficient, or whether it should have been * every Day after the Forfeiture; it was agreed, that the 40 *s.* Forfeiture *Nomine Pænæ* ought to be demanded; and the better Opinion was, that for every 40 *s.* there ought to be a Demand, and that one would not be sufficient for the Whole; but that here there was but one 40 *s.* forfeited, because it was *quolibet die proximo* the Feast-Day on which the Rent ought to be paid, which Word *proximo* must relate to the very next Day following the Rent Day; and so likewise when the Rent became due and unpaid at the next Rent-Day after that, and so on. *Palm. 207. Tracy versus Dutton. See Baron and Feme. (A) 11. S. C.*

7. In Replevin, &c. the Case upon the Pleadings was, (*viz.*) there was a Grant of a Rent-charge of 20 *l.* *per Annum* to the Husband, and a Covenant to pay to the Children 300 *l.* a-piece; if Sons, at the Age of twenty-one, and if Daughters, at the Age of eighteen Years; and in Default of Payment of the said 300 *l.* &c. then the Grantor farther granted to the Husband and Wife an Annuity of 4 *l.* over and above the Annuity of 20 *l.* as a Forfeiture or Penalty, with a Clause of Distress, &c. and for which a Distress was afterwards taken; and in Replevin the Question was, whether this 4 *l.* *per Annum* was a distinct Rent, or a *Nomine Pænæ* annexed to the Rent

* Kid-
welly's
Case.
Capell's
Case.

Rent of 20 *l. per Annum* ; for if it was a *Nomine Pænæ*, then the Plaintiff could not distrain for it, because at Common Law the Heirs, Executors, or Administrators of any Person *seised of a Rent*, had no Remedy for the Arrears incurred in the Life-Time of the Ancestor, or Testator ; therefore the Statute 32 *H. 8.* gave both an Action of Debt and Distress for *Arrears of Rent-Services, Rent-Charge, Rent-Seck, and Fee-Farm Rents* ; but a *Nomine Pænæ* is neither of these Rents, so not within the Letter or Meaning of that Act ; 'tis true, the Deed expresseth, that this 40 *l. per Annum* shall be paid as a *Forfeiture or Penalty* ; but that must be intended as a Forfeiture for not paying the 300 *l.* which is a collateral Matter ; whereas a *Nomine Pænæ* is always created upon Default of a *Payment of a Rent* before granted ; the Case was not adjudged. 2 *Lutw. Rep.* 1151. *Egerton versus Sheafe. Antea Baron and Feme. (D) 19. S. C.*

Nonfuit.

(A)

This is called in the Civil Law, Litis Renunciatio ; and in our Law 'tis a Relinquishing the Suit by the Plaintiff, upon the Discovery of some Error or Defect, when he hath so far proceeded in the Action, that the Jury are ready to give their Verdict.

1. **D** E B T upon Bond, the Defendant pleaded ; to which Plea the Plaintiff demurred, and the Demurrer being argued, the Court gave Judgment for the Defendant ; thereupon the Plaintiff prayed, that he might be Nonfuit ; but adjudged, that he could not. *Trin. 2 Jac. 2 Cro. 35. Adderly versus Adderly, and ibid. Phelpes versus Echard. S. P.*

2. Where the Record of *Nisi prius* is mistaken, the Plaintiff may be Nonfuit before the Jury are sworn, and there shall be a *Venire facias de novo* to try the Issue ; this was in the Case of *Young versus Englefield. Godb. 328. Antea Error. (E)*

3. Where Damages are recovered against several in a Writ of Conspiracy, they must all join in an Attaint, and the Nonfuit of one shall not be prejudicial to the other, no more than in an *Audita querela* or *Scire facias* upon a Release. 6 *Rep. 25. in Ruddock's Case.*

4. The Queen brought a *Quare Impedit* against the Bishop and Incumbent, who pleaded several Pleas, and the Queen did not prosecute, but let the Action depend a long while ; whereupon the Defendants moved, that she might be Nonfuit ; but adjudged she could not be nonfuit ; 'tis true, the Suit may be discontinued upon the Prayer of the Party after a Year ; and in the Case of a Common Person the Plaintiff may discontinue his Suit within the Year, but the Defendant cannot discontinue it till after the Year. *Trin. 29 Eliz. Goldsb. 53. The Queen versus Leigh.*

5. The Plaintiff in Ejectment not appearing at the Assises, he was nonsuited, and this was recorded ; but there was no *Venire* or *Habeas Corpora* put in, and this appeared by the *Postea* now produced ; and thereupon the Nonfuit was discharged, because the Judge of *Nisi prius* hath no Power to nonsuit without an *Habeas Corpora*, or *Distingas*. *Sid. 164. Thompson versus Hudsbett.*

6. Writ of Error in the Exchequer-Chamber, upon a Judgment in *B. R.* and after the Error assigned, the Defendant pleaded a Release of Errors, upon which they were at Issue, and at the Trial the Defendant having his Witnesses, to prove the Release, the Plaintiff did not appear, but was nonsuited, so that the Defendant had not Opportunity to prove his Release ; and thereupon it was moved, that the Plaintiff in the Original Action might have Liberty to take out Execution on the Judgment, which was granted, because a Nonfuit at the Assises, was a Nonfuit in the Writ of Error ; for otherwise the Plaintiff might be delayed for ever. *Sid. 257. Temple versus Ullock.*

7. Where a Man appears at the Return of the Process, and files Bail, tho' he was never arrested, he may have a *Nolle prosequi* against the Plaintiff, if he do not declare within two Terms. 2 *Salk. 454. Cook versus Foster.*

8. Trespass against two Defendants, the Plaintiff had a *Verdict*, and one of them being an *Infant*, the Plaintiff entered a *Nolle prosequi* as to him, and took out Judgment against the other, and Execution, and thereupon a Writ of Error was brought ; and it was insisted for the Defendant, that the Judgment and Execution could not vary from the Writ ; on the contrary, *Hob. 71. and 1 Roll. Rep. 379.* were cited, to prove that a *Non pros'* may be entered after a Trial by Verdict, as well as upon a Judgment on a Demurrer ; but the Court held, that a *Non pros'* could not be entered upon a final Judgment, but after an interlocutory Judgment it might ; as upon Demurrer, &c. 2 *Salk. 455. Lover versus Salkeld.*

9. A Judge of *Nisi prius* may receive a *Non pros'* at the Assises; as for Instance, an Ejectment was brought against several Defendants, who all entered into the Common Rule, to confess *Lease, Entry and Ouster*; and at the Assises, when the Question was demanded by the Plaintiff's Counsel, whether they would confess *Lease, &c.* some would, and others would not; whereupon the Plain iff proceeded to Trial against those who confessed, &c. and had a Verdict, and entered a *Non pros'* as to the other; upon this a Rule was made, that in the like Cases hereafter, the Cause of the *Non pros'* should be expressed in the Record, (*viz.*) That those Defendants would not confess *Lease, Entry and Ouster*; that upon the Return of the *Postea* the Court might be informed what Lands were in their Possession, that the Judgment might be entered against the casual Ejector as to them; but this was against the Opinion of the *Ch. Just. Holt*, who held, that before the Statute of *York*, the Justices had no Power to record in the Country, either a *Nonsuit* or *Default*; and tho' they have no Power by that Statute to record a *Nonsuit*, yet a *Non pros'* is not within the Statute, and consequently they have no Power to enter it. 2 *Salk.* 456. *Greeves versus Rolls.*

Notice.

Where 'tis requisite; and where the Parties are to take Notice at their Peril; and what shall be good Notice. (A)
Where 'tis not requisite, and where an

Executor is not bound to take Notice of Debts or Judgments against his Testator. (B)

(A)

Where 'tis requisite; and where the Parties are to take Notice at their Peril; and what shall be good Notice. See *Bankrupts.* (D)

1. **I**N an Indenture to lead the Uses of a Fine, there was a Proviso, that if the Cognisor tender or pay 20 *l.* at any Time during his Life, to the Cognisee, at the Font-stone of the Church of *Corsham*, that then the Uses shall be to the Cognisor and his Heirs; adjudged, because no certain Day is limited either for the Tender or Payment, the Cognisor must give Notice of it. *Mich. 19 Eliz. Dyer* 354.

2. Lessee for Years; afterwards the Lessor made a Feoffment in Fee to another; in such Case the Feoffee may distrain, or may have an Action of Debt against the Lessee, but in his Avowry or Declaration he must alledge, that the Lessee had Notice of the Feoffment; so if he bargain and sell the Reversion by Deed enrolled, the Bargainee shall never take any Advantage of a Condition to re-enter upon Non-payment of Rent, &c. without giving Notice to the Lessee of the Bargain and Sale; for tho' 'tis enrolled, and on Record, yet because it may be done in several Courts, and very privately, the Law will not compel the Lessee to search after it, but in order to preserve his Interest, will compel the Bargainee to give Notice of it. 5 *Rep.* 113. *Mallory's Case.*

3. *Assumpsit, &c.* for that there was a Communication between the Plaintiff and Defendant, concerning the Sale of some Lands made to him by the Defendant, for which he paid 20 *l.* and the Defendant promised, that if the Plaintiff did not like the Lands, he would repay the Money within a Fortnight; and he alledged, that he did not like the Lands, and that the Defendant had not repaid the Money; after Judgment for the Plaintiff, and a Writ of Error brought, it was assigned for Error, that the Plaintiff had not alledged, that he gave Notice of his Dislike within a Fortnight; but adjudged, that the Defendant ought to take Notice of it at his Peril, because he had bound himself by his Promise so to do. *Cro. Eliz.* 834. *East versus Thoroughood.*

4. Lessee for Years, rendring Rent, upon Condition, that if he, or his Assigns, did alien or assign any Part of the Land, without the Assent of the Lessor, his Heirs or Assigns, that then he or they might enter and turn out the Lessee; he assigned Part of the Lands, without the Assent of the Lessor, who having no Notice of such Assignment, accepted the Rent, and afterwards re-entered; adjudged, that this being a * collateral Condition, (*viz.*) to give an Entry, in Case the

* See Goodal's Cases

5 *Rep.* 95. *Moor* 708. *Gould* 176. *Cro. Eliz.* 384. *Poph.* 100. *S. P.*

lessee did alien, it might be done in such a *secret Manner*, that it may be impossible for the Lessor to know it; therefore in such Case Notice is necessary. 3 Rep. 65. In *Pennant's Case*.

5. The Vendor being seised in Fee, &c. in Trust to the Use of another, and his Heirs, and being about to sell the Lands, the Vendee was told, that the other had no Title, and therefore he was bid to take Care how he bought the Land, for the Vendor had nothing in it but only in Trust for another; adjudged in Chancery, that this was not a sufficient Notice of the Trust, for flying Reports are usually false. *Goldf. 147. Wildgoose versus Wayland*.

6. The Husband devised his Lands to his Wife for Life, then to his eldest Son and his Heirs, paying to his youngest Son 40 *l.* and *fining his said eldest Son*, then to come to the youngest Son and his Heirs; the Money was not paid by the eldest Son as directed by the Will, and the Question was, Whether his Estate was forfeited by Non-payment of the Money, *without Notice of his Father's Will*; it was insisted for him, that it was not forfeited, because it shall be presumed, that being the eldest Son he entered as *Heir*, which is a better Title than he had by the Will; 'tis true, if the Devise had been to a *Stranger*, in such Case, as *he takes Notice* what Estate he hath by the Will, so he is bound to take Notice upon what Condition 'tis given; but the *Heir at Law* is bound so to do; for which Reason it was adjudged, that Notice must be given to him of a Condition annexed to his Estate. 1 *Lutw. 809. Whaley versus Read*. 4 Rep. 82. *Sir Andrew Corbet's Case*. S. P. 2 *Leon. 60. S. C.*

7. Debt against an Administrator, who lived in the County of S. but the Action was laid in another County; and before he had Notice of this Action he paid several Debts which the Intestate owed upon Specialties, and had not Assets left to pay the Debt for which this Action was brought, to which he now appeared, and pleaded all this Matter, and concluded, that he had nothing in his Hands, &c. adjudged, that the Plea was good. *Trin. 32 Eliz. 1 Leon. 312. Corbett's Case. Keilw. 51. S. P. Plow. Com. 279. S. P. Vaugh. 94. S. P.*

8. There is a Difference where a Devisee, who is to perform a Condition, is a Stranger, and where he is *Heir at Law*; for in the last Case he must have Notice, because he having a good Title by Descent, need not take Notice of any Will; and so is 8 Rep. 89. *Frances's Case*.

9. T. S. gave the Plaintiff *Leave* to lay his Hay on his Land till he could conveniently sell it; *Palm. 71.* and afterwards he made a Lease of the Lands on which the Hay stood, to the Defendant, who *2 Roll.* put in his Cattle, and they eat up the Hay; adjudged, that the Defendant ought to have given *Rep. 148,* Notice to the Plaintiff of this Lease made to him, and to require him to remove his Hay. *Poph. 191. S. C.* 151. *Webb versus Paternoster*.

10. The Principal and two Sureties entered into a Recognisance to the Plaintiff, conditioned, *Yelv. 53;* that if he sued the Principal before such a Day, that then he should within eight Days *S. C.* after *Warning* appear, and if he was condemned, would pay the Debt, or render his Body to Prison; all which was set forth in the Declaration against one of the Sureties; to which he demurred, and had Judgment, because the Plaintiff had not set forth, that he gave the Defendant *Warning* of the Action brought. 2 *Cro. 45. Hargrave versus Rogers*.

11. *Assumpsit, &c.* for that the Plaintiff being ready to go to Trial in an Action brought against the Defendant, he promised, that if the Plaintiff would desist and give him a Note of his Charges, that he would pay the Money to the Plaintiff *at his first Coming into Somersetshire*, and alledged Performance on his Part, and that on such a Day he came *into Somersetshire*; after a Verdict for the Plaintiff, the Judgment was arrested, because he had not alledged, that he gave the Defendant *Notice of his first Coming into Somersetshire*. *Hob. 68. Richards versus Carbonell*.

12. The Testator had a Wife and three Sons, and he devised his Lands to his Wife for Life, and after her Decease to his eldest Son and his Heirs; and if he die without Issue of his Body, then to the second Son and his Heirs; and if both of them die before they have Issue of their Bodies, then to the youngest Son, and his Heirs; and if the eldest Son shall enjoy the Lands, then he shall pay to each of the younger Sons, 20 *l.* and if he refuse, the the Lands shall remain to then second Son for ever, paying to the eldest and youngest Son such a Sum; and if the second Son enjoy the Lands, then he likewise to pay to the youngest Son 20 *l.* the Testator died, and then his eldest Son died without Issue, and afterwards the Wife died; then the youngest Son made his Will, and his Wife Executrix, and died, and the second Son entered and was seised in Tail, but did not pay the Money to the Executrix: Now, if this was a *Conditional Estate* to the second Son, as it certainly was to the eldest, then he ought to have given *Notice* to the Executrix, when he intended to make his Entry, that she might be there ready to demand the Money; because there can be no Refusal to pay, without a Demand, and the Executrix could not tell when to demand it, till she had Notice of the Entry. *Poph. 12. Ward versus Browning*.

13. The Defendant bought a Quantity of Corn of the Plaintiff, and promised to pay for it as much as the Plaintiff should receive for the like Quantity of another; in an *Assumpsit* brought against the Defendant, the Declaration set forth, that after the Agreement the Plaintiff sold the like Quantity, &c. to T. S. for which he had 18 *l.* but did not shew, that he gave *Notice* to the Defendant, that T. S. had paid so much for it; and for that Reason the Judgment was reversed; but if the Agreement had been, that the Defendant should pay so much as T. S. had paid, in such Case the Plaintiff is not bound to give Notice, *quia constat de persona*; but where the *Person is uncertain*, there the Plaintiff to entitle himself to the Action, must give Notice. 2 *Cro. 456. Hemesley's Case*. 1 *Roll. Rep. 285. S. C. Paul versus Hemmings, S. P. Hob 51. Holmes versus Twist. Cro. Car. 571. S. P.*

14. The Father having bound his Son Apprentice for eight Years, entered into a Bond to the Master, by which he bound himself and his Executors to make Satisfaction for all such Goods of the Master as should be wasted by the Apprentice during that Term, within three Months *after due Proof thereof*, either by the Confession of the Apprentice, or otherwise, and Notice thereof given to the Father or his Executor; the Father died, and the Master brought an Action of Debt against his Executor, who pleaded, that the Plaintiff had not *proved*, that the Apprentice had wasted, &c. the Plaintiff replied, that the Apprentice had wasted, &c. to the Value of 400 *l.* and that by a Writing under his Hand *he had confessed it*; and that on such a Day and Place the Plaintiff gave Notice to the Defendant, that the Apprentice had wasted, &c. and upon Demurrer to this Replication, it was objected, that the *Proof* against the Apprentice ought to be upon a *Trial at Law*; but adjudged, that it might be by Circumstances in Writing, according to the Intention of the Parties, which Judgment was affirmed in a Writ of Error in the Exchequer-Chamber; but then it was objected against the Replication, that the Plaintiff alledged, that on such a Day and Place he gave Notice to the Defendant, (who was an Executor) that the Apprentice had wasted his Goods, but did not say, that he gave Notice *after the Death* of the Testator; for if it was given in his Life-Time, it was to no Purpose; and for this Reason the Judgment was reversed. *Mich. 10 Jac. 2 Cro. 381. Gold versus Death. Postea Proof. (A) 3. S. C.*

15. The Mother and Son levied a Fine, and declared the Uses to the Mother and her Heirs, if the Son did not pay her 10 *l.* on the first Day of September ensuing, and if he did, then to the Use of the Son and his Heirs; he died *before the Day of Payment*; his Sillers and Heirs having *no Notice* of this Deed to lead the Uses of the Fine, did not pay the Money *on the first of September*; it was said, they were bound to take Notice of it, because they are Co-Heirs, and are privy to the Condition which descends on them; and so it was resolved in *Frances's Case, 8 Rep.* where the Heir was bound to take Notice of the Proviso in a Feoffment, without any Notice given; and this Difference was taken, that where Notice is required to be given by the Original Deed or Agreement, there 'tis hereditary, and descends to the Heir, and he is bound to take Notice at his Peril; but if 'tis collateral to the Father, it shall not bind his Heir without express Notice. *Winch. 108. Cowper versus Edgar.*

16. Debt on a Bond, conditioned to pay 300 *l.* within three Months after his Daughter should be of the Age of eighteen Years, or within eighteen Days after her Marriage, and *after Notice* given, which of them should first happen; adjudged, that this Notice shall relate to both Days, because 'tis incertain, which of them shall first happen. *Latch. 158. Read versus Bullington.*

17. In *Trover*, &c. the Defendant justified by Virtue of a Warrant from the Commissioners to take the Cattle by Way of Distress, for not paying a Tax set by them on the Plaintiff towards Repair of the *Sea-Walls*; and upon Demurrer the Plea was held ill, because the Defendant did not set forth, that Notice was given to the Plaintiff, that the Tax was set on him, which ought to have been done, and the Tax demanded, before any Distress could be taken. *Style 13. Whittle versus Farwett.*

Allen 24. 18. *Assumpsit*, &c. to pay 2 *s.* a-piece for every Piece of Cloth the Plaintiff should buy for the Defendant; and the Plaintiff set forth, that he had bought so many Pieces, for which he was to have so much Money, but that the Defendant *licet sapius requisitus*, had not paid it; the Plaintiff had a Verdict; but it was moved in Arrest of Judgment, that he had not alledged, he gave Notice to the Defendant how many Cloths he had bought for him; now, tho' they were actually bought for his Use, and tho' the Request to pay the Money implies, that he had Notice how many were bought, yet the Court inclined, that *Personal Notice* ought to be given. *Style 53. Tanner versus Lawrence.*

Allen 24. 19. Debt upon Bond, conditioned, that the Obligor should make an Estate of Inheritance to the Obligee, at such a Day and Place; the Defendant pleaded, that he was ready at the Day and Place, &c. to make an Estate of Inheritance, &c. and upon Demurrer the Plea was held ill, because he had not set forth, that he gave the Plaintiff Notice, *what Estate he would make.* *Style 61. Brook versus Brook.*

20. *Assumpsit*, &c. to pay 16 *l.* for a Booth in *Sturbridge-Fair*, and to pay the Plaintiff for all such Wine and Hops as should be sold in the Booth during the Fair, and did not set forth, that he gave Notice to the Defendant, how much Wine and Hops he laid into the Both during the Fair; for which Reason the Judgment for the Plaintiff was reversed. *Style 172. Harris v. Gibbons.*

21. The Defendant being a Coachman, broke a Pipe of Wine in the Street, by his careless driving the Coach, and promised the Plaintiff, that in Consideration he would forbear to sue him, that he would pay as much as he was damnified, and the Plaintiff did not in his Declaration set forth, how much the Wine was worth that was spilt; but adjudged, that the Defendant is bound to take Notice of the Damage. *Style 458. Folk versus Presdale.*

22. *Assumpsit*, &c. in an Inferior Court, in which the Plaintiff declared, that the Defendant, in Consideration of so much Money received, did promise, that he would pay to the Plaintiff so much *when he returned into England from Hamborough beyond Sea*, and alledged, that such a Day he went over Sea to *Hamborough*, and returned such a Day to the Parish of *St. Clements Danes in London*, and that he required him to pay the Money, but he had not done it: Upon *Non Assumpsit* pleaded, the Plaintiff had Judgment; and upon a Writ of Error brought, the Error assigned was, that the Plaintiff did not set forth, that he gave Notice to the Defendant of his Request; for he ought to have alledged *express Notice*, and not *habens notitiam inde*, for that is too general, he should have set forth both the Time and Place where Notice was given; and for this Reason the Judgment was reversed. *Hill. 15 Car. 1 Cro. 412.*

23. Devise to his Wife for Life, Remainder to the Daughter in Tail, upon Condition to pay so much Money; adjudged, that if she failed in Payment, it was no Forfeiture, unless she had Notice; but in this Case it doth not appear by the Report, whether the Daughter was Heir at Law; for if she was, then she must have Notice. *Palm. 164. Sanders versus Carwell. See 8 Rep. 89.*

24. The Defendant promised to pay to the Plaintiff for a Horse which he bought of T. S. as much Money as he (the Plaintiff) paid T. S. for the Horse; and in an Action brought upon this Promise, the Plaintiff averred, that he had paid T. S. 7 l. for this Horse, which he required the Defendant to pay, but he refused; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff ought to have given Notice to the Defendant (before the Action brought) how much he had paid T. S. for the Horse: *Sed per Curiam*, the Defendant ought first to have demanded of the Plaintiff how much he had given for the Horse; and without such Demand he is not obliged to give him Notice how much it Cost. *W. Jones 207. Jacob versus Cook.*

25. In Covenant, the Case was, Some Lands were to be purchased for 400 l. but if it did not amount to so much, then the Parties covenanted with each other by the Articles, to repay, according to the Abatement, in Proportion, (*viz.*) The Defendant's Testator covenanted for himself and his Executors, &c. to repay to the Plaintiff his Proportion, so as the Plaintiff gave him Notice in Writing of the Sale of the said Lands, but did not say Notice in Writing to his Executors or Administrators; but in the Declaration the Plaintiff averred, that he gave Notice to the Defendant (who was Executor) *secundum formam & effectum articulorum*, &c. and upon a Demurrer to this Declaration it was objected, that here was a Variance between the Covenant and the Declaration, for the one was to give Notice to the Testator; and the Declaration was, that he had given Notice to the Executor: *Sed per Curiam*, this Variance is not material, because the Covenant runs in Interest and Charge; therefore, as the Executor is bound to pay, so 'tis reasonable he should have Notice; and because 'tis expressly required in the Covenant, that it should be in Writing, it ought to have been so pleaded, for Notice *secundum formam & effectum articulorum* will not be sufficient to help the Want of Substance, and so Judgment was given for the Defendant. *2 Mod. 268. Harwood versus Hilliard.*

26. Debt on a Bond, &c. conditioned to perform Articles, by which it was agreed, that the Plaintiff should assign his Term in an Inn, &c. to the Defendant, and afterwards should serve the said Inn with Strong Beer and Ale during the Term, &c. The Defendant pleads Performance of all the Articles on his Part; the Plaintiff replied, and averred, he was ready to serve the Inn with Strong Beer and Ale, and assigned the Breach, that the Defendant had bought several Hogheads of other Brewers; and upon Demurrer to this Replication, it was objected, that the Plaintiff ought to shew that he had brought Beer and Ale to the Inn, and that the Defendant had refused it; but it was answered, that it was impossible that the Plaintiff should know how much to bring, unless the Defendant had given Notice to him how much was needed; 'tis like the Case where the Lessor covenants with his Lessee to find Timber for Repairs, the Lessee must give Notice what Quantity is necessary, otherwise the Lessor is not bound to deliver any; but here was no Judgment in the principal Case. *1 Lutw. Rep. 374. Ange versus Patterson.*

27. Lease for Years, rendring yearly two fat Turkeys, or ten Shillings for them; and in an Action of Debt, the Plaintiff declared for 4 l. 10 s. for Turkeys, after she had made her Choice to have the Money in Discharge of the Turkeys, and Notice thereof had by the Defendant; and upon Demurrer it was objected to this Declaration, that it was ill, because the Plaintiff did not aver, that on such a Day, &c. she made Choice to have the Money instead of the Turkeys, and that she gave Notice thereof to the Defendant, for it was not issuable to say, that after she made Choice, &c. and Notice thereof had by the Defendant, that being only an Allegation and no express Averment; but adjudged, that the Defendant ought to tender either the Money or the Turkeys, and he had done neither; and that the Plaintiff by bringing this Action had determined his Choice to have the Money, and not the Turkeys. *1 Lutw. Rep. 643. Letten versus Winne. See Antea Election. (C) contra.*

(B)

Where 'tis not requisite, and where an Executor is not bound to take Notice of Debts or Judgments against his Testator. See *By-Law. (A) Bankrupt. (D)*

1. **W**Here an Executor payeth a Debt on a simple Contract, 'tis good in Discharge of another Action of the same Nature, if he had not any Notice of Debts of an higher Nature at that Time. *Keilw. 51. Plow. Com. 279. S. P. Vaugh. 94. S. P.*

2. Where one is bound to another to make such an Assurance as T. S. shall advise, in such Case the Obligor is bound to make the Assurance without Notice, that T. S. had advised it; but if he had been bound to make such Assurance as the Counsel of the Obligee shall advise, there Notice ought to be given that W. N. the Counsel of the Obligee had advised. *Leon. 105. Arkinson versus Rolfe.*

3. The Law is, that an Executor is not bound to take Notice of a Judgment against his Testator, because he is not privy to his Acts; and tho' a Judgment is Matter of Record, yet that doth

not alter the Case, for an Executor is no more bound to take Notice of a Record, than the Court it self in which 'tis recorded, who are not bound to take Notice of their own Records after the first Term; and by the same Reason an Executor is not bound to take Notice of a Judgment, &c. but must have Notice given; as for Instance, a Man owed Money on a *Bond*, and also upon a *Recognisance*, and the Bond-Creditor got Judgment, but before Execution the Defendant died, having made his Wife Executrix; then his Goods were taken in Execution upon the *Recognisance*, and thereupon the Bond Creditor brought a *Scire facias* against the Executrix, to shew Cause why he should not have Execution on his Judgment, to which she pleaded the Execution on the *Recognisance*; and adjudged a good Plea, because she being chargeable with the just Debts of her Husband, and Execution being taken out upon the *Recognisance*, she could not prevent its being executed, especially since she had Notice of the Judgment on the Bond. 2 *And.* 157.

Yelv. 29.
S. C.
2 *And.*
160. S. C.
2 Brownl.
39, 81.
S. C.

4. But about three Years afterwards, in a parallel Case, the Administratrix had Notice of the Judgment on the Bond against her Intestate, for she brought a Writ of Error to reverse it; and whilst the same was depending his Goods were taken in Execution upon the *Recognisance*; and afterwards the Judgment being affirmed on the Writ of Error, the Plaintiff brought a *Scire facias* against the Administratrix, &c. who pleaded the *Execution upon the Recognisance*, and that she had not *alia Bona*, &c. and this was adjudged a good Plea, tho' the Plaintiff did not set forth, that the Defendant had Notice of the Judgment on the Bond; for when she paid the Debt due on the *Recognisance*, she could not plead the Judgment on the Bond, because, whilst the Error was depending, she could not tell whether it would be affirmed, or not. *Cro. Eliz.* 734, 822. *Bereblock versus Read.*

5. So where the Thing to be done is between the Parties themselves, without the Intervention of a third Person, there Notice is to be given of the Time and other Circumstances of the Act; but where the Thing is to be done by a *Stranger*, there both Parties are to take Notice of it at their Peril. 1 *Bulst.* 44. *Goble versus Mofse.*

6. *Assumpsit*, &c. the Case was, *H. D.* promised *T. S.* that if he would borrow 100 *l.* of *L. W.* in such Case he the said *H. D.* would repay it *at the Day, and upon the Condition agreed on between the Lender and Borrower*; *T. S.* borrowed the Money and agreed to pay it on a certain Day, but died before that Day came; afterwards, the Money being not paid, the Lender brought an Action against the Executor of *T. S.* who borrowed the Money and recovered, and then the said Executor brought another Action against *H. D.* upon his Promise made to his Testator, and had Judgment; it was objected in Error, the Plaintiff had not alledged, that he gave the Defendant Notice of the Condition agreed on between the Borrower and Lender, and without such Notice the Defendant was not bound by his Promise; but adjudged, that where a Penalty is to be recovered, there Notice is requisite; but 'tis not so where Damages are to be recovered, for in such Case the Party hath sufficient Notice by the Action brought. 1 *Bulst.* 12. *Beverly versus Leighton.*

7. Error of a Judgment in *Assumpsit*, where the Defendant promised, that in Consideration of several Sums paid to him, that if *T. S.* when he returned from beyond Sea, *should affirm*, that he received 20 *l.* of the Plaintiff, then the Defendant would pay him 20 *l.* the Error assigned was, that the Plaintiff had not shewed before whom *T. S.* affirmed it, or that he gave the Defendant Notice of the Affirmation; adjudged, that he is to take Notice at his Peril, because the Affirmation was to be made by a Stranger, and the Consuance thereof lieth as well in the Knowledge of the Defendant as the Plaintiff. 2 *Cro.* 492. *Powle versus Haggett.* 2 *Bulst.* 143. *Child versus Horden.* S. P. *Postea* 12. S. C.

8. Lease for Years, &c. upon Condition, that if the Lessee or his Assigns did not repair the House within six Months *after Notice*, that the Lease should be void; the Lessee assigned it for ten Years, and Notice was given to the Assignee, that the House wanted repairing, &c. adjudged, that this was no good Notice, because it was given to a wrong Person, it ought to be given to the Lessee himself, for he it was who was bound to repair it under a Forfeiture, upon Notice, &c. 2 *Cro.* 9. *Sweetman versus Cusb.* See Repairs. (B) 2. *Owen* 114. S. C. reported by the Name of *Streetman versus Everfly.* Repairs. (A) 9. S. C.

9. Case against the Defendant as Executor, upon a Promise made by his Testator for a Marriage-Portion; and the Plaintiff did not set forth, that Notice was given to the Defendant of the Marriage; adjudged, that where a *collateral Thing* is to be done at or after Marriage, there Notice ought to be given of it; but where *Money* is to be paid, in such Case 'tis a Debt due to the Party, and may be recovered without any Notice given of the Marriage. 2 *Bulst.* 254. *Selby versus Wilkinson.*

10. Lessee for ninety Years made an Assignment for ten Years, and the Assignee covenanted to repair, then the Lessee devised the Residue of the Term, and died, and the Devisee brought an Action of Covenant against the Assignee for not Repairing; adjudged, that the Action did lie, tho' no Notice was given of the Devise of the Residue of the Term, because there was no Penalty annexed in not Repairing; and it differs from *Mallory's Case*, for that was a Condition with a Penalty. *Godbolt* 160: *Bristow versus Bristow.*

11. Debt upon Bond for Performance of Covenants brought against the Lessee, who pleaded Performance generally; the Plaintiff replied, and set forth a *Bargain and Sale of the Reversion* made by the Lessor to *W. R.* and *T. W.* and that there was a Covenant in the original Lease, that the Lessee, at *Michaelmas*, &c. or after, upon Request, should deliver Possession to the Lessor, or his Assigns; and then sheweth for Breach, that the two Bargainees, the next Day after *Michael-*

was, required the Defendant to deliver Possession, which he refused; after a Verdict for the Plaintiff, it was objected, that the Breach was not well assigned, because the Plaintiffs did not shew that they gave Notice to the Lessee that the Reversion was sold to them, and without Notice the Lessee is not obliged; but adjudged, that having entered into a Bond, with a Condition to deliver Possession at such a Time, he must take Notice of it at his Peril. 2 Cro. 475. *Higgins versus Paine*.

12. Case, &c. in which the Plaintiff declared, that there being a Difference between him and the Defendant concerning how much Rent he ought to pay; the Defendant promised, that if *W. R.* would say, that the Rent reserved was six Pounds, then he would pay double that Sum, and that the said *W. R.* did affirm the Rent to be six Pounds; upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict; and upon a Motion in Arrest of Judgment, it was objected, that the Declaration was ill, because the Plaintiff did not alledge that he had given Notice to the Defendant what the said *W. R.* did affirm; but adjudged good, tho' no Notice was alledged; because the Defendant having undertaken to do a Thing, in such Case he undertakes to do all Circumstances incident to the doing it, and that without Notice; but if he had been ignorant of the Thing to be done, there Notice must be given. 2 Bulst. 143. *Child versus Harding*. Antea 7. S. C.

13. Error of a Judgment in Covenant, in which the Case was, There was an Agreement between the Plaintiff and Defendant for a Purchase of Lands at 11 *l.* per Acre, and so much the Plaintiff paid for the same, and the Defendant covenanted, that there were so many Acres, &c. and it was agreed between them, that the Lands should be measured *before the last Day of January*, by two Measurers appointed by each of them; and if there were not so many Acres for which the Plaintiff had paid, then the Defendant covenanted to repay the Plaintiff *before May* 11 *l.* per Acre for every Acre it should fall short of the Number for which the Plaintiff had paid, &c. and that the Plaintiff had appointed one to measure on his Part on such a Day, before the last Day of January, of which he gave Notice to the Defendant, but no Body came on his Part, whereupon the Lands were measured by the other, and so many Acres were found to be short, &c. of which he gave Notice to the Defendant on such a Day in May following; and for Non-payment of the Money this Action was brought, and a Verdict and Judgment for the Plaintiff; and now, upon Error brought, the Error assigned was, that the Covenant was to repay the Money, &c. *before May*, and the Notice is alledged to be given *in May*, so the Breach is not well assigned: *Sed per Curiam*, If the Measurer had been appointed by the Covenant it self, there ought not to be any Notice, for in such Case the Defendant ought to take Notice at his Peril; and here the subsequent Matter amounts to as much as if the Measurer had been appointed by the Covenant it self; for it appears that the Plaintiff gave the Defendant Notice both of the Person and Time, by whom and when the Lands should be measured; and it was his own Fault that he did not send a Person on his Part to measure. 1 Roll. Rep. 314. *Sir Baptist Hix versus Coates*.

14. *Assumpsit*, &c. the Defendant, in Consideration of such Thing delivered to him, promised to pay to the Plaintiff on the Day of his Marriage 5 *l.* and the Plaintiff alledged that he was married such a Day, and that the Defendant *licet sapius requisit'* had not paid the Money; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff ought to have given the Defendant Notice of his Marriage before he had married, for that rests in his Privity, and the Defendant is not bound to take Notice of it; but adjudged, that the Defendant at his Peril ought to take Notice. Cro. Car. 23, 35. *Crane versus Crompton*. Request. (C) 4. S. C. Hutt. 8. S. C.

15. *Assumpsit*, &c. to pay so much Money as a third Person (naming him) should appoint, and the Plaintiff set forth, that the said Person appointed so much, but did not shew that he gave the Defendant Notice thereof; adjudged, that the Defendant is bound to take Notice of it at his Peril as well as the Plaintiff, because this third Person was a Stranger to both; but the Plaintiff having set forth, that he *required the Sum* appointed, and that implies Notice. Cro. Car. 93. *Juxon versus Thornhill*.

16. The Condition of a Bond was, that if the Plaintiff would marry the Defendant's Daughter, then after the said Marriage the Defendant would pay him 1000 *l.* in an Action of Debt brought on this Bond, the Plaintiff averred, that he married the Daughter, but did not shew that he had given Notice thereof to the Defendant, which he ought to do, because the Act was to be done by himself, and not by a third Person; but adjudged, that he having set forth, that he married the Daughter *at the Instance* of the Defendant, that implies he had Notice of it. Poph. 165. *Hodges versus More*. Latch 15. S. C.

17. Award for the Defendant to pay 8 *l.* to the Plaintiff, or 3 *l.* and Costs of Suit, as should appear by a Note under his Attorney's Hand; adjudged, that the Defendant, and not the Plaintiff, ought to require the Note of the Attorney, for he could not compel him to give such Note, so that this Matter did not lie within the Knowledge of the Plaintiff, for if it did, then he is to tender the Note, and to give Notice of it to the Defendant. March 156. *Dewell versus Mison*.

18. *Assumpsit*, &c. in which the Plaintiff declared, that the Defendant and several other Coppyholders of the Manor of *L.* were Complainants in Chancery against *W. R.* Lord of that Manor, to have their Fines made certain by a Decree of that Court; and that, in Consideration the Plaintiff, at his Costs and Trouble, should procure a Decree, that the Defendant should enjoy his Coppyhold at a Fine certain, he promised to pay the Plaintiff 3 *l.* after such Decree obtained, upon Request; and then he set forth, that he had obtained such a Decree at his Costs; and *tho'* at such

a Day he required the Defendant to pay 3 *l.* he did not pay it; upon *Non Assumpfit* pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that the Declaration was ill, because the Plaintiff had not alledged that he gave Notice to the Defendant, that he had obtained the Decree; and adjudged, that he need not give such Notice, because the Defendant himself was one of the Complainants in the Suit upon which the Decree was obtained, and a Party to it. *Hill. 5 Jac. Yelv. 121. Ab versus Doughty.*

19. The Defendant took the Plaintiff's Son to be his Clerk, and covenanted with the Father to give the Son so much for every Quire of Paper he should write, and for Non-payment of the Money the Action was brought; and adjudged good, without alledging Notice given to the Defendant how manyQUIRES the Son wrote, because it was to be done by a third Person; in which Case the Parties, Plaintiff and Defendant are *in aquali gradu* as to the taking Notice. *Allen 9. Needler versus Guest.*

20. In *Assumpfit*, &c. the Plaintiff declared, that *W. R.* assaulted him, &c. and that the Defendant, in Consideration the Plaintiff would not prosecute the said *W. R.* promised to pay him as much as he was damnified; then he sets forth, that he did not prosecute *W. R.* nor yet doth, and that he was damnified so much, &c. which, tho' at such a Time and Place, the Defendant was required to pay, he did not; upon *Non Assumpfit* pleaded, the Plaintiff had a Verdict; it was moved in Arrest of Judgment, that the Plaintiff should have given the Defendant Notice how much he was damnified; but adjudged that he need not, because the Defendant had taken upon him to pay the Damage, which being ascertained by the Plaintiff, and required to be paid, the Defendant must pay it. *Allen 22. Fyner versus Jefferies.*

Sid. 442.
& C.

21. Debt upon Bond, conditioned, that whereas the Plaintiff was bound with the Defendant (who was an Excise-man) that he should give a true Account in the Exchequer, &c. that the Defendant should save him harmless, &c. He pleaded *Non damnificatus*; the Plaintiff replied, that a *Scire facias* was brought against him out of the Exchequer upon the said Bond, and that he retained an Attorney, &c. and upon Demurrer it was objected, that the Plaintiff ought to have given Notice of the *Scire facias*; but adjudged, that it was not requisite. 1 *Vent. 35, 78. King versus Atkins.*

22. The Defendant promised the Plaintiff, that if she married with the Consent of *W. R.* he would settle such a Farm on her for her Advancement in the Marriage; she afterwards married, and for not settling the Farm the Action was brought; after a Verdict for the Plaintiff, and 1300 *l.* Damages, it was objected in Arrest of Judgment, that the Plaintiff had not given the Defendant Notice of the Consent of *W. R.* but adjudged, that where one might take Notice of the Thing as well as the other, there it was not requisite. 2 *Sid. 115. Spratt versus Agar.* 1 *Sid. 36. Brown versus Stephens. S. P.*

23. Trespass, &c. wherein the Plaintiff set forth, that he made a Lease for one Year to the Defendant of Lands in *N. H.* and *B.* and so from Year to Year as long as both Parties should agree, rendring Rent, which being in Arrear for one Year and an half, he distrained five Quarters of Barley, &c. and that the Defendant *apud H.* did rescue the same; upon Not guilty pleaded, the Plaintiff had Verdict; and one Objection to the Declaration in Arrest of Judgment was, that the Plaintiff did not set forth that he gave Notice to the Owner of the Corn, that he had distrained it for Rent; but adjudged, that Notice in this Case is not necessary, because the Action was not brought upon the Lease, but against the Defendant as a *Wrong-doer*, and the Setting forth the Lease was only an Inducement to the Wrong. 1 *Lutw. Rep. 213. Belafise versus Burbridge.*

* See Fry
and Por-
ter's Case.

24. In a Special Verdict in Ejectment, the Case was, The Father being seised in Fee, and having Issue only one Daughter named *Katharine*, settled his Lands upon Trustees and their Heirs, to the Use of himself for Life, and afterwards to *Katharine* in Tail, provided she * married with the Consent of the Trustees, or the major Part of them, &c. but if not, then the said Trustees should raise a Portion out of the said Lands for her Maintenance, Remainder over to *Latitia* (his Sister) in Tail, &c. The Daughter *Katharine* being then but two Years of Age, had Notice of this Settlement at fourteen Years old, but not by the Trustees, and at the Age of eighteen Years she married, &c. without the Consent of the Trustees, or the major Part of them: The chief Question was, whether her Estate-tail was determined, &c. and it was insisted, that it was, tho' she had no Notice of this Proviso given to her by the Trustees themselves, because by the same Means that she takes Notice what Estate she hath in the Lands, she may likewise take Notice of the Limitation in this Proviso: That in all Cases where Conditions are annexed to Estates to pay Money, there Notice is necessary; but where Estates are limited upon Performance of collateral Acts, 'tis not necessary, that where an Estate is created by the Act of the Party, and restrained by particular Limitations, without any Appointment of Notice; there the Law will not add Notice and make it necessary, because the Person who created the Estate might have given it upon what Conditions he pleased: *Sed per Curiam*, since it cannot be intended that the Father would disinherit his Daughter and only Child, without having any Notice of this Settlement, tho' he had not appointed any particular Person to give Notice; so it must necessarily be presumed, that he intended she should have the Estate, unless upon Notice she had refused to comply with the Conditions imposed on her; now, the Daughter being Heir at Law, and having a good Title as such, if any Conveyance be made to defeat such Title, by the Rules of Law and Reason, she ought to have Notice of it; 'tis true, in *Fry and Porter's Case*, Notice was not held necessary; but the Reason was, because the Devise was to a Grandaughter, who was not Heir at Law, (for the Earl of *Newport* had three Sons then living) and therefore the Parties who were concerned ought to in-

form

form themselves upon what Conditions they were to have the Estate; for these Reasons Judgment was given, that the Estate-tail was not determined, without Notice had been actually given to *Katharine* by the Trustees themselves. 3 *Mod.* 28. *Malloon* versus *Fitzgerald*.

25. Debt upon Bond, conditioned to pay all such Charges as shall appear to be due to the Plaintiff's Attorney in prosecuting the Defendant at his (the Plaintiff's) Suit: The Defendant pleaded, that it did not appear what was due to the Attorney; the Plaintiff replied, that 9*l.* was due, of which the Defendant had Notice, but did not pay it; the Defendant rejoined, that it did not appear what was due, and traversed the Notice; and upon Demurrer the Plaintiff had Judgment, because the Defendant ought to take Notice at his Peril what was due to the Attorney, he being no Party to the Action; 'tis true, where the Matter falls properly under the Knowledge of the Plaintiff, he ought in such Case to give Notice to the Defendant. 4 *Mod.* 230. *Pitman* versus *Biddlecomb*.

26. *Assumpsit*, &c. in which the Plaintiff declared, that whereas *T. P.* owed him, (the Plaintiff) 30 *l.* upon Bond, the Defendant promised, that if the Plaintiff would deliver up the said Bond, he (the Defendant) would pay the 30 *l.* and the Plaintiff averred, that he did deliver up the Bond to *T. P.* of which the Defendant had Notice, but had not paid the Money; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, and adjudged, that the Delivery in this Case must be intended to the Obligor, and that Notice need not be given to the Defendant, that the Plaintiff had delivered the Bond, because the Defendant might resort to *T. P.* to know, whether it was delivered up or not, because he was particularly named in the Declaration; but if he had not been named, then Notice might be necessary. 2 *Salk.* 457. *Smith* versus *Goffe*.

Nuncupative Will.

(A)

What it is, and the Effects of it.

1. **A** Nuncupative Will is made by a Verbal Declaration of the Testator's Mind, before a sufficient Number of Witnesses, which being reduced into Writing either before or after the Death of the Testator, is good to dispose his *personal Estate*, but not his *Lands*.

2. Before the making the Statute 29 *Car.* 2. it was necessary not only to put such Will in Writing, but to prove it likewise by Witnesses in the Spiritual Court, and to have it under the Seal of the Ordinary; for where an Administrator exhibited a Bill in Equity against the Defendant, to have a Discovery, and an Account of the Intestate's Estate; he pleaded, that the supposed Intestate made a Nuncupative Will, and *T. P.* Executor, and insisted, that he was not accountable to the Plaintiff as Administrator, nor to any other Person whatsoever, but only to the said *T. P.* as Executor; but it was decreed, that a Nuncupative Will, before Probate, is not pleadable against an Administrator. 1 *Ch. Rep.* 122. *Verborne* versus *Brewin*.

3. But now by a late Statute, 'tis enacted, That a Nuncupative Will shall not be good exceeding 30 *l.* unless proved by three Witnesses, who were present at the Making thereof; nor unless it was made in the Time of the last Sickness of the Deceased, or in his House, or where he hath been resident for ten Days before, unless surprised in Sickness from Home: And no Evidence shall be given to prove such Will after six Months, unless 'tis committed to Writing within six Days after the making.

Neither shall any Letters Testamentary, or Probate of such Will, pass the Seal of any Court till fourteen Days after the Decease of the Testator, nor until Process hath issued to call in the Widow, or next of Kin, to contest it. 29 *Car.* 2. cap. 3.

4. By the Statute 29 *Car.* 2. 'tis enacted, That no Will in Writing concerning any Personal Estate, shall be repealed, or any Clause therein altered, by any Words or Will by Word of Mouth, except the same be put into Writing in the Life-Time of the Testator, and read to, and approved by him, and proved to be so done by three Witnesses: After the making this Statute, *George Stonywell*, by his Will in Writing, made *Elizabeth* his Wife Executrix, and devised to her all the Residuum of his Estate, after some Legacies paid; *Elizabeth* died in the Life-Time of *George* her Husband and Testator, and then he made a Codicil by Word of Mouth, and devised to *Geo. Robinson* all which he had given to his Wife; and adjudged by the Commissioners of Delegates, that this was a good Codicil Nuncupative, and that 'tis quasi a new Will, for so much as he had given to his Wife; and that it was no Alteration of the Will in Writing, as to that, because there was no such Will, for the Operation of it was determined by the Death of the Wife dying in the Life-Time of the Testator, so that as to the Residuum devised to her, it was totally void. *Raym.* 334. *Stonywell's Case*.

Nuisance.

See *Ac. Case.* (I) per totum.

(A)

1. **I**N a *Quod permittat, &c.* the Plaintiff declared, that the Defendant had 'erected on his Freehold Lands one House so near the Plaintiff's House, that Part of it hung over his House, in Breadth seventeen Inches, and in Length seventeen Foot, *ad nocumentum liberi tenementi sui*, and to his Damage 10*l.* it was objected against this Declaration, that the Plaintiff had not alledged any certain Nuisance, (*viz.*) that the Rain fell on his House from that which the Defendant had newly built, or that his House was damnified or rotten by the Rain so falling, or that his Lights were stop'd; but only in general, that it was *ad nocumentum liberi tenementi*; but adjudged, that the Law doth not compel a Man to set forth, that which appears clear to the Court upon the very Face of the Declaration, which in this Case was, that the New built House hung over the Plaintiff's House so many Feet so that of Necessity the Rain which fell from the one must fall on the other. *Mich. 8 Jac. 9 Rep. 54. Batten's Case.*

2. Indictment for a Nuisance was quashed, for that it concluded *in detrimentum omnium inhabitantium*. *1 Mod. 197. Sir John Thorogood's Case.*

3. A Prohibitory Writ issued out of *B. R.* against *Betterton* and other Actors, for erecting a New Play-House in *Little Lincoln's Inn-Fields*, reciting, that it was a Nuisance to the Neighbours, and therefore prohibits them to continue it, but they not obeying this Writ, an Attachment was granted against them; it was objected, that such an Attachment could not be granted, because the Parties had no Way to defend themselves, but to be examined upon Interrogatories upon Oath, and that they were ready to make Oath, that it was not a Nuisance, and that the most proper Method was to proceed by Indictment, and then the Jury would consider, whether it was a Nuisance or not; and this was the better Opinion. *5 Mod. 142.*

4. Moved to quash an Indictment for keeping Hogs in the back Streets in *London*, because by the Statute *2 Will. & Mar. cap. 8. Par. 20.* the Hogs are forfeited; adjudged, where a new Penalty is applied to an Offence, which before was indictable at Common Law, the Remedy may be pursued either by the Penalty or by Indictment; as in this Case, before the Statute it was an Offence to keep Hogs in the Streets, and by the Statute a Penalty is added to that Offence, (*viz.*) a Forfeiture of the Hogs; but 'tis otherwise where a Statute makes the Offence, and appoints the Punishment; for in such Case, that very Remedy which is given by the Statute must be pursued, and no other; then it was objected, that this Indictment was concluded *contra formam Statuti*; but that was held only Surplusage; but admitting it be a Fault, it being an Indictment for a Nuisance, *B. R.* will not quash it; therefore the Defendant must demur to it. *2 Salk. 460. The King versus Wigg.*

Oaths. See Officer. (D) 11, 12.

Offices.

Grants thereof, good. (A) Grants thereof, not good. (B) Of Forfeitures and Sales of Offices. (C)		Of Judicial and Ministerial Offices, and what Offices are consistent, and what not. (D)
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(A)

Grants thereof, good.

1. THE Earl Marshal of *England* granted the Office of Marshal of the King's Bench; and adjudged, that the Grant was good. 1 *Leon.* 322. *Earl of Shrewsbury's Case.* 4 *Leon.* 19. S. C.
2. So the Office of *Clerk of the Fines* to a Judge in *Wales* is restrained by the said Statute 5 *Ed. 6. cap. 16.* to be sold. *Goldsb. 180. Walter versus Walters.*
3. The Offices of *Chancellor, Commissary and Register*, are Offices within the Statute 5 *Ed. 6.* tho' they chiefly concern Matters *pro salute animæ*; yet they also concern Matrimony and Legitimation, and Personal and Real Legacies, and therefore the said Statute restrains the Buying such Offices. 2 *Cro.* 269. *Dr. Ferrer's Case.* A Bailiwick of an Hundred is not within the Statute. 4 *Leon.* 33. *Godbolt's Case.*
4. So the Office of a *Cofferer*, which concerns the King's Revenue, is restrained by the Statute, and must not be sold. *Hob. 72. Sir Arthur Ingram's Case.*
5. The King granted the Office of *Serjeant at Arms* to attend upon the Lord Keeper for Life; he may license such Grantee to be absent, because he is an immediate Officer to the King, tho' Attendant on the Keeper, and he parts with no Interest, but only suspends his Service for a Time. 9 *Rep.* 99. *Mark Steward's Case*, cited in *Sir George Reynold's Case.*
6. The Court of *Augmentations* was dissolved by *Queen Mary*, and united to the *Exchequer*, and all Records and Books of the Court so dissolved, wherein the Leases and Warrants for making them, were enrolled, and all Accounts of her Issues and Revenues shall be with the Clerk of the Pipe in the *Exchequer*. King *Ed. 6.* granted the Office of *Ingrosser* of the great Rolls of the *Exchequer*, or the Clerk of the Pipe, to one *Christopher Smith* for Life; the Queen, *Anno 20* of her Reign, granted this Office to one *Morrison*, after the Determination of the Grant to *Smith*; and afterwards *Anno 30* of her Reign, reciting the Grant to *Smith*, and her Grant to *Morrison*, she farther granted to *Woolley* the Office of Clerk of the Pipe, and of the Engrosser of the Patents of Dimissions and Offices, and also the Keeper of the Accounts, Enrolments and Records, of the late Court of Augmentations, &c. *Habendum* to the said *Woolley* for Life, after the Determination of the Grants to *Smith* and *Morrison*; afterwards *Smith* died, and tho' *Morrison* was then living, yet upon *Smith's* Death *Woolley* possessed himself of all the Records; and it was ruled, that *Morrison* might enter the House where the Records were kept, and take them from *Woolley*. *Moor 289. Morrison's Case.*
7. The Bishop of *Rocheſter* granted the Office of *Register* to one for Life, which was confirmed by the Dean and Chapter, and then the Bishop died, his Successor granted the Reversion of the said Office to his Son, an *Infant*, to be exercised by himself, or his sufficient Deputy; adjudged, that this Clause made the Grant good. *Cro. Car. 401. Young versus Fowler.* 2 *Cro.* 17. *Lady Ruffel's Case.* S. P. *Scambler's Case.* *Cro. Eliz. 636.* *Cro. Car. 556.* S. C. March 38. *Cro. Car.* 278.
8. A Grant of the Office of *Official* of an Archdeacon, and of the Office of a *Commissary* of a Bishop, to a *Lay Person*, is good, and not restrained by the Statute 37 *H. 8.* (which is but an Affirmance of the Common Law) to *Doctors of Law* only; for so it was resolved in *Pratt* * and *Stoke's Case*, *Hill. 35 Eliz.* where the Office of *Commissary* was granted to one who was *Butcher of Law*; adjudged likewise, that these Offices were *Hereditaments*, and so grantable by the Statutes 1 & 13 *Eliz.* as Parcel of the Possessions of the Archdeacon and Bishop. *Cro. Car. 258. Walker versus Lamb.* W. Jones 263. * *Cro. Eliz.* 314.

9 In a Special Verdict in an Action on the Case, for disturbing the Plaintiff in the Exercise of the Office of *Register of Policies of Assurance*; the Case was, This Office was granted to the Plaintiff for Life, by the Word *Concessimus*, but the Defendant had a Prior Grant thereof for Years, and the Questions were, whether the Grant to the Plaintiff was good, and whether this was an

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Office grantable for Years; it was insisted for the Plaintiff, that the Grant was good by the Word *Concessimus*, because the Office was in Being before; 'tis true, if it had been a new Office, then there must be Words of Creation, as *Erigimus, constituimus*; but it has been held, that if the King grant the * Office of House-Keeper, with a Fee, &c. 'tis good, tho' there was no such Office before; tho' a * Fee is not always necessary; then it was objected, that this Office was not grantable for Years, because 'tis an Office of Trust; for those are Offices of Trust which concern the Common-wealth, the King's Revenues, the Administration of Justice, and the Subjects in general; now, this Office concerns the King's Revenues, with Respect to the Customs; besides, it concerns the Interest of the Subject in general, for it concerns all Trading Merchants; but adjudged, that the Grant to the Plaintiff was good by the Word *Concessimus*; 'tis true, the Original Grant of this Office, Anno 17 Eliz. was void, because the Office was then newly erected, but 'tis now made an Office by the Statute 43 Eliz. cap. 12. for Registering Policies of Assurance; and therefore it being an Office in Being, before the Grant to the Plaintiff, 'tis good by the Word *Concessimus*: 'Tis true, there is no Fee appointed, but the Statute requires, that the Policies shall be entered, and the Law will allow what is reasonable; besides this Matter is settled by Usage since the Statute; if not as a Fee, yet as a competent Recompence for his Labour; and admitting, that in Strictness of Law 'tis not an Office, yet 'tis a profitable Employment, and therefore valuable; but tho' the Plaintiff's Title is good, yet the Defendant's is better, because prior to the other; 'tis true, 'tis granted to the Defendant for Years, but yet that Grant is good, because where a greater Estate may be granted, there regularly a Lesser may, where Usage hath not prevailed to the contrary; and there is nothing in the Nature of this Office to disable the Grant, for there is no Trust in the Case; all that the Officer has to do, is to write after a Copy, as the Making of *Sulpæads* and Sealing them, is granted for Years. *Hardres* 351. *Veale* versus *Privur*.

10. In Trespass, &c. the Case was, That *Pagett* was seised of the Office of *Custos Brevium* of *B. R.* and of Keeping the Rolls, and Making the *Nisi prius*, and that he, and all those who had that Office, Time out of Mind, &c. had seven Clerks, who had certain Fees, and that the Plaintiff, &c. was admitted to the Office of one of those Clerks, and enjoyed it until he was turned out by the Defendant *Pagett*, &c. Upon a Trial at Bar he proved, that he was kept out eleven Years, and the Jury gave him 600 *l.* Damages; it was moved in Arrest of Judgment, that this was not an Office, but an Employment, for *Pagett* was answerable for all Mis carriage, so that the Plaintiff was no more than one of his Servants; and if so, removable at Pleasure; but if the Plaintiff was an Officer, he ought to have shewed of what Office, because by his own Shewing the Defendant had several, and if he was an Officer, then his Office was void, because he bought it; besides, he did not set forth, that he was *debito modo admissus & jurat*; but adjudged, that admitting it to be no Office, but only an Employment, the Defendant could not turn him out at Pleasure; for if he might, then the Secondary and the Clerks of the Papers of *B. R.* might be turned out by the Chief Clerk, and both these Officers claimed Privilege as his Clerks; and as to the Buying Offices, those which are sold by any of the Chief Justices, are excepted out of the Statute of *Ed. 6. Stat. 74. Whitechurch* versus *Paget*.

11. *Indebitatus Assumpsit*, &c. the Case was, The King granted the Office of Comptroller of the Customs in the Port of Excester to two, for their Lives, one died; the Question was, Whether the other shall have the Whole by Survivorship; & per Curiam, he shall not, for there shall be no Survivor in an Office of Trust, if 'tis not granted to them, and to the Survivor. 2 *Mod.* 260. *Arvis* versus *Stukley*.

12. Upon a *Mandamus* to the Mayor of *Norwich*, &c. to restore one *Thacker* to the Place of Alderman, they return, that *Thacker* was chosen Alderman Anno 16 Car. 2. and that he took the Oaths, and the Declaration, but did not subscribe the same when he took the Oath of Office, not until the 30th of May, and thereupon they chose another in his Room; it was objected against this Return, that it did not appear that *Thacker* was required to subscribe the Declaration, or that it was tendered to him to subscribe: Sed per Curiam, 'tis not necessary, he ought to do it at his Peril, and the Office is void for not subscribing, &c. *T. Jones* 121. *The King* versus *Thacker*.

13. In a Prohibition the Plaintiff declared, that the Office of Chancellor of the Bishop of *Landaff* was an ancient Office, and grantable by the Bishop for the Time being, for one or two Lives, and to the Survivor, &c. that it was granted to the Plaintiff and *Dr. Loyd*, and to the Survivor for Life, and that the Plaintiff survived, and was sued in the Spiritual Court, in order to deprive him of the Office by a definitive Sentence, &c. contra Prohibitionem, &c. and upon a Demurrer, the better Opinion was, that a Prohibition should go, because the Suit in the Spiritual Court was merely for * Deprivation in a Matter of Freehold, which cannot be determined by the Civil or Canon Law; and tho' this Office was Spiritual as to its Exercise, yet as to the Right it was Temporal, and the Plaintiff having a Freehold in it for Life, that makes it determinable at Common Law. 4 *Mod.* 27. *Jones* versus *Beau*.

* See *Dr. Sutton's Case*, contra; but that was at a Time when the High Commission-Court extended its Power too far in Cases of Deprivation; for *Dr. Sutton* had a Freehold, and might have an Assize to try his Right.

14. By the Statute 1 Will. 3. the *Custos Rotulorum* is to appoint a Clerk of the Peace upon a Vacancy, who may execute it by himself or Deputy, for so long Time only as he shall behave himself well, &c. In a Special Verdict in an *Indebitatus* for 40 *s.* Fees, the Case was, The Earl of *Clare* being *Custos Rotulorum* of *Middlesex*, did by Writing under his Hand and Seal, appoint the

the Plaintiff *Harecourt* to be Clerk of the Peace, *so long as he should demean himself well*: The said Earl being removed, the Duke of *Bedford* was made *Custos*, who, by Writing under his Hand and Seal, appointed the Defendant *Fox* to be Clerk of the Peace so long as he should demean himself well: The Question was, whether the Clerk of the Peace depended on the *Custos*, and was removeable with him, or whether being once appointed by him, had an Estate for Life: *Et per Holt Ch. Just.* and by the Court, he hath an Estate for * Life. As to the Beginning of this Office there are only probable Conjectures, but as to his Continuance in the Office, 'tis to be collected out of the Statute 37 H. 8. and not before; now, the first Beginning of a *Custos* was Anno 34 H. 8. there being at that Time some Difference amongst the Justices, who should keep the Records; and to prevent any farther Disputes, the King appointed a fit Person for that Purpose; and because of the Necessity of making Entries and joining Issues, the *Custos* appointed a Clerk for that Purpose, who was then, and ever since, called the Clerk of the Peace, and the Words by which he is appointed, (*viz.*) for so long Time only as he shall demean himself well, do plainly import an Estate for Life, for when Places depend on Contingencies, it occasions neglect in Officers; but when Men have a fixed Estate in them, they will be diligent and careful in the Execution. 4 Mod. 167. *Harecourt* versus *Fox*.

* This Judgment was affirmed in Parliament. Cases Adj. 158.

15. *Indebitatus Assumpsit* for 200 l. received by the Defendant to the Plaintiff's Use; upon Non Assumpsit pleaded, the Jury found a Special Verdict, in which the Case was, that *John Hammond*, Archdeacon of *Lincoln*, in Consideration of 100 l. granted the Office of Register of his Court to Two for their Lives; the Bishop of the Diocese, who was also Patron of the Archdeacon, supposing that this Grant was void by the Statute 5 & 6 Ed. 6. made against the Sale of Offices concerning Administration of Justice, granted this Office to the Defendant, which Grant was confirmed; then the Survivor of these two Persons to whom the Archdeacon had granted the Office, died in Possession of the same, and afterwards the Archdeacon granted it to the Plaintiff and two more for their Lives, and the Life of the Survivor; and they, before any Office found for the King, obtain a Grant thereof from him; it was agreed in this Case, that the Office of Register might be granted for Lives, it having been usually so granted, and so found by the Verdict; and that was *Young and Stoll's* Case; so a Grant of a Reversion of an Office of Register, is good, being warranted by Usage; and that was *Young and Fowler's* Case; but without such Usage 'tis not grantable in Reversion; and that was *Walker and Lamb's* Case; it was agreed also, that the Grant of this Office, in Consideration of Money, is void by the Statute 5 & 6 Ed. 6. because it is an Office concerning Administration of Justice, and that was *Dr. Trevor's* Case. 12 Rep. 78. 2 Cro. 269. S. C. The chief Point was, that since the Statute enacts, that the Person selling such Office shall forfeit all his Right to it, but doth not say to whom, whether the King or the Bishop shall dispose this Office, by taking Advantage of this Forfeiture; and adjudged, that the King shall dispose it, because where a Statute gives a Forfeiture, and doth not appoint to whom, the King shall have it, unless there is a particular Person grieved, as in Case of the Forfeiture of the treble Value for not setting out Tithes; or where a particular Person hath an Interest in that which is forfeited, as where a Copyholder forfeits, the Lord shall take Advantage of it, and so shall he in the Reversion where the Forfeiture is made by Tenant for Life: 'Tis true, this is at Common Law and not by any Statute; but here the Bishop hath nothing in the Office of the Register, he cannot dispose of it in the Vacancy of the Archdeacon; he may constitute one to supply the Place for a Time, but then the next Archdeacon may remove him and put in another; adjudged likewise, that the King may constitute a Register in this Case before Office found of the Forfeiture; 'tis true, where a Freehold is forfeited to the King by any Statute, 'tis requisite that an Office should be found of the Forfeiture; but this was not an Estate in the Archdeacon, it is only a Power to appoint a Register; therefore, as to the present Vacancy of this Office, 'tis a Chattel separate from the Inheritance, and the King may supply it before Office found, tho' it may be true, that the Right of Nomination in Point of Estate may not vest in the King before Office found; but the Plaintiff in this Case had a Grant from the Archdeacon as well as another from the King; so that if nothing be in the King before Office found, then the Estate must remain in the Archdeacon, and by Consequence his Grant is good to the Plaintiffs. 2 Vent. 187, 267. *Woodward* versus *Fox*.

* 3 Lev. 287. 2 Lev. 71. Raym. 216.

16. Articles of Agreement, reciting, that whereas *Sir William Godolphin* was Auditor of *Wales* for his Life, and had made the Defendant Deputy, &c. who *pro deputatione*, did agree to pay to him yearly, during the said Deputation 200 l. and in Consideration thereof the Defendant should have all the Rents and Profits of the said Office to his own Use; there was a Bond for Performance of these Articles; and upon an Action of Debt brought, the Defendant pleaded the Statute 5 & 6 Ed. 6. cap. 16. making Bonds for certain Offices void, without the necessary Averments; the Plaintiff replied, that there was a fixed Salary of 20 l. per Annum belonging to the said Office; that the legal Profits thereof were yearly 329 l. 10 s. that the Defendant received the said yearly Sum to his own Use, and did not pay 200 l. per Annum to the Plaintiff for so many Years; there was a Rejoinder and a Demurrer to it; adjudged, that where an Office described by the Statute has a certain Salary annexed to it, the Deputation of such an Office, reserving less than the standing Salary, will not be within the Statute; but if there is no certain Salary, and the Fees are uncertain, in such Case Reserving a certain Sum out of the Fees will not be within the Statute, because the Deputy is not bound to pay it, unless the Fees do amount to it; so that Reserving a Sum certain upon a Deputation out of Profits or Fees, which are uncertain, is only a Reservation of Part of that which was wholly his own before, and the rest to his Deputy; so the Defendant had Judgment. Mod. Cases 234. *Godolphin* versus *Tudor*.

4 Mod.
222. 17. In Debt upon Bond, the Defendant pleaded the Statute of *Ed. 6.* against buying Offices concerning the Administration of Justice; and averred, that the Bond was given for the Purchase of the Office of *Provost-Martial in Jamaica*, and that it concerned the Administration of Justice, and that *Jamaica is Parcel of the Possessions of the Crown of England*; the Plaintiff replied, that 'tis an Island conquered from the *Indians and Spaniards* in the Reign of Queen *Elizabeth*, and that the Inhabitants are governed by their own Laws; the Defendant rejoined, that before such Conquest they were governed by their own Laws, but since they are governed by the Laws of *England*; and upon Demurrer it was adjudged, that *Jamaica* being conquered, and not pleaded to be Parcel of the *Kingdom of England*, but Parcel of the Possessions of the Crown; the Laws of *England* did not take Place there until declared so by the Conqueror, or his Successors; the Kingdom of *Ireland* and the *Ile of Man*, are Parcel of the Possessions of the Crown, but are governed by their own Laws; that if our Laws did take Place there, yet they having Power to make new Laws, our general Laws may be altered by them; Judgment for the Plaintiff. 2 *Salk. 1. Blancard versus Gully.*

4 Mod.
16. 18. Case for Disturbing him in his Office of Vicar-general, a Special Verdict was found, that the Bishop of *Landaff* granted this Office to the Plaintiff and *T. P. habendum conjunctim & divisim exercend' per se vel sufficiens deputat'*; adjudged, this was a good Grant, but if one dies, the Office doth not survive, because the Grant was not to the Survivor. 2 *Salk. 465. Jones versus Pugh.*

4 Mod.
275. 19. In a *Scire facias* to repeal a Patent, the Case was, King *Charles the Second* granted to *R. W.* the Office of *Searcher in the Port at Plymouth, habendum durante b. neplacito*, and afterwards granted the same to *T. P. for Life*, to commence after the *Death, Surrender, or Forfeiture* of *R. W.* then *T. P. surrendered* to the King, who, in Consideration thereof granted this Office to *Kemp* the Defendant, to commence after the *Death, Forfeiture, Surrender, or other Determination* of the Estate of *R. W.* it was objected, that the Grant to *T. P. for Life* was void, because it depended upon an *Estate at Will*, which could neither be *surrendered or forfeited*; and if so, then the Surrender could be no Consideration; adjudged, that an *Estate at Will in Lands* cannot be surrendered, because 'tis determinable at the Will of either Party; but an *Estate at Will in an Office* is at the Will of the King only, and not of the Party, and therefore may be surrendered to him, for the Party can by no other Means determine his Will; and 'tis the constant Practice so to do, that he who is Tenant at Will to the King of an Office, may forfeit it, upon an Inquisition taken of the Cause of Forfeiture, and when that is returned, the Office is forfeited; that a Freehold of Lands cannot be granted to commence *in futuro*, or to depend on an *Estate at Will*; but a new Office, or a *Rent de novo* may be granted to commence *in futuro*, for 'tis a Creature of him who makes it, and never had a Being before the Grant; and in such Case the King doth not grant a Reversion but in Reversion. 2 *Salk. 465. The King versus Kemp.*

* Postea
5 Mod.
386. 20. In Debt upon Bond given by a Deputy to pay the Principal *half the Profits of an Office*; the Defendant pleaded the Statute 5 & 6 *Ed. 6. cap. 16.* adjudged, that this Bond is not within the Statute, because the Condition is not to pay a *Sum in gross*, but *half the Profits of an Office*; for which, if there should be Occasion, an Action must be brought in the Name of the Principal, for they belong to him, tho' the Deputy is to have a Share for his Service. 2 *Salk. 466. Culliford versus Cardonnell 468. * Godolphin versus Tudor. S. P.*

* 1 W. 3.
cap. 21. 21. In a Writ of Error to reverse a Judgment in an *Affise*, for the Office of the Clerk of the Peace for *Kent*, the Case was, The Earl of *Winchelsea* being *Custos Rotulorum* by a Writing under his Hand and Seal, made *P. Owen Clerk of the Peace during Pleasure*; and because by a late Statute he is to continue *for Life*, the Justices in Sessions refused to admit him upon this Grant, and thereupon the Earl of *Winchelsea* came into the Court, and said, *I nominate P. Owen to be Clerk of the Peace, according to Act of Parliament*; the Question was, whether this was good, not being by Deed; adjudged, that tho' the * late Statute gives the *Custos* Power to give and grant this Office, yet that is only a Power of appointing, and consequently may be without Deed; for notwithstanding these Words, it cannot be a Grant, or enure as a Grant from the *Custos*, because the *Custos* himself is only at Will, and he who is an Officer at Will cannot make a Grant for Life, for his original Estate is not sufficient for that Purpose; therefore those Words must enure as a Power to appoint a Clerk of the Peace, or the Execution of a Power given by the Statute, the Consequence of which is, that this is a good Appointment without a Deed; for whatever is to take Effect out of an Authority, or by Way of Appointment, is good without Deed; otherwise where the Thing is to take Effect out of an Interest, and is to enure as a Grant. 2 *Salk. 467. Sanders versus Owen.*

2 Salk.
680. 22. The Defendant was convicted by the Quarter-Sessions on the Articles of Misdemeanors exhibited against him in his Office of Clerk of the Peace, pursuant to the Authority which they had by the late Act * of Parliament, by which 'tis enacted, that the Justices in the Quarter-Sessions, or the major Part of them, upon Complaint exhibited in Writing, may, upon Examination and due Proof, suspend or discharge him; this Conviction being removed by *Certiorari*, it was objected, that one of the Articles exhibited in Writing against him was, that he did extort and force *W. R.* to pay him 2 s. 6 d. for a Subpœna for a Witness to appear at the Sessions, which was more than his just Fees; it was objected, that the Article ought to set forth what the just Fees were, that they should have laid the Taking the 2 s. 6 d. to be *colore Officii*; that they should have set forth to what Quarter-Sessions the Witness was to appear by Virtue of that Subpœna, for it might

might be at the Quarter-Sessions of any County, and therefore not any Matter in the Execution of his Office; adjudged, that the Articles are the Foundation of this Proceeding, which ought to be as certain and direct as any Fact laid in an Indictment, because they are to deprive a Man of his Freehold; and tho' the Title of these Articles, is for Misdemeanors in his Office, yet he must be charged with the Fact in the Articles themselves, and it must be laid to be done *colore Officii*; but here he is not charged with any Thing directly in Execution of his Office. *Mod. Cases* 192. *The Queen versus Baines*.

23. By the Statute 1 Will. 3. the *Custos Rotulorum* is to appoint a Clerk of the Peace for so long Time only as he shall demean himself well: Mr. Owen brought a *Mandamus* to be restored to that Office; the Return was, that the Earl of Winchelsea did appoint Mr. Owen to be Clerk of the Peace during Pleasure; that the Earl being dead, the Lord Sydney was made *Custos*, who appointed Mr. Sanders to be Clerk of the Peace of Kent, pursuant to the Act 1 Will. 3. The Question was, whether a Grant of this Office during Pleasure, which is only an Estate at Will, shall be so governed by the Statute as to make it an Estate for Life, when once the Person is admitted to the Office; and it was insisted, that it did, for 'tis the Statute, and not the Grantor, which gives him an Interest; because, when the Person is nominated and appointed, the Grantor hath executed his Power, and hath no farther Authority to modify or limit what Estate he shall have in that Office: *Sed per Holt Ch. Just.* a *Mandamus* was denied, for the Clerk of the Peace being appointed in another Manner than the Statute directs, the *Custos* hath not executed his Authority, and by Consequence the Person appointed by him in another Manner is not Clerk of the Peace. 4 *Mod.* 293. *The King versus Owen*.

(B)

Grants thereof, not good.

1. A Grant to a Person who is not qualified to execute the Office is void; and therefore Brooke the Chief Justice of the Common Pleas having granted the Office of Chief * Pronotary * 2 And. to his Wife's Brother, revoked the said Grant, because he was incapable to execute the Office. 118. S. P. *Mich.* 5 Mar. *Dyer* 150.

2. There being no Chief Justice of the Common Pleas, the Queen granted the Office of *Exigenter* of London to Scroggs; adjudged, that the Grant was void, because the Office was incident to that of Chief Justice, &c. 2 *Eliz.* *Dyer* 275. *Scroggs's Case*. 4 *Rep.* 33. *Mitton's Case*. S. P. *Dyer* 150. S. P.

3. H. 8. granted the Office of Clerk of the Hamper to Two for their Lives, of which there were two Exemplifications in the same Form, one of them being only a Duplicate of the other; the original, which was in Custody of one of the Patentees, was surrendered by him and cancelled; the Queen, reciting the said Patent and the Surrender, granted the Office to another; adjudged, that when the Original was surrendered, the Duplicate is void. *Dyer* 179. *Kemp versus Hales*.

4. If the Office of Marshal of the King's Bench is granted for Years, 'tis void, because it concerns the Administration of Justice, and 'tis a personal Trust reposed in the Officer, which cannot be transferred to an Executor or Administrator. 9 *Rep.* 96. *Sir George Reynell's Case*.

5. A Grant of a judicial Office to Two for their Lives, if one of them dies, the Grant is void, because there can be no Survivorship in such an Office, neither can such Office be granted in Reversion. 11 *Rep.* 2. *Auditor Curle's Case*.

6. The King granted a new Office for Registering all Strangers within the Realm, with a Fee to be taken for the same, except Merchant Strangers in London; adjudged a void Grant. 12 *Rep.* 117. *Sir Walter Chute's Case*.

7. The Queen granted the Office of making out Writs of * *Superfedeas* in the Common Pleas to * See one Cavendish, and she sent a Messenger to the Judges, commanding them to admit him to that Office, which they refused to do; thereupon she sent a Writing to them under the Sign Manual and Signet, commanding them to the same Purpose, and to sequester the Profits from the Time of the Grant into the Hands of some sufficient Person, who should give Bond to answer the same to the Grantee; which they refused likewise to do, because it would be a Disseisin of some other Persons in their Freehold, who claimed a Right to make out these Writs; afterwards she sent another Letter to the Judges under her Sign Manual, commanding them to see that Payment be made of the Profits to the Grantee, and that forthwith they admit him to the said Office; thereupon the Judges attended the Lord Chancellor and the Earl of Leicester with their Answer, that they could not admit the Grantee, &c. without being perjured; and this Answer being reported to the Queen, she commanded the Chancellor, the Chief Justice of B. R. and the Master of the Rolls, to hear the Reasons of the Judges; and the Queen's Serjeant attending at the same Time, insisted that it was her Prerogative and Right to grant to the said Cavendish the Making out these Writs; that the Office of Curllitors had been erected by the Queen, by the Means of the Lord Keeper Bacon, and several other Offices; to which the Judges replied, that this Method of Proceeding was not in a Course of Justice, that they themselves claimed nothing in the Making out these Writs, but the Ironotaries and Exigentes claimed it as their Freehold for their Lives; therefore they ought to answer

answer this Matter; that the Queen had sworn to preserve the Laws; that the Judges had done the like; but if they should obey her Commands in this Case, they should act contrary to Law, and by Consequence contrary to their Oath, and cited *Empson's Case*, where the Indictment against him is printed at length; but no farther Proceedings were in this Case. 1 *And.* 152. *Cavendish's Case*.

8. Where the Queen granted the Office of *Clerk of the Crown* and Attorney of the King's Bench, to a Person unskilful in that Office, the Grant is void, and for this there is a Precedent in *Mich. 5 Ed. 4.* in 2 *And.* where the Copy of the Record is printed at large. 2 *And.* 118. *Vinter's Case*.

9. Case, &c. for that *A.* was seised in Fee of such a Manor, and had by Deed granted made him (the Plaintiff) his Bailiff thereof for Life, and that the Defendant hindered him in the Execution of his Office; the Defendant pleaded, that after the Grant aforesaid, the said *A.* granted the aforesaid Manor to *B.* in Fee, who made the Defendant his Bailiff: And *per Curiam*, tho' the Grant to the Plaintiff was for Life, yet the Grantor may displace him, because it was an Office of Charge and Trouble, without any Fee or Salary. *Cro. Eliz.* 859. *Harvey versus Newlin*.

10. In a Suit by the *Bishop of Salisbury*, who insisted, that the Office of Chancellor of the Garter belonged to him; the King referred the Right to the Chief Justices and Chief Baron; and it appearing to them that King *Ed. 4.* Anno 15 of his Reign, granted to *R. Beaucamp*, then *Bishop of Salisbury*, the Office of Chancellor of the Garter for Life, but without any Fee; that there was no such Officer before, and that the said Bishop was the first Chancellor, &c. and farther granted, that his Successors, Bishops of *Salisbury*, should be for ever Chancellors of the Garter; after the Death of Bishop *Beaucamp*, the Kings of *England* appointed the succeeding Chancellors at their Pleasure, but none claimed it by Succession, therefore the said Judges were of Opinion, that the Bishop had no Right to this Office by Succession; first, because the Patent it self was originally void to make a succeeding Bishop an Officer, since Bishop *Beaucamp* himself had an Estate for Life in the Office; so that if he had been removed from the Bishoprick, he would still have continued Chancellor, and his Successor could not, during his Life, which shews that the Grant was made to him in his natural Capacity, and not in his politick Capacity, so that 'tis plain he did not take an Inheritance in Succession in the Office; besides, the Office was never executed by a Successor, as such. *Moor* 808. *Bishop of Salisbury's Case*.

11. King *James* granted the Office of *Superfedeas* to one *Michell*, and thereupon *Brownlow* Chief Pronotary, brought an *Affise* against him for a Disseisin of the Profits of his Office, &c. The Defendant *Michell* obtained the King's Writ to the Judges, reciting the Grant of this Office, commanding them not to proceed *Rege inconsulto*; and it was argued against the Writ, that the Court might proceed, because the Writ doth not mention, that the King had a Title to the Thing in Demand, nor any Prejudice which might happen to the King if they should proceed; the Cause was compromised, but the King granted by a Privy Seal, that he would never afterwards make any Grant of any other Members of Offices in the Common Pleas. *Moor* 844. *Brownlow versus Cape*.

12. *Dr. Sutton* being a Divine, and not bred up in the Knowledge of the Canon or Civil Law, was made a Chancellor by the Bishop of *Gloucester* for Life, and his Grant was confirmed by the Dean and Chapter; but adjudged, because he had no Knowledge in those Laws the Grant was void. *Cro. Car.* 65. *Dr. Sutton's Case*.

65. *Noy* 91. *Godb.* 390. *Litt. Rep.* 2.

13. Covenant, &c. brought by the Mayor and Commonalty of *London* against the Defendant, for Rent reserved upon a Lease for Years made by them of the Garble Office; the Defendant pleaded, that the Office was an Office of Trust, and so not to be leased for Years; upon Demurrer to this Plea it was insisted for the Mayor, &c. that he had a Fee-simple in the Office, and not a meer Trust to execute it; and that he may lawfully make a Deputy to execute it; and if so, then this Lease shall be in Nature of a Deputation; but it was argued for the Defendant, that this Office is vested in the Corporation for the publick Good, and not in the Mayor, &c. to make a Profit of it by leasing it out under a Rent reserved; for tho' he may make a Deputy to execute it, he cannot make a Lease of it for Profit; and the Court seemed of that Opinion, but no Judgment was given. *Mayor and Commonalty of London versus Hutton.* *Style* 357.

14. In a Special Verdict in *Assumpsit*, the Case was, The Queen granted to Sir *Robert Howard* the Office of Stewardship of the Honour of *Pomfret* for Years, *habendum* from the End of a former Term, in which Stewardship were comprised *Courts-Leet* and *Courts-Baron*; the Defendant procured a subsequent Grant thereof, and by Virtue of the same he held a Court and received Money, for which the Action was now brought as received to the Use of the Plaintiff; adjudged, that the Grant in Reversion for Years of the Office of Steward of a *Court-Leet* is void, because 'tis a judicial Office; but 'tis otherwise of a *Court-Baron*. 2 *Lev.* 245. *Howard versus Wood*.

2 *Mod.*
260.
Jones
126. *S. C.*
See Mead
v. Lenthall.

(C)

Of Forfeitures and Sale of Offices.

1. *Smith* brought Debt against the Executor of one *Colehill*, upon a Bond conditioned for Performance of Covenants, &c. The Defendant pleaded the Statute 5 Ed. 6. against selling Offices, by which 'tis enacted, *That every Bond for Money or Profit to be given for any Office or Deputation of any Office* (mentioned in the Statute) *shall be void against the Maker thereof, &c.* then she pleads, that the King granted to *T. Colehill*, the Office of Surveyor of the Customs in as ample Manner as one *Leonard* had the same, and appointed him to be the Officer, and he being thus seised thereof, an Agreement was made between him and *Smith*, (the Plaintiff) that *Smith* should be *Colehill's* Deputy, and in Consideration thereof should pay unto *Colehill* 600 l. and that they would procure a new Grant of the Office to them and the Survivor; and afterwards an Indenture was made between them for the said Purposes, in which likewise *Colehill* covenanted with *Smith* to surrender his Letters Patents to the Queen, in order to procure a new Grant, and that he would not take any of the Profits, except such as were agreed on in the said Indenture, and that *Smith* should have the Residue during his Life, and that if he died in the Life-Time of *Colehill*, then he to pay the Executors of *Smith* 300 l. and *Smith* covenanted to pay *Colehill* 100 l. per Ann. out of the Profits of the Office; then the Defendant averred, that these Indentures were made for the Exercise of the said Office; and upon Demurrer to this Plea, it was insisted for the Plaintiff, that the Bond was good; for if a Man is bound to procure a Grant of an Office, the Bond is good for that Matter, and if it should likewise be to exercise that Office, 'tis void for that, but still remains good for the other Part: *Sed per Curiam*, an Obligation is an entire Act of the Obligor, which Act cannot be void and good at the same Time, because these are Contraries; 'tis true Part of a Bond may be good, and Part not, but not as a Bond; as for instance, *T. S.* and a Feme Covert enter into a Bond, &c. there the Words of a Feme Covert are void; for as to her 'tis no Bond, but still 'tis a Bond as to *T. S.* and entire, where 'tis really a Bond; and therefore this Case is not like to Bonds with impossible Conditions and with Conditions against Law: Now in this Case, the Bond was made for Performance of Covenants, concerning the Deputation and Profits of an Office, and all the Covenants in the Indentures concern the same Office; therefore a Bond made for Performance of such Covenants, is within the Statute, and by Consequence void. 2 And. 107.

55. *Smith* versus *Colehill*.

2. *Sir George Reynell* forfeired the Office of Marshal of the King's Bench, by suffering several voluntary Escapes; and in such Case the King may seise the Office without a *Sci. fa.* 9 Rep. 95. *Sir Geo. Reynel's* Case.

3 But where the Prisoners encreased, and there being no Room to lodge, he built a new House, within the Precincts of the Marshalsea, and removed a Prisoner thither, who was in Execution; this was adjudged no voluntary Escape, and by Consequence no Forfeiture. 2 Bulst. 58. *Mead* versus *Sir Geo. Reynell*.

4. There are two Causes of Forfeitures, *Abuser, non User*; *Abuser*, as if the Marshal or Gaoler suffer voluntary Escapes; *Non User* of any Office which concerns the Administration of Justice, and which requires continual Attendance; but *Non User* of some Offices is no Forfeiture, if the Non-attendance be no Damage to him who is Officer. 9 Rep. 49. In the *Lord Shrewsbury's* Case.

5. There was a Sentence in the Star-Chamber against *Sir John Bennet* for Bribery, who afterwards brought an Assise for the Office of Chancellor to the Archbishop of York, and upon a Motion for an Injunction, by Reason of that Sentence, he produced the King's Pardon, in which Briberies were recited, and all Penalties and Disabilities by Reason thereof, pardoned; and resolved by all the Judges of England, that the Pardon took away the Force of the Sentence, which Sentence did not deprive him of the Office, but only of the Execution of it, for it could not take away the Office, because it was a Freehold. Cro. Car. 40. *Bennet* *Sir John* versus *Easdale*.

6. Debt upon Bond, conditioned to perform the Covenants in a Lease of the Bailiwick of the Duchy in the Savoy, by which, amongst other Things, the Goods of Felons were demised; and the Lessor made the Defendant his Deputy Bailiff, rendring 60 l. per Ann. and upon Demurrer adjudged, that this Lease was void upon the Statute of Ed. 6. made against Buying and Selling Offices; for tho' *bona felonum* may be demised, yet being joined in the same Deed with making the Defendant Deputy Bailiff, and wherein the Bailiwick was demised to him, the whole is void: but the Truth being, that the King was seised in Fee of this Bailiwick, who demised it to the Plaintiff, who demised it to the Defendant, and Offices in Fee are excepted out of the Statute, and Under-Leases of such Offices inclusively. 2 Lev. 151. *Ellis* versus *Ruddle*.

7. The Marshal of B. R. having not attended for two Terms, another was sworn in his Place; Mod. Ca. but as to the Possession the Court left it to be determined by Law; the new Marshal made a Forcible Entry into the Prison; and a Motion being made, that the Court would quiet the Possession, till the Right between the two Marshals was determined, and the rather, because this Officer having so immediate Dependance on B. R. it would be disrespectful to apply to any other Jurisdiction to have an Inquisition for a Forcible Entry, and that the Justices of Peace might refuse to meddle with it for that Reason; but adjudged, that B. R. hath no Original Jurisdiction of

of Forcible Entry ; and this being a Question of Right between two contending Officers, it must be decided in that Manner as the Law directs : The new Marshal when he was sworn produced a Lease from the Grantee of the Office for a certain Number of Years, determinable upon *his Life*, which is good ; but that a Lease for Years absolutely had been void, because of the Danger of its going to Executors or Administrators. *Mod. Cases* 57. *Sutton's Case*.

(D)

Of Judicial and Ministerial Officers, and what Offices are consistent, what not.

1. **A** Remembrancer of the Exchequer, who held that Office by Patent for Life, was made a Baron of that Court ; adjudged, that his Office of Remembrancer was *ipso facto* void and determined, and there needs no *Sci. fa.* to repeal his Patent, because a Man cannot be Judge and Minister in one and the same Court. 3 *Eliz. Dyer* 198.

2. An Annuity was granted to one to exercise the Office of a Steward, and it being in Arrear, he brought a Writ of Annuity for it, and had Judgment to recover ; then he brought a *Scire facias* to have Execution, to which the Defendant pleaded, that pending the Writ, he was required to keep a Court, &c. but refused ; and this was adjudged a good Plea ; for upon the *Sci. fa.* he had Judgment for the Arrears due before and pending the Writ, and after, if he refuseth, &c. the Annuity ceaseth. *Pasch* 23 *Eliz. Dyer* 377.

3. Judgment in a Writ of Right in the King's Court in his Castle of Rising in Norfolk ; and upon a Writ of False Judgment brought the Error assigned was, that *idem Dominus Rex* by his Writ of Right Patent *præcepit Ballivis suis de Rising Castle, &c. quod plenum rectum teneant*, when that Court, and the Proceedings therein, were *coram scætoribus*, and not *coram Ballivis* ; but the Judgment was affirmed, because the Bailiffs are to make the Summons, and the Suitors to do Justice ; and where the King is Lord, the Writ is directed to the Bailiffs, but where a Subject is Lord, 'tis directed to the Lord himself. *Capell versus Church. Moor* 1.

1 Roll.
Rep. 274.
S. C.

4. A Constable is a ministerial Officer, and therefore if a Warrant is directed to him by a Justice of Peace, he may make a Deputy to execute it, and such a Deputy shall have the Benefit of the Statute 7 *Jac. cap. 5.* to have double Costs ; but all Returns made by such an Officer ought to be in the Name of the Principal ; 'tis otherwise in the Case of a Judicial Officer, for he being personally to do Justice, cannot make a Deputy. 2 *Bull. 77. Phelps versus Winchcomb. Moor* 845. S. C. See *Leet. (A) 16. contra. S. C. cited in Sid. 355.* and doubted.

5. In a Writ of Right, the Plaintiff demanded *duas partes Custodiæ de Hay in tres partes dividend'* in the Forrest of C. it was objected against this Writ, that it ought to be *Officium custodiæ duarum partium, &c.* like *advocatio duarum partium Ecclesiæ, &c.* and not *duas partes advocacionis* ; besides *in duas partes dividend'* is wrong ; for it should be in *duas partes divisas*, because the Word *dividend'* is not proper in any Manner of Writ, except a Writ of Partition ; neither will a Writ of Right lie of an Office, for 'tis not *liberum tenementum* by the Common Law, but the Party grieved may have a *Quod permittat* ; and of that Opinion was all the Court. *Mich. 31 Eliz. Leon. 36. Salway versus Inson.*

6. In False Imprisonment, the Defendant justified the Putting the Plaintiff in the Stocks ; for that he (the Defendant) was Constable, and that the Plaintiff brought a Child of two Months old, and left it in the Church, that it might be starved, and thereupon the Defendant put him in the Stocks till he should agree to take the Child ; and upon a Demurrer this was held a good Justification, because the Plaintiff had a *felonious Intention* to destroy the Child, and the Act of the Constable was only to prevent the Felony, which he might do by Virtue of his Office. *Moor* 284. *Keale versus Carter.*

7. Resolved, that an Alderman may resign his Office of Alderman to the other Aldermen in Common Council ; 'tis true, a Resignation ought to be to a Superior ; but this is not properly a Resignation, but a Relinquishing his Office. 2 *Roll. Rep. 11. Hazard's Case.*

8. Prohibition to the Court of Chester, to stay a Suit upon an *English Bill*, in which the Earl of Rivers was Plaintiff, for that the Earl of Derby was Chamberlain of Chester, and Judge of the Court, and that the Plaintiff had married his Sister ; but a Prohibition was denied, because Favour shall not be presumed in a Judge. *Hard. 503. Brooks versus Lord Rivers. 12 Rep. 114. Earl of Derby's Case.*

9. *Mandamus* to restore him to the Office of Town-Clerk of Sandwich ; the Return was, that he being Town-Clerk, was such a Year chose Mayor, and accepted and executed that Office, and afterwards was chose a *Jurat'*, which is a Justice of Peace there, and that in Sandwich there hath been Time out of Mind a Court of Record, held before the Mayor, where the Town-Clerk ought to attend as Minister ; the Question was, whether the Office of a Mayor and Town-Clerk were comparable, and the Court inclined, that they were not, because the Mayor is the Judge, and the Town Clerk the Minister of the Court, and shall be fined for his Defaults, and he could not impose a Fine upon himself ; 'tis as inconsistent in one Person, as a Chief Justice to be Pro-notary or Clerk of the Papers ; or as a Bishop to be a Parson in his own Diocese, for he cannot visit himself, tho' he may have a Church in Commendam in another Diocese. *Sid. 305. Verrior versus Mayor of Sandwich.*

10. Information against the Defendant for executing the Office of *Bailiff* in arresting *T. S.* not having taken the Oath appointed by 27 *Eliz. cap. 12.* after a Verdict the Judgment was stay'd, because 'tis not alledged that he was a *General Bailiff*, and being charged only for a single Act, in arresting one Man, he shall be intended a *Special Bailiff*; and if so, he is not within that Act. 2 *Lev. 151. The King versus Watts.*

11. Error of a Judgment in *Newbery-Court*, of which the Mayor is Judge, and the Error assigned was, that he had not taken the Oath according to the Statute 25 *Car. 2.* which makes the Office void; for the Judgment was *coram non judge*; 'tis true, the Statute makes the Office void, but that is only as to himself, to subject him to a Fine for intermeddling; besides this is not assignable for Error, because 'tis contrary to the *Record*, which admits him to be Judge, and if he was only so *de facto*, 'tis sufficient; but adjudged, that the Statute makes the Office void to all Manner of Purposes concerning Jurisdiction; and if so, then this Matter is assignable for Error, tho' contrary to the *Record*; but it was adjudged contrary in the following Case. 2 *Lev. 184. Hippley versus Tuck.*

12. Error of a Judgment in *Norwich Court*, for that the Sheriff, who was Judge of the Court, had not taken the Oath according to the Statute 13 *Car. 2. cap. 1.* the Defendant pleaded, that the Oaths and Declaration were not tendered to the Sheriff; and upon Demurrer to this Plea, it was adjudged this Matter was assignable for Error, because 'tis contrary to the *Record* and Admittance of the Parties; besides this Statute requires, that the Oath shall be tendered, &c. and the Declaration likewise to him to subscribe, and the Tender is traversable; 'tis true, the Proviso by which the Office is made void upon Default of Taking the Oath, &c. stands by it self, and is absolute, yet it shall relate to the first Part of the Statute, which appoints it to be tendered. 2 *Lev. 242. Denning versus Norris.*

13. There is a Distinction where a Person usurps an Office, and where he comes in by Colour of an Election; for in the first Case the Acts of such an Officer are void, but the Acts of the other shall bind, tho' he is no more than an Officer *de facto*; as for Instance, *Queen Eliz.* incorporated the City of Wells by one Name, and King *Car. 2.* by another, and a Mayor being chosen by Virtue of their new Charter, he with the greater Number of the new Corporation, put the Common Seal to a Bond; it was adjudged, that the Bond was good, tho' it was only sealed by a Mayor *de facto*; because all Ministerial and Judicial Acts done by an Officer only *de facto*, are good. 1 *Lutw. 508. Knight versus Mayor of Wells.*

14. Information against *Dr. Burrell* for exercising the Office of Censor of the College of Physicians, not having taken the Oaths as by the Statutes * 25 *Car. 2. cap. 2.* and 31 *Car. 2. cap. 1.* is directed, by which all Persons who shall be admitted into any *Publick Office or Employment Ecclesiastical or Civil*, are obliged to take the Oaths, &c. Upon Not guilty pleaded, the Jury found a Special Verdict, wherein the only Point was, Whether the Censor of this College is an Office of Trust within these Statutes; it was insisted, that it was not, because it doth not relate to the Publick Administration, concerning the Peace, Manners or Government of the People; 'tis an Office which relates to a private Constitution; it consists purely in the Science of Physick, and this Officer hath no Manner of Dependence on the Government: But the better Opinion was, That since a Censor hath the Care of preserving the Health of the Subjects, and since the College of Physicians is incorporated by the * Statute for the good of the Common-wealth, and the Censor hath Power to inflict Punishments on those who offend against the Rules and Methods of Physick; therefore he is a Judge, and by Consequence a Publick Officer within the Meaning of these Statutes. 5 *Mod. 431. Dr. Burrell's Case.*

15. Adjudged, that a Village and a Constable are Correlatives; that an Hamlet hath no Constable, and that the Sessions may appoint a Constable where the Leet neglects or refuses so to do; 'tis true the Statute 13 & 14 *Car. 2. cap. 12.* gives them Authority so to do in particular Cases therein mentioned, but *B. R.* will intend they have a sufficient Authority for it; and as to the Authority of a Constable, if a Warrant is directed to him by his Name, commanding him to execute it, he may go out of his Precinct, if he will, and shall be justified by the Warrant, tho' he is not compellable to go out; but if 'tis directed to the Constables in general, then he cannot go out of his Precinct. 1 *Salk. 175. The Case of the Vill of Chorley.*

Orders.

For Servants Wages. (A)	Concerning Certificates. (F)
About Alehouses and Vagrants. (B)	For the Relief of the Poor, and concerning the Church-wardens and Overseers Accounts. (G)
About Removals of the Poor, and of Appeals and Settlements. (C)	Orders of Sessions good, and not good. (H)
What shall be a Settlement. (D)	
What shall not be a Settlement. (E)	

(A)

For Servants Wages.

1. **O** Rder to pay his *Coachman's Wages*, being removed by *Certiorari* into *B. R.* it was quashed because the Statute 5 *Eliz. cap. 4.* doth not extend to Coachmen, or any other Servants, but in Husbandry. *T. Jones. 47. Devall's Case.*
2. The Justices made an Order upon *W. R.* that he should pay *W. W.* so much Money for Labour and Work done, without setting forth, that *W. W.* was his Servant; the Order was quashed, because the Justices have only Power in Cases of Wages of Statutable Servants, (*viz.*) Servants in Husbandry, and that they would be very tender in quashing such Orders; but by this Order it doth not appear, but that the *Work done* might be Carpenters Work. *Mod. Cases 91. The Queen versus Corbett.*
3. An Order was made, reciting, that *W. W.* and *W. R.* were retained by one *London*, who was Overseer of the Works of the King's Gardens in *Hampton-Court*, at so much a Day, to work in the Garden; and that they worked so many Days, &c. and so much was due to them, which *London* was ordered to pay; this Order being removed by *Certiorari* from *Hicks's Hall*, it was quashed, because the Justices have no Power by the Statute 5 *El. cap. 4.* to order Payment of Wages of any Labourer or Servant, but such as are employed in Husbandry, in which they may compel Men to serve by Virtue of the Statute, and therefore may enforce the Payment of their Wages, which they have Power likewise to settle; 'tis true, where an Order is for the Payment of Wages generally, it shall be intended Wages in Husbandry; but upon the Face of this Order it appears to be otherwise, therefore 'tis void. *Mod. Cases 204. The Queen versus London.*
4. Justices in Sessions made an Order for Payment of Servants Wages, and Costs of Suit, and committed the Master for not paying it; but the Order was quashed, for they cannot commit, but must indict for disobeying their Order; besides they have no Power to compel the Payment of Servants Wages. 5 *Mod. 419. The King versus Pope.*
5. The Servant of one *Harding* complained to the Sessions, that her Master was in Arrear, and would not pay her Wages; on hearing the Matter both Parties referred it by Agreement to *Sir Tho. Lane*, to be determined, and an Order of Sessions was made accordingly; afterwards *Sir Thomas* made an Award, and thereupon a *Certiorari* was brought; and adjudged, that the Sessions cannot, even by Consent of the Parties, make an Order of Reference of a Thing to be determined by another; they may make an Order to refer a Thing to the Examination of another, and to make his Report, but not to determine. 2 *Salk. 477. The King versus Harding.*
6. An Order was made by the Justices of Peace, for the Defendant to pay 40 s. for Wages generally; it was moved to quash it, because 'tis not said for what Wages, and the Justices have only Power to settle Wages in Husbandry; but adjudged, that it shall be intended for such Wages, since the contrary doth not appear. 2 *Salk. 484. The King versus Gregory.* See *The King versus Gouch.*

(B) About

(B)

About Alehouses and Vagrants.

1. **I**ndictment by a Jury at *Portsmouth*, for that *W. E.* was an idle Person, and did wander in that Town selling Ware as a *Petit Chapman*; and upon a Demurrer to this Indictment it was insisted to maintain it, that a *Petit Chapman* is a Vagabond by the Statute 39 *Eliz. cap. 4.* 'tis true, by the Statute * 8 & 9 *Will. 3. cap. 25.* some *Petit Chapmen*, (*viz.*) such as are quali- * 9 & 10
fied by these Statutes may follow that Occupation, but not in *Borough Towns or Corporations*, for *W. 3. c. 27.* these Acts do not extend to give them Liberty to sell or trade in those Places: But adjudged, that a Vagabond *quatenus* such, was not indictable, for at Common Law a Man might go whither he would; but if he is an idle and loose Person, he might be taken up as a Vagrant, and bound to his Good Behaviour at Common Law, and might be compelled to work by the Statute of *Labourers*; the Indictment was quashed. *Mod. Cases* 240. *The Queen versus Branworth.*

2. Adjudged, that the Sessions cannot suppress an Alehouse licensed by two Justices, unless 'tis for Disorder, for by the Statute 5 & 6 *Ed. 6. cap. 25.* they have no such Authority. 2 *Salk.* 470. *The King versus Randall.*

3. *T. P.* was settled at *E.* and afterwards became a *Vagrant*; that can be no Determination of his Settlement; for by the Statute 39 *Eliz. cap. 4.* he may be sent to the Place of his Birth; and by the Statute 43 *Eliz. cap. 2.* he may be sent as a poor Person to the Place where he was legally settled; but if that cannot be known, then to the Place of his Birth; so that both these Statutes are consistent. 2 *Salk.* 526.

(C)

About Removals of Poor, Appeals, Settlements, &c.

1. **T**WO Justices made an Order to send a poor Man from *Redbourne* to *St. Albans*; but upon an Appeal to the Sessions, an Order was made to quash the Order of the two Justices; and upon a *Certiorari* to remove the Sessions Order into *B. R.* a Rule was made, that it should be quashed, and that the first Order of the two Justices should be confirmed, so that now the poor Man was settled at *St. Albans*; but he of his own Accord came back to *Redbourne*; and the Justices being of Opinion, that they could not send him to the House of Correction for thus returning to the Place from which he was first removed, because the first Order was not before them; it being removed by *Certiorari*, the Court of *B. R.* was moved for a Rule to enforce the Execution of the former Rule, by which the Sessions Order was quashed; but the Court directed, that the former Rule should be shewed to the Justices, and the first Order; and then, if they refused to punish the Person thus returning, to make an *Affidavit* of the Matter and move the Court again. 5 *Mod.* 163. *The King versus Hall.*

2. An Order was made by two Justices to remove a Man from the Parish of *Walton* to the Parish of *Chesterfield*, which Order was confirmed upon an Appeal to the Sessions; and being removed by *Certiorari*, the first Order was quashed, because it did not appear to be made by two Justices of the Peace, it was only, *Whereas Complaint hath been made unto us*, not reciting their Authority as Justices; 'tis true, they were mentioned to be Justices upon the Appeal, but that will not help, for they might be so then, but not at the Making the Order. 5 *Mod.* 322. *The Parish of Walton.*

3. Two Justices made an Order to remove a poor Man from *Westham* to *Battersea*, and upon an Appeal to the Sessions that Order was set aside; then the same Sessions did supersede their own Order, and confirmed the Order of the two Justices; and it was insisted, that their own Order was in their Power during all the Time of their Sessions, and therefore they might lawfully supersede it; but adjudged, that having once executed their Power by setting aside the Order of the Justices, they cannot set it up; so the Court affirmed the first Order of Sessions and quashed the Second. 5 *Mod.* 396. *Battersea versus Westham.*

4. The Order was, *Whereas Complaint hath been made unto us by the Church-wardens, &c. that W. R. came to settle in the Parish of C. contrary to Law, we therefore Order you to remove him from, &c.* quashed for Want of an *Adjudication*, that he was likely to become chargeable. *Mod. Cases* 163. *The Queen versus Inhabitants of Newnham.*

5. Upon an Appeal to the Sessions, they made an Order to quash the Order of the two Justices; and to send the Person to the Parish from whence he was removed; and upon a Motion to quash this Order, because the Sessions have only Power to affirm or quash, but here they had made a new Order, it was ruled, that an Order may be good in Part and void in Part; so that Part, which ordered the poor Person to be sent back, was quashed, and the other confirmed. *Pasch.* 1 *Ann. Farr.* 10. *The Queen versus Parish of Milverton.*

6. On a *Certiorari* an Order was returned, that a Girl about thirteen Years old lived constantly with her Grandmother at *Dumbleton*, but her Father had a Settlement in *Beckford* in the same

County; and this Girl wanting Relief, was by Order of two Justices sent to *Beckford*, for no other Reason, but because her Father was lawfully settled there: This Order was quashed, for tho' till *eight Years*, the Settlement of the Child must follow that of the Parent, yet afterwards the Child may acquire a Settlement elsewhere: But it doth not appear by this Order, that it had not gained a Settlement elsewhere. 2 Salk. 470. *Inhabitants of Dumbleton* versus *Beckford*.

5 Mod. 208. 7. Two Justices made an Order to remove a poor Man from *Woking* to *Oswell*; and upon an Appeal, the Sessions ordered the Justices Order to be *superfeded*, and that the Person should be removed to *Woking*; it was insisted in *B. R.* that the *Sessions* have only Power to *affirm or quash*, but not to *superfede* an Order, or to suspend it for a Time; and here they have made an Order upon a third Parish not concerned, for it doth not appear, that *Woking* and *Waking* is the same Parish; it was referred to a Judge of Assize. 2 Salk. 473. *Inhabitants of Oswell* versus *Woking*. See *Batterfa* versus *Westham*.

8. One *Rice* being six Years last past legally settled in the Parish of *St. Nicholas*, clandestinely came into the Parish of *St. Helen* in *Abingdon*, and there lived, without giving any Notice to the Parish-Officers; thereupon he was removed by the Order of two Justices to *St. Nicholas's*, which Order was confirmed upon an Appeal; and being now removed into *B. R.* the Question was, whether having lived in *St. Helen's* for six Years, Notice might be presumed, and every Thing else necessary to gain a Settlement there; and adjudged, that it should not, because it appears by the Order, that he clandestinely removed himself thither, and might continue there so long in the like Manner. 2 Salk. 472. *St. Helen's Parish* versus *St. Nicholas's Parish*.

5 Mod. 315. 9. An Order to remove a poor Man was quashed, for that it was, *whereas B. is (as we are credibly informed) the Place of his last legal Settlement*, which is no Judgment that it was so, and the Statute requires, that the Person shall be removed to the Place where he was last legally settled. 2 Salk. 473. *Trobridge Parish* versus *Weston*.

5 Mod. 321. 10. Order to remove a poor Person was quashed, because it did not set forth that one of the Justices was of the *Quorum*; for this being a Special Authority, must be pursued. 2 Salk. 473. *Chid-dingstone Parish* versus *Penhurst*.

11. An Order to remove a poor Person was quashed, because it did not appear that the two Justices were of the County, but only residing in the County. 2 Salk. 474. *The King* versus *Dobbins*.

12. An Order of two Justices to remove a Person to *Terrent Crawford* in *Dorsetshire*, from *Terrent Kingston* in the said County; and upon an Appeal the Sessions made an Order to remove him to *Amner*, which appeared to them to be the last Place of his lawful Settlement; this Order was quashed in *B. R.* because the Sessions made an original Order, they might have reversed the first Order, or ordered the Person to be removed to *Terrent Kingston*, but not to *Amner*, which is a third Parish, which was no Ways concerned, either in the Order or Appeal. 2 Salk. 474. *Amner Parish's* Case.

13. The Case upon a Removal to *Talbury* was, *Robert Flood* was born in *Talbury* and served seven Years Apprenticeship there, which ended in the Year 1693, and since that Time he lived in *Foston* in the Parish of *Scropton*, and in other Places; but the Blacksmith of *Foston* dying, *Flood* went thither in the Year 1694, and rented a Chamber and the Shop of the Widow at 52 s. per Annum, with the Consent of the Bailiff of the Lord of the Manor, and was publicly employed by the Parishioners, and particularly by the said Bailiff, and by the Vicar, and by the Justice of Peace, but gave no Notice in Writing, nor rented a Tenement of 10 l. nor served any publick Office; the Question was, whether this publick Way of Living did not amount to a giving Notice in Writing within the Meaning of the Statutes 1 Jac. 2. and 3 & 4 Will. & Mar. cap. 11. adjudged, that it might satisfy the first Statute, but not the last; for since the last Statute nothing shall amount to a giving Notice in Writing, but what is therein particularly mentioned. 2 Salk. 476. *Talbury Parish* versus *Scropton*. See *Buckingham Parish. S. P.*

14. An Order by two Justices to remove *Anne Talley* from *Cockfield* to *Buxted*; and upon an Appeal the Order was confirmed; but at the next Sessions afterwards there was an Order of Review made, and the Sessions Order was quashed, because obtained by Surprise; but adjudged, that this Order of Review shall be quashed, because after the first Sessions the Justices have no farther Power. 2 Salk. 477. *Cockfield Parish* versus *Buxted*.

15. One *Facy* was settled at *Heavy-Tree*, and afterwards went into the Parish of *St. Mary le More* in *Excester*, where he rented an House at 7 l. per Annum, wherein he lived a Year, and paid the Rates and Taxes due for the said House, which were not charged on his Person, but on the House; adjudged, that this Payment of Parish Taxes made a Settlement. 2 Salk. 478. *Parish of St. Mary* versus *Heavy-Tree*. See *Talborne* versus *Boston*.

16. An Order was thus: ff. Whereas Complaint hath been made unto us, &c. that *Elizaleth Fulford* is lately come into the Parish of *St. Giles's Cripplegate*, and is likely to be chargeable to the same, and whereas on Oath made by the said Elizabeth Fulford, it appears, that her Husband was last legally settled in *Hackney*: These are therefore, &c. quashed, because there was no * Adjudication of the last Settlement, but only it appeared to be so upon the Oath of the Woman. 2 Salk. 478. *St. Giles's Parish* versus *Hackney*.

* See *Sad-dlecomb* v *Lar-wash*, and *Berry* v *Arundell*, and *The Queen* v *Newnham*.

17. An Order, made by two Justices for settling a poor Person, was quashed at the Sessions, but because it did not appear that it came before them by Way of *Appeal*, that Order of Sessions was quashed in *B. R.* for the Sessions have no Jurisdiction without it. 2 *Salk.* 478.

18. Order of two Justices was, Whereas Complaint hath been made unto us, that *Jacob Duckin* with his Wife and Children, came from the Place of his Abode and last legal Settlement in *Berry to Arundel*, &c. quashed, because there is no Adjudication by the Justices, that *Berry* was the last legal Place of his Settlement; but it was only complained, that *Berry* was that Place. 2 *Salk.* 479. *Berry Parish versus Arundell.*

19. One *Jerrison* was a Servant to *Sir Paul Jenkinson* in *Waltham*, and afterwards was put out by his said Master to a Barber in *Chesterfield* to learn to shave, for which the Barber was to have 5 *l.* of *Sir Paul*, and continued there a Year, according to Covenants made between *Sir Paul* and the Barber, to which *Jerrison* was no Party; adjudged, that this did not make a Settlement at *Chesterfield*, because no Service by *Hiring*, but rather as a Boarder there for his Education. 2 *Salk.* 478. *The Case of Chesterfield.* 5 Mod. 328.

20. Order to remove a poor Woman from *Turdly* in *Worcestershire* to *Swolhill* in *Warwickshire*; afterwards two Justices in *Warwickshire* made an Order to remove her to *Norton* in *Worcestershire*, and then two Justices sent her back to *Swolhill* in *Warwickshire*; and upon an Appeal to the Justices in their Sessions in *Warwick*, the Settlement was confirmed at *Norton*; and then an Order was made by two Justices to execute the Sessions Order; the Court seemed to be of Opinion to quash all the Orders but the First, for that being made by two Justices, is binding against all Parishes till repealed, which must be by Appeal to the Sessions, and the Order to send her to *Swolhill* was never repealed, for when she came thither, she was sent to *Norton*, a third Place, and the Sending her thither shall never be taken to be an original Order, for if it should, then they might send her back again to *Turdly*, and so there would be a continued Circuitry; but since *Norton* had appealed to the Sessions, and had been concluded there, the Court would not quash the Order. 2 *Salk.* 481. *Norton Parish versus Swolhill.*

21. An Order was made to remove two Men and their Families, quashed, because too general, for some of their Families might not be removeable by Law; as for Instance, a Man settled in *B.* marries a poor Woman settled in *W.* who had Children by her first Husband; the Wife must be settled where her Husband is, but the Children above seven Years old are not removeable; 'tis true, those under that Age must go with the Mother, but 'tis only as Nurse-children, for they shall be kept at the Charge of the Parish of *W.* where their Mother was settled before she married. 2 *Salk.* 482, 485. *Silvanus Johnson's Case. S. P.*

22. It was settled in the Case of the Parish of *Hootton Bassett*, that if the first Order is naught, no subsequent Order upon an Appeal can make it good, and for that Reason both Orders were quashed. 2 *Salk.* 482. *Hootton Bassett's Case.*

23. A poor Infant was left in *Christ-Church Hospital*, and upon Complaint of the Wardens of the Hospital, two Justices made an Order, that the Overseers of the Poor of that Parish should receive and maintain it; but it was quashed, because it was not said, that the Parents were unknown, or that the Child was likely to be chargeable to the Parish. 2 *Salk.* 485. *Christ's Hospital's Case.*

24. An Order of two Justices for sending a poor Man from *Beeding* to *Kingston*, was reversed upon an Appeal, and then the poor Man went back to *Beeding*, and they procured another Order to send him from thence to *D.* and upon a Motion to quash that Order, it was insisted, that the Order of Reversal, upon an Appeal, was conclusive and made the Settlement at *Beeding*; but adjudged, that this Determination upon an Appeal binds only the contending Parishes, and not a third Parish. 2 *Salk.* 486. *Beeding Parish versus Kingston Bowsey.* 2 *Salk.* 524. *Harrow versus Rislip. S. P.* See *Swanscomb versus Thenseild. S. P.* 2 *Salk.* 527. *Minton versus Stony Stratford. S. P.*

25. An Order of Sessions was drawn up specially to have the Opinion of the Court, which was thus concluded, *And if the Court shall be of Opinion, &c.* then; adjudged naught, for the Sessions ought to determine it first, and not conclude to the Opinion of the Court. 2 *Salk.* 486.

26. A Sessions Order was made for Relief of poor Prisoners in Gaol, and for providing Materials to set them on Work, upon the Statutes 14 *Eliz. cap. 5.* and 19 *Car. 2. cap. 4.* by which a Sum was assessed on several Parishes, not exceeding what is allowed by these Acts; quashed, because they ought to make distinct Orders upon each Act, the Money being applicable by the Acts to different Purposes. 2 *Salk.* 487. *Eaton-Bridge Parish versus Wistram.*

27. Where a Place is extraparochial, the Justices can neither send a poor Man to it or from it; so adjudged in the Case of the *Forrest of Dean* and *Parish of Linton*; so where a Special Order of Sessions was made, that *T. P.* was bound Apprentice and served seven Years within the Precinct of *Bridewell*, and afterwards lived nine Years in *Clerkenwell*, but gained no Settlement there, therefore he was sent to *Bridewell*, that being the last Place of his legal Settlement; and this Order set forth *Bridewell* to be an extraparochial Place; and adjudged, that the Justices have no Power to send him to such Place; 'tis *casus omisus* out of the Statute, and the Order was quashed: This was 2 *Salk.* 486. *Bridewell Precinct versus Clerkenwell.*

28. But it hath been since ruled, that by Virtue of the Statute 13 & 14 *Car. 2. cap. 12. sect. 21.* the Justices may exercise the Powers given by the 43 *Eliz.* and by that Act in all extraparochial Places, where there are more Houses than one, so as the Place comes under the Denomination

mination of a Vill or Township; for, as an extraparochial Place may be taxed in Aid of a Parish 'tis reasonable that a Parish should aid an extraparochial Place. 2 Salk. 486. *Stokelane versus Dolting*.

29. Order to remove a poor Man from *B.* to *Chalbury*; then the Parishioners of *Chalbury* got an Order to remove him to *Farringdon* in *Berkshire*; and these Orders being returned by *Certiorari* into *B. R.* it was adjudged, that *Chalbury* should have got the original Order upon them repealed; for Sending him to *Farringdon* was a falsifying the original Order, which cannot be done, but upon an Appeal; for the Order of two Justices is a Determination of the Right against all Persons till repealed, therefore *Chalbury* should have appealed and got the Order discharged, and then the poor Man must have been returned to *B.* and they must send him to *Farringdon*. 2 Salk. 488. *Chalbury Parish versus Farringdon*.

30. Order to remove a poor Man with his Wife and Children, from *Ware* to *Stansted*, quashed; because *Wife and Children* was too general and incertain, for some of the Children might not be removeable; besides, the Order was thus, (*viz.*) it appears upon *Examination before us, or one of us*, which is ill, because the Examination ought to be before two Justices. 2 Salk. 488. *Ware Parish versus Stansted*.

31. Order of two Justices to remove a poor Man from *Tarring* to *Findon*, this was in the Year 1694; about six Years afterwards the Man came to *Thackham*, a third Parish; and in Regard *Findon* had never appealed, they of *Thackham* get an Order to send him back thither, and then, and not before, *Findon* appealed from the Order of *Thackham*; adjudged, that the Man was legally settled at *Findon*, they having not appealed from the first Order in six Years, and are now concluded to say, that the Settlement is not with them; but in Regard of the Length of Time, which was six Years, the Man might in that Time gain a new Settlement in another Place, or at least at *Thackham*; they would not quash the Order. 2 Salk. 489. *Thackham Parish versus Findon*.

32. Two Justices of a Corporation made an Order to remove a poor Man from them to *Wendover*; from this Order there was an Appeal to the Sessions in the Corporation, where it was confirmed, but both Orders were quashed, (*viz.*) the original Order, for that it was, *Whereas we are credibly informed, that Wendover was the last Place of his legal Settlement*, which is no Adjudication that it was so; and the Order upon the Appeal was quashed, because it was to the Sessions of the Corporation, when it should be to the Sessions of the County. 2 Salk. 490. *Watford Parish versus Wendover*.

33. Order of two Justices quashed, for that it was, *Whereas Complaint hath been made unto us, &c. that T. P. is likely to become chargeable to the Parish, &c.* for this is no Adjudication; if it had been, *Whereas it appears unto us, upon the Complaint* of the Church-wardens, &c. that had been well enough. 2 Salk. 491. *Saddlecomb Parish versus Burwash*.

34. Order to send a poor Man to *Shensfield*, and upon an Appeal that Order was confirmed; afterwards *Shensfield* sends him by another Order to *Swanscomb*; these Orders being returned by *Certiorari*, the Order to *Swanscomb* was quashed, because by the confirming the first Order upon an Appeal, *Shensfield* was bound against all the World, and could not say that was not the last Place of his Settlement; 'tis true, if the first Order had been reversed upon the Appeal, or if there had been no Appeal at all, then the Matter is at large as to all Parishes, other than to the Parish to which the poor Man was sent, for he shall never be sent thither again, because by the Reversal of the Order, the Sessions had determined, that was not the last Place of his Settlement, so that an Order reversed is final only between the contending Parishes, but an Order confirmed, or not appealed from, is final to all. 2 Salk. 492. *Swanscomb Parish versus Shensfield*. See *Bedenham versus Kingston. S. P.* 2 Salk. 527. *Minton versus Stony-Stratford. S. P.*

5 Mod.
149. 35. Order of two Justices to remove a poor Man from the Parish of *Wootton Rivers* to *St. Peter's* in *Marlborough*; it was objected that the Order was ill, because it was said, *upon Complaint* only, without saying, *of the Church-wardens and Overseers of the Poor*; and it was not, that she did not Rent a Tenement of 10*l.* per Annum; adjudged, that as to the not Renting a Tenement, &c. 'tis not necessary in the Order, but it was quashed for the first Exception; for any Man coming into a Parish cannot be disturbed but by those who have Authority to do it, therefore a *Complaint ex Officio* signifies nothing, it must be made by the Church-wardens or Overseers of the Poor, or both; and tho' it appeared to be so upon the Return of the *Certiorari*, yet that will not cure the Defect in the Order it self, where it was not so. 2 Salk. 492. *Wootton Rivers Parish versus St. Peter's Marlborough*.

36. An Order was made to remove a poor Man from the Parish of *St. George* to the Parish of *St. Ollave*, where he was last legally settled, and this Order was confirmed upon an Appeal, and both these Orders being removed by *Certiorari*, were quashed, because the Direction of the original Order was to the Church-wardens, &c. of the Parish of *St. Ollave*, that being the Parish to which he was sent; and the Justices cannot command them to remove him to themselves. 2 Salk. 493. *St. George's Parish versus St. Ollave*.

Mod. Cases 287. 37. The Quarter-Sessions in *Middlesex* made an Order, and in the same Sessions vacated that Order by a subsequent Order, and both these Orders being returned into *B. R.* it was ruled, that they ought not to have returned the vacated Order; and that the Sessions being accounted as one Day in the Law, they may alter their Judgment, and make a new Order. 2 Salk. 494. *St. Andrew Holborn Parish versus St. Clements Danes*.

38. Two Justices made an Order to send an *Idiot* to the Place where his Father was last legally settled; and this was adjudged good, and not like the Case of a *Bastard*, who is to be maintained by the Parish where born, because in such Case he is esteemed to be *nullius filius*; so that the one hath a Father, and the other none. 2 *Salk.* 427. *Hard's Case*.

39. Order of two Justices, to remove a poor Man from *Rowborough* to *Broadchalke* was confirmed upon an *Appeal*; afterwards the Man came to *Downhead* a third Parish, and they procured an Order, reciting the Original Order, and the Confirmation thereof, by which he was sent back to *Broadchalke*; but it was objected to this Order, that it was made by two Justices, and it did not appear that one was of the *Quorum*; it was answered, this might be a good Exception, if it had been an Original Order, but this was an Order made in Pursuance of an Order confirmed on an Appeal; but it was quashed, for the Omission of *Quorum unus*. 2 *Salk.* 481. *Downhead* versus *Broadchalke*.

(D)

What shall be a Settlement.

1. **T**HE Church-wardens of *S. L.* gave a Man (who had a Wife and five Children) 5 *l.* to remove into another Parish, upon Condition, that if he returned within forty Days, to repay the 5 *l.* accordingly he removed into the other Parish, and there staid above forty Days; afterwards this Matter appearing to the last Parish, they got an Order to remove him to the first Parish, which Order was confirmed upon an Appeal, and both Orders being removed into *B. R.* by *Certiorari*, they gave Judgment upon the first Order of Removal, that it was not good, because the Man by staying above forty Days in the last Parish had gained a Settlement there. 3 *Mod.* 67. *Burgh's Case*.

2. The Son was bound Apprentice to his Father, being a poor Man; afterwards he gave up his Indenture, and the Son hired himself into another Parish for a Year, and served the whole Year, but the Indentures of Apprenticeship were not cancelled, and thereupon an Order was made for his Settlement in the Parish where he lived with his Father as an Apprentice, because he continued still so to be, the Indenture being not cancelled. *Mod. Cases* 190.

3. A Child was born in the Parish of *Cumner*, and whilst it was under seven Years old, the Father removed from thence and gained a Settlement in the Parish of *Milton*; and this was adjudged a Settlement of the Child; it was likewise held, that where the Father is settled in a Parish and dies, and afterwards his Wife dies in Child-Bed, the Child shall be settled there. *Mod. Case* 87. *Cumner Parish* versus *Milton*.

4. A Servant was hired for a Year in *S.* and served half a Year, and then was married to a Woman in *W.* adjudged, that this Hiring could not be dissolved by the Marriage at the Complaint of the Church-wardens, &c. tho' it might upon the Complaint of the Master; but if he will suffer his Servant, (tho' married) to continue in his Service for a Year, that makes a Settlement; 'tis true, the Statute says, where any unmarried Person is hired for a Year, &c. such Service, &c. Now the Words, *such Service* shall relate to a Service where the Hiring is for a Year, and not to a Service where the Man is unmarried all the Year; for the Contract continues, and the Marriage is no Hindrance to the Service; for certainly, if he marries a Woman in the same Parish, that shall gain a Settlement. 2 *Salk.* 527. *Farringdon Parish* versus *Witney*, 529. *S. C.* The Marriage doth not make him removeable to the last Place of his Settlement, 529. *S. C.*

5. Adjudged, that Renting a Water-Mill of 10 *l. per Annum* makes a Settlement, for a Mill is a Tenement. 2 *Salk.* 536. *Evelin Parish* versus *Rentcomb*.

6. Adjudged, that where a poor Man was appointed to be a *Parish-Clerk*, and executed the Office for a Year, that makes a good Settlement; and 'tis not material, whether he came in by the Appointment of the Parson, or by the Election of the Parishioners; for he is in for Life, and this is Executing an Annual Office and Charge within the Meaning of the Statute 3 & 4 *W.* 3. 2 *Salk.* 536. *Gatton* versus *Melwich Parish*.

7. A poor Child was bound Apprentice at *C.* and afterwards his Master assigned him over to another Master in the Parish of *B.* adjudged, that he is settled in the Parish of *B.* where his second Master lived; for tho' this Assignment is not good to pass an Interest, yet it amounts to a Contract between the two Masters, and therefore good by Way of Covenant. 1 *Salk.* 68. *Caster* versus *Aicles*.

8. The Chief Justice *Holt* declared, that the most regular Way to proceed on the Statute 14 *Car.* 2. in Removing a poor Person, is to make a Record of the Adjudication and the Complaint, and upon that to make a Warrant under their Hands and Seals to the Church-wardens, to convey the Persons to the Parish to which they ought to be sent, and to deliver in the Record at the next Sessions, to be kept amongst the Records; and this Record may be removed by *Certiorari*. 1 *Salk.* 406.

(E)

What shall not be a Settlement.

1. A Poor Man was sent by an Order to the Parish of *H.* for that the Banns of Matrimony were published between him and his intended Wife, in the Parish Church there; but this Order was quashed, because this is not such Notice as is required by Law, for that must be in Writing, since the Statute 3 & 4 Will. 3. which being an explanatory Act, shall not be construed equitably. 5 Mod. 454. *King versus Inhabitants of Chertsey.*

2. A poor Man was removed by the Order of two Justices, from *Boston*, to the Parish of *Talbury*, that being the Place of his Birth; and upon an Appeal to the Sessions, the Fact was stated upon the Order of Sessions, by which it appeared, that he had lived at *Boston* a whole Year, and being a *Smith*, he shoe'd the Horses of the Lord of the Manor, and of the Vicar; whereupon the Order of the two Justices was quashed, and by the Sessions Order he was settled at *Boston*, they adjudging, that this Matter amounted to Notice in Writing; these Orders being removed by *Certiorari*, it was moved to affirm the Sessions Order, because Settlements were as before the Making the Act 1 Jac. 2. cap. 17. unless the Party came by clandestine Means into a Parish, which this Man did not, for he came openly, at the Desire of the Parishioners, and lived there a Year, and worked for the Lord of the Manor and the Vicar, and others; but adjudged, tho' this might have amounted to Notice in Writing to satisfy that Statute, yet Notice in Writing by Implication, shall not be allowed since the explanatory Act 3 & 4 Will. 3. by which 'tis enacted, that the forty Days shall be accounted after the Publication of Notice in Writing of the Place of his Abode, and the Number of his Family: Now, neither the Lord of the Manor, or the Vicar can tell how many he hath in his Family by his Shoeing their Horses; so the first Order was confirmed. 5 Mod. 330. *Dalbury versus Foiston.*

* 3 & 4
Will.

3. Adjudged, that where a Man is taxed and stays in a Parish forty Days after a Taxation, and without giving Notice, this is no Settlement within the Statute * Will. unless he pays the Tax; for 'tis Taxing and Paying that is equivalent to Notice. 2 Salk. 523. *Talborne Parish versus Boston.* See *St. Mary Heavy-Tee.*

5 Mod.
416.

4. Where a Man lives in a Parish, and hath Land of his own there, or in Right of his Wife, this will make a Settlement; but if he hath Land in one Parish, and lives in another, the Land will not make a Settlement of him in that Parish where it lies. 2 Salk. 524. *Risip versus Harrow.*

5. Adjudged, that the Statute 8 & 9 Will. 3. cap. 3. by which 'tis enacted, that an unmarried Person hired for a Year, shall not be settled unless he serves the whole Year, shall have no Retrospect, but shall extend only to such Cases as may happen of this Nature after the Making the Act. 2 Salk. 525. *Beckenham Parish versus Camberwell.*

6. *T. P.* a poor Man, came to the Town of *Buckingham* where he rented an House of 3 *l.* per Annum, but agreed with the Landlord, that he would pay no Taxes; the Apartment which he took was distinct from the House, and taxed as an House by it self, and the Tax was assessed on the Landlord; but whilst *T. P.* lived there, he took his Freedom of the Corporation, and voted as a Freeman at the Election of Bailiffs; adjudged, that since the explanatory Act 3 & 4 Will. 3. nothing makes a Settlement that is not within the Words of that Act; 'tis true, Coming into a Parish, and being taxed, made a good Settlement, without Notice to satisfy the Act 2 Jac. but the Law is altered by this explanatory Act, which implies a Negative to any Thing else; that as to his Voting, it doth not imply a Settlement, for 'tis an Act which relates to the Corporate Body, and not to the Parish, and by the Constitution of the Corporation, a bare Residency might entitle him to vote. 2 Salk. 534. *The King versus Buckingham Parish.* See *Talbury versus Scropton Parish. S. P.*

7. A Servant was hired to live at *Ridgwick* for half a Year, and after that was ended, he was hired again by the same Master for another half Year in the same Parish, and so continued in one Service for a whole Year, but upon two Contracts; adjudged, that this was no Settlement, for it ought to be a Service for a whole Year upon one Agreement; for the Statute requires, that the Contract should be entire as well as the Service; for by the Statute of *Eliz.* the Retainer was to be for a Year, and the Statute 14 Car. 2. requires forty Days Continuance in a Parish; and these later Statutes 3 & 4, and 8 & 9 Will. 3. cap. 30. do but turn the forty Days Service to a Year's Service, and the Hiring to be a Retainer for a Year, it being supposed, that no Master would hire a Servant for such a Term, unless he was of able Body, and not likely to be chargeable within that Time; but if a Service under several Contracts should gain a Settlement, then a Man may hire for a Month, and one who serves by the Week, or by the Day, if he continue so for a Year, will gain a Settlement, and thus the Statutes will be eluded. 2 Salk. 535. *Dunsfold Parish versus Ridgwick.*

3

(F)

Concerning Certificates.

1. **T**. P. came from the Parish of B. to Honiton with a Certificate, and afterwards he went to the Parish of W. and now being sent to the Parish of B. who gave the Certificate; they offered to prove that he was settled in another (*viz.*) in the Parish of St. Mary Axe; and the Question was, Whether the Parish who gave the Certificate, was bound as to Honiton only, to whom it was given, or whether it was conclusive to them against all other Parishes; adjudged, that a Certificate is a solemn Acknowledgment, that the Person is lawfully settled with them; and there is no Reason to make it differ from an Adjudication, since 'tis an Acknowledgment of the Parishioners, signed by proper Officers, and confirmed by two Justices, who are proper Judges; and there would have been an Adjudication of a Settlement upon less Evidence, by which all Parties would be bound till repealed. 2 Salk. 535. *Honiton Parish versus St. Mary Axe*. See the next Case a contrary Resolution.

2. The poor Man was born at B. and lived at W. many Years, but gained no Settlement there; afterwards, for the Convenience of getting a Livelyhood, the Parish of W. where he lived so long, gave him a Certificate to C. whither he went, and becoming chargeable, was sent back to the Parish of W. and they finding, that he was last legally settled at B. the Place where he was born, sent him thither; adjudged, that a Certificate concludes only the Parish who gave it, against the Parish to whom it was given, so that they shall never have the poor Man; but as to all other Parishes 'tis as it was before the Act of Parliament about Certificates. 2 Salk. 530. *All-Saints Parish versus St. Giles*.

3. T. P. came by a Certificate from the Parish of W. where he was legally settled, to the Parish of K. and because he was *likely to be chargeable*, they sent him back to the Parish where he was settled, and who gave the Certificate; but this Order was quashed, because by the Statute 8 & 9 Will. 3. cap. 30. he is not removable, coming with a Certificate, unless *he is actually chargeable*, and by this Order 'tis said only, that he is *likely to be chargeable*; 'tis true, if there is a Fault in the Certificate, he may be sent back before he is actually chargeable; but then this Fault must appear in the Order by which he is sent back, and the Sessions have no Jurisdiction by Way of Appeal upon such a Certificate. 2 Salk. 530. *Little Kirk Parish versus Woolfall*.

4. The Order was thus, *ff.* Whereas Complaint hath been made unto us, by, &c. that T. P. who was lately come into the Parish of B. with a Certificate according to the Statute 8 & 9 Will. 3. is *actually* chargeable to the said Parish, &c. quashed, because the Justices must make an *Adjudication*; for unless they adjudge him chargeable, he is not to be removed. 2 Salk. 436. *Mulden Parish versus Fletwick*.

(G)

For Relief of the Poor, and concerning Church-wardens Accounts, and Overseers Rates.

1. **T**HE Overseers of the Poor of Peterborough having made a Rate to raise Money expended on the Poor in the Time of the Plague, and having taxed the Inhabitants of certain Hamlets in the said Parish of Peterborough, desired the Justices of Peace of Soke, (in which Liberty all the Places taxed were) but exempt from the County, to sign the Rate, apprehending, that two Justices of the County were not sufficient within the Statute 43 Eliz. but the Justices of that Liberty refusing to sign it, unless they would leave the Hamlets out of the Rate, B. R. made a Rule for them to sign it, or shew Cause, &c. and no good Cause being shewed, a peremptory Rule was made upon them to sign it, or an Attachment should go. *Sid.* 377. *Case of Inhabitants of Peterborough*. See 5 Mod. 275, 421.

2. The Order of two Justices was thus; *ff.* Being informed, that the Overseers of the Poor of the Parish of, &c. have refused to pay 2 s. per Week to a poor Man, they order, that they shall continue to pay it and the Arrears, until they find him an House, &c. quashed, because the Overseers have no Power to find him an House, that must be done by the Lord of the Manor, or by the Justices in Sessions; besides, it did not appear, that he was poor and impotent. 5 Mod. 397.

3. *Mandamus* to the Justices of Peace, and to the Overseers of the Poor of Shipton-Maller, to give an Account of Monies by them received, for the Relief of the Poor; who return, that they had given an Account of the Money, and that they had disposed several Sums in a particular Manner, setting them out, &c. adjudged, that the *Mandamus* was ill, for want of suggesting, that the ordinary Remedy could not be had. 5 Mod. 420.

4. The Defendants were indicted at the Sessions, for that being chosen Overseers of the Poor of the Parish of *Lynn*, for the Year 1693, and having taken upon them that Office, they *utroque eorum* did collect and receive several Sums for the Use of the Poor, and did refuse to account within four Days after the End of the Year; and after new Overseers were chosen, did refuse to give an Account to two Justices of what Sums they did receive, and to deliver over the same to those New Overseers; but converted it to their own Use, * *contra formam Statuti*; this Indictment being removed by *Certiorari*, it was objected, that it would not lie, because this is an Offence created by an Act of Parliament, which was not so at Common Law, and the Punishment being directed by that Act, (*viz.* that the Offender shall be committed by two Justices, till he doth account, &c. there to remain without Bail) that Remedy must be pursued, and no other; to which it was answered, that it was a proper Means to come at the Right, but the not Accounting was a Contempt of the Law, for which an Indictment would lie at the Suit of the King; and to this the Court inclined. 5 *Mod.* 179. *The King versus Commins.*

5. An Order was made by two Justices, that *W. R.* should take upon him the Office of Overseer of the Poor of that Part of the Parish of *St. Andrew* which lies in *Middlesex*; it was objected, that it was ill, because it did not appear, that *W. R.* was a House-Keeper or Inhabitant of that Parish; and the Court will not * intend him to be one; besides, he ought to be appointed Overseer for the whole Parish, and not for Part of it, &c. *Mod. Cases* 77. *The Parish of St. Andrew's Cafe.*

6. Indictment for refusing to relieve and maintain the Wife of his Son *John Turnock*, according to an Order made at Sessions, which was set forth *in hac verba* in this Indictment, (*viz.*) *Ad generalem Session' pacis*; quashed, because the Word *Quarterialem* was left out; for by the Statute 43 *Eliz. cap. 2. Sect. 7.* these Orders are appointed to be made at the *General Quarter-Sessions.* 2 *Salk.* 474. *The King versus Turnock.* 2 *Salk.* 476. *Purnall's Cafe. S. P.*

7. An Original Order was made at Quarter-Sessions, setting forth, that the Parish of *Dimchurch* was burthened with Poor, and that *Eastchurch* had no Poor, therefore they ordered *Dimchurch* to be annexed to *Eastchurch*, and that the Occupiers of Lands there should contribute 20 *l. per Annum*, by equal monthly Payments to *Dimchurch*, as long as it was overburthened with Poor, and *Eastchurch* had none; adjudged, that by the Statute 43 *Eliz.* the Sessions may tax particular Persons, in Aid to the Relief of the Poor in another Parish; or they may, (as in this Case they had done) assess the whole Parish in a certain Sum, and leave it to the Parish Officers to collect and levy the same of particular Persons; and that this Order was good for that Part, but ill as the *Uniting the Parishes.* 2 *Salk.* 480. *Dimchurch versus Eastchurch.*

8. The Church-wardens, &c. made a Rate for the Relief of the Poor, which was confirmed by two Justices; but all was rated upon the *Real Estates*, and none on the *Personal*; and therefore upon an Appeal the whole Rate was quashed, and the Church-wardens ordered to make a Rate both upon Personal and Real Estates, which they afterwards did, but with great Inequality on the *Real Estates*, which were taxed ten Times more in Proportion than the Personal Estates; thereupon several Persons appealed again, and this Rate was likewise vacated; it was objected, that the Sessions had no Power to vacate whole Rates, but only to relieve particular Persons, whom they find aggrieved; but adjudged, that they may quash whole Rates, and refer it to the Church-wardens to make new Rates, or they may make a new Rate themselves. 2 *Salk.* 483. *St. Leonard Shoreditch's Cafe.*

9. Three Justices took the Account of the Church-wardens and Overseers of *Topsham*, for the Year 1697, and adjudged, that there was 69 *l.* 8 *s.* 10 *l.* due from them to the Parish; and they made an Order for the Payment thereof to the succeeding Overseers for the Year 1698. it was objected, that the Justices had no Power to make such an Order, but only to issue out Warrants to distrain on the last Overseers; but adjudged, that the Order was well made, and the Court confirmed it. 2 *Salk.* 485. *The Church-wardens, &c. of Topsham's Cafe.*

10. Upon a Trial at Bar in Replevin against the Defendant, as Overseer of the Poor; the Question was, whether *Stratton* was a Parish of it self in Reputation, or Part of the Parish of *Biggleswade in Com. Bedford*; it was ruled, that having a distinct Overseer, and maintaining their own Poor, was not sufficient to make it a * *Parish in Reputation* within the Statute 43 *Eliz.* it must have a Parochial Chapel, and Chapel-wardens, and Sacraments at the Time of the Statute made: 'Tis true, they had one Chapel-warden, whose Office was to collect the Rates taxed upon *Stratton*, and pay them to *Biggleswade*, and the Sacraments and Sacramentals were there. 2 *Salk.* 501. *Rudd versus Morcton.*

11. Order for *T. P.* to pay 2 *s.* per Week towards the Support of his Father, till the Court should order to the contrary, good, because it was indefinite; for if it had been for a Time certain, an Estate might have fallen to him within that Time. 2 *Salk.* 534. *Jenkin's Cafe.*

12. An Overseer accounted before two Justices, and his Account was allowed; the Parish appealed to the Sessions, and the Account was disallowed, and he ordered to pay so much over, &c. which they adjudged to be in his Hands, and for not doing it, they committed him; this Order was quashed, and the Man discharged, because the Sessions should have ordered the Money to be levied by *Distress*, in the same Manner as the two Justices should do, and upon Return of their Warrant, that there was no Distress, then, and not before, to commit him. 2 *Salk.* 533. *The King versus Hedges.*

13. *T. P.* took Part of an House in the Parish of *B.* on the third Day of *December*, and was rated and distrained for a *Quarter's Rate* due at * *Christmas* following, which Distress was taken on a general Warrant made for the whole Year; adjudged, that he could not be rated for a whole Quarter, because, by the Statute the poor Rates are to be assessed *Monthly*; for otherwise a Man cannot remove in the Middle of a Quarter, but he will be twice rated, neither can a Distress be taken by a general Warrant made at the Time of the Rate, but there ought to be a Special Warrant on Purpose; neither can it be taken for a Quarter's Rate before the Quarter is ended, if the Custom is to Rate quarterly. 2 *Salk.* 532. *Tracy* versus *Talbot*, adjudged in *Replevin*. Mod. Cases 214. contra. * The Usage is, that he may be distrained. Mod. Cases 214.

14. An Overseer laid out his own Money to relieve the Poor, and before the End of the Year the Justices turned him out of his Office, and having obtained a *Mandamus* to the Church-wardens and Overseers to make a * *Rate to re-imburse him*, this *Mandamus* was set aside, because *B. R.* cannot order the Overseers to make a *Rate to re-imburse another*, but only to raise Money for the Relief of the Poor. 2 *Salk.* 531. *Tawny's Case*. Mod. Cases 97. * It ought to be to levy Money for the

Poor, and not to re-imburse him. There should be a Rate made every Month, which the Justices should approve; and if they refuse, then a *Mandamus*.

15. Adjudged, that *Hospital Lands* are rateable to the Poor as well as other Lands, for no Man by appropriating his Lands to an *Hospital* can exempt them from such Rates to which they were subject before, and by that Means lay a greater Burthen upon the Parish. 2 *Salk.* 527.

16. In the Year 1665, the Parishioners of *Audley* agreed to a Rate, which had been followed ever since; but *Anno* 11 *Will.* 3. a new Rate was made, and that which they had followed many Years was laid aside; and upon an Appeal to the Sessions the new Rate was set aside, and the old one confirmed; it was adjudged, that the Justices could not make a standing Rate, because, by the Statute 43 *Eliz.* the Rate must be equal, which a standing Rate cannot be, because Lands may be improved every Year, and therefore the Rate should be altered, according as Circumstances alter; therefore this Order of Confirmation is naught, and so it was quashed. 2 *Salk.* 526. *The King* versus *Audley Parish*.

17. Adjudged, that the Sessions may quash a whole Rate where 'tis unequal and burthensome to several Parishioners, and they may make a new one themselves, or order a new one to be made by the antient Inhabitants. 2 *Salk.* 524. *Shoreditch Parish's Case*.

18. *Mandamus* to the Justices, &c. on the 43 *Eliz.* to compel the precedent Overseers to come to an Account with the present Overseers; quashed, because by the Statute, the Account is to be given to the two Justices, and not to the succeeding Overseers; besides, two of the Persons named in the Writ, and who were to account, do not appear to be Overseers. 2 *Salk.* 525.

19. Indictment on 14 *Car.* 2. cap. 12. against Church-wardens and Overseers, &c. for not making a Rate to re-imburse the Constables; it was objected, that the Statute puts it in their Power to do so by the Word *May*, but doth not command it to be done as a Duty and to make the Omission punishable; but adjudged, that where a Statute directs a Thing to be done for the Sake of Justice, or for the Publick, there the Word *May* signifies the same Thing as *Shall*; thus the Statute 23 *H.* 6. says, the Sheriff *May* take Bail, (*i. e.*) he *shall*, for he is compelled so to do. 2 *Salk.* 609. *The King* versus *Barlow*.

(H)

Of Sessions, good, and not good.

1. THERE had been, Time out of Mind, one Constable for *Ratcliff*, *Shadwel* and *Old Wapping*, who joined in Relief of their Poor, but the Number of the Houses and Inhabitants increasing within thirty Years last past, they had several Constables, and relieved their Poor separately; but the Poor of *Shadwel* increasing, they were not able to relieve them, whereupon they complained to the Sessions, where two of the Judges were present; and it was ordered, that these Parishes should join again to relieve their Poor; but at another Sessions where *Sir John Robinson* was Chief, it was ordered, that they should be severed again; which last Order was quashed, because the Sessions cannot alter the Order of another Sessions made when any of the Judges are present, because, by the Statute, Matters of Difficulty are to be judged by them; so that what they Order is of greater Authority; besides, the Justices had no Power concerning the Poor before the Statute 43 *Eliz.* and even by that Statute they have no Power to sever Parishes, for which Reason several Acts of Parliament have been additionally made for several Parishes in the North. *Sid.* 292. *The King* versus *Inhabitants of Ratcliff*.

2. The Sessions adjourned an Appeal to the next Sessions, and then an Order was made, which was now moved to be quashed, because the *Determination upon the Appeal* was not at the next, but at an adjourned Sessions; but adjudged, that the Appeal must be lodged at the next Sessions, but may be determined at an adjourned Sessions. 2 *Salk.* 605. *Kings Langley Parish*.

3. The Caption of an Indictment at the Sessions, *Sessio tenth' vicesimo & vicesimo octavo die Julii*, &c. adjudged ill; for tho' a Sessions may adjourn from one Day to another, yet it must appear

pear distinctly, and not as fitting from the 20th to the 28th Day of the Month altogether. 2 Salk. 605. *Linfield Parish versus Battle*.

4. The Sessions made an Order, that the Clerk of the Peace should prosecute an Indictment of Barrettry found against *T. P.* and that the Charge should be allowed out of the *County Stock*; because by the Statute 43 *Eliz. cap. 2.* the Sessions have Power to dispose of the *Surplus to Charitable Uses*; but adjudged, that 'tis not a Charitable Use to prosecute an Offender, and that they cannot make an Order to prosecute, &c. and the Charge to be paid out of the *County Stock*. 2 Salk. 605. *The King versus Savin*.

5. Adjudged, that where an Order is made at the Sessions, 'tis still in the Breast of the Court, during all that Sessions, to alter or revoke it, and make a new Order to vacate the former, tho' 'tis drawn up; that the Court at the *Old Baily* have altered and set aside their own Judgments often in the same Sessions, where they have given Judgment against a Man to be pressed to Death, and have afterwards allowed him to plead, and tried, &c. and have given another Judgment against him to be hang d; the same Thing is done in *B. R.* where Judgments have been altered during the same Term; and the Sessions as well as the Term, are in Law accounted as one Day. 2 Salk. 606. *St. Andrew Holborn versus St. Clement*.

6. Where a Justice of Peace was Surveyor of the Highway, and a Matter coming in Question at the Sessions concerning his Office, he joined in the Making the Order, and his Name was put to the Caption, and for that Reason it was quashed. 2 Salk. 607. *Foxham Tithing*.

7. On an Appeal, the Sessions discharged the Order, but did not say, whether for Form or upon the Merits; and for that Reason it was moved to quash this Order of Discharge; but adjudged, that the Sessions is not bound to set forth the Reason of their Judgment no more than other Courts; that where a Sessions discharges an Order upon an Appeal, and it being removed into *B. R.* it appears to be good, this Court must intend that it was discharged upon the Merits, and will confirm the Order of Discharge; but if it appears to be bad, then this Court must intend that it was discharged for Form. 2 Salk. 607. *South Cadbury Parish versus Braddon*.

Ordinary.

Of the Creation of a Bishop, and his Authority. (A)
Of Actions brought against him. (B)

Of his Examination of a Clerk, and Refusal to admit him. (C)

(A)

Of the Creation of a Bishop, and his Authority. See *Administration*. (C) per totum.

1. **T**HIS is by Election and Consecration; the Election is by a License under the Great Seal, which is in the Nature of a Letter missive to the Dean and Chapter to elect the Person nominated by the King in his Letters Patents. See the *Stat. 25 H. 8. cap. 20*.

2. When he is *elect*d, he is Bishop only *Nomine*, and not *in Re*, and therefore the Benefice or Dignity which he had before in the Church, is not void by such Election; but a *Commendam Retinere* such Benefice comes Time enough. *Hob. 140. Colt versus Bishop of Coventry*.

3. *Consecration* makes him a compleat Bishop, as well to the Temporalities as to the Spiritualities, for he may then certify an Excommunication, which is a judicial Act, he may confer Orders, &c. Before the *Stat. 25 H. 8.* the Consecration and Investiture was by *Bulls from the Pope*, but now 'tis by the *Metropolitan of the Province*, in such Manner as prescribed by that Act; but tho' the *Freehold of the Temporalities* are in him *after Consecration*, yet they are not *de jure* to be delivered to him, till the Archbishop hath certified the Time of his Consecration; and if they are not then delivered, he may bring a *Writ de restitutione temporalium* directed to the Escheator, by which he shall recover the actual Possession.

4. Before the *Stat. 2 Eliz.* the King might create a Bishop without any *Letter missive* to the Dean and Chapter, for that was only a Ceremony. 2 *Cro. 353. Obrian versus Kinton*.

5. All Bishopricks are of the Foundation of the Kings of *England*, and at first were donative *per traditionem annuli & baculi*; but King *John*, by his Charter in the seventeenth Year of his Reign, granted they should be eligible. 5 Rep. 14. *Cawdry's Case*.

6. They hold their Bishopricks *per Baroniam*, and they sit in Parliament by Reason of their temporal Possessions. 5 Rep. 14. *Cawdry's Case*. *Kelway* 184. *Dr. Standish's Case*.

7. If the King hath a Title to present, and refuseth, the Bishop may sequester the Profits of the Church, for he is to take care that the Cure be performed. *Hob.* 144.

8. After the *Conge de Eslire* was settled in King *John's* Reign, and the Bishop was elected by the Dean and Chapter, he was not to have his Temporalties till he swore Allegiance to the King; but Confirmation and Consecration belonged to the Pope, so that in Effect he had the Disposol of all Bishopricks till 25 H. 8. by a Statute in that Year the Papal Usurpation was abolished; afterwards, by 1 Ed. 6. cap. 1. All Bishopricks were made donative again; but the Statute 25 H. 8. was restored by the Statute 8 Eliz. cap. 2. and made them elective again in *England*; but in *Ireland* they are still Donative. See 1 *Jones* 160.

9. When a Bishop is translated, the old See is not void till his Election to the new is confirmed, for the new Election must be certified to the King, Archbishop, and to the Person elected; and the King by his Letters Patents gives his Royal Assent, and commands the Archbishop to confirm and consecrate; and probably the King may not assent, nor the Archbishop confirm; therefore 'tis not reasonable that he should lose his old See till confirmed in the new One. See *Jones* 162. Latch 37. S. P. 1 Salk. 136. S. P.

10. Formerly, when a Bishop was translated, he was not elected to the new See; for the Canon Law is, *Electus non potest Eligi*; and the Pretence was, that he was married to the first Church, which Marriage could not be dissolved, but by the Pope; thereupon he was petitioned, and he consenting to the Petition, the Bishop was translated; and this was said to be by Postulation; but this was an Usurpation, and against Law, and restrained by the Statute 16 R. 2. and 9 H. 4. cap. 8. and Translations have ever since been by Election and not by Postulation. See 1 *Jones* 160. 1 Salk. 137. S. P.

11. The Bishop of *St. Davids* was cited before the Archbishop at *Lambeth*, for Simony and other Offences, and upon a Motion for a Prohibition, he suggested that he was cited to *Lambeth*, and not to the Arches, and before the Archbishop, and not before his Vicar-general, and the Proceeding against him was to a Deprivation; adjudged, that the Archbishop hath a Provincial over all the Bishops of his Province, and may hold his Court, and cite before himself, and sit as Judge, where, and when he will, and so may any other Bishop in his own Diocese; for the Power of a Chancellor or Vicar-general is delegated only for the Ease of the Bishop; that a Bishop may be punished in the Archbishop's Court, for any Offence against the Duty of his Office, as Bishop *Cawdry's Case* is remarkable, who was deprived for Preaching against the Common Prayer: It being the first Instance of a Deprivation, where there was another Punishment appointed by the Statute, for that very Offence, a Prohibition being denied, the Archbishop proceeded to a Sentence of Deprivation; thereupon the Bishop appealed to the Delegates in *Michaelmas-Term*, 11 Will. 3. suggesting, that by the Common Law an Archbishop alone could not deprive a Bishop; and the Delegates refusing to admit his Allegations, he moved B. R. for a Prohibition, insisting, that all Bishops were Barons, and *inter se pares*, that *par in parem non habet imperium*, and that a Bishop may be censured; yet he cannot be deprived by an Archbishop, because their Temporalties are concerned, and these are protected by the Common Law; and that they are not deprived, unless by Convocation; but adjudged, this is a new Fancy of Council; for an Archbishop hath Power over his Suffragans, and may deprive; that Bishops are *pares jure divino*, but not *humano*, for otherwise the Institution of an Archbishop would be to no Purpose; that their Peerage is by Reason of their Baronies; that several Abbots formerly sate in the House of Lords, but they never pretended any Exemption from the Bishop, and that he could not deprive them; that by the Common Law an Archbishop is superior to Bishops, and hath a metropolitical Jurisdiction; 'tis true, his Power was usurped by the Pope, but restored to its Extent at Common Law by the Statute 26 H. 8. and 'tis as true, that he hath Power to visit, and he who may visit, may deprive as well as censure, these being several Degrees of Ecclesiastical Punishment; so the Prohibition was denied; and it was ordered, that the Suggestion might be entered on the Roll, that the Court might enter their Reasons of Denying it; then the Bishop moved the House of Lords for a Writ of Error, and it was there held that it would not lie. 1 Salk. 134. *Bishop of St. Davids versus Lucy*.

(B)

Of Actions brought against him.

1. **T**HE Intestate died possessed of several Goods, which were afterwards sequestered into the Hands of the Ordinary; adjudged, that any of the Creditors of the Intestate may have an Action of Debt against the Ordinary; and in such Case he may not administer the Goods to another Person, if he hath not sufficient in his Hands to satisfy the Debt for which the Action was brought. *Mich.* 7 Eliz. *Dyer* 232.

2. Information against him upon the Statute 2 H. 5. cap. 3. for refusing to give the Plaintiff a Copy of the Libel. *Lutw. Abr.* 49.

(C)

Of his Examination of a Clerk, and his Refusal to admit him.

1. **T**HE Bishop of *Norwich* refused to admit a Clerk, because he was a common Haunter of Taverns, and a Player at unlawful Games; adjudged, these were not sufficient Causes of his Refusal, for tho' they were Offences, they were only so because they were prohibited, they were not *Mala in se*, for which the Clerk should be refused, or deprived, if he was admitted. 9 *Eliz. Dyer* 254.

2. When the Clerk is presented to the Bishop, he is to examine him before he admits him to the Cure, and if he is found unable, he may refuse him. 5 *Rep.* 57. *Specot's Case*.

3. The Bishop is bound to examine the Clerk within six Months after the Avoidance, and not suffer the Lapse to incur. *Idem*.

4. This Jurisdiction of Examination is not local, but follows the Person of the Bishop wherever he is. *Leon.* 33. *Carter versus Crofts*, and 342. *Kuolls versus Dobbins. S. P.*

Postea placito 7. S. C. 5. The Clerk, before his Examination, is not bound to shew his Testimonial or Letters of Orders. 1 *Leon.* 230. *Palmes versus Bishop of Peterborough.*
Cro. Eliz. 241. S. C.

6. In *Specot's Case*, the Bishop pleaded to a *Quare Impedit* brought against him; that upon the Examination of the Clerk he found him to be *Schismaticum inveteratum*, and for that Cause, by the Laws of the Church, to be *personam inhabilem & minime idoneam ad occupandum aliquod beneficium cum cura Animarum*, and thereupon he refused to admit him; adjudged, and afterwards affirmed in Error, that the Plea was not good, because *Schismaticus inveteratus* was too general an Appellation and altogether incertain; he ought to shew some special Crime or Cause of his Refusal, that the Party might take Issue upon it, or traverse it. 5 *Rep.* 58. *Specot's Case*.

Antea 5. S. C. 7. In a *Quare Impedit* the Bishop pleaded, that he demanded of the Plaintiff to see his Letters of Orders, and his Letters missive or testimonial, which he did not shew, but desired Leave to bring them, and that he gave him a Week for that Purpose, and he did not return within six Months, and so he collated by Lapse; adjudged, that these were no Causes for the Bishop to refuse the Admittance of the Clerk, for he is not bound to shew these Letters to the Bishop, he must try him upon Examination, and not otherwise. Cro. Eliz. 241. *Palmes versus Bishop of Peterborough*.

8. Adjudged, that whatever is a sufficient Cause to deprive a Clerk, the same is a good Cause for the Bishop not to admit him. *Pasch.* 7 *Jac. B. R. Austin's Case*.

Oyphans. See *London*.

Outlary.

In what Cases it will not lie. (A)	dons, not good. (E)
Of the <i>Capias Utlagatum</i> . (B)	Returns of Outlaries, good, and not
What is forfeited by an Outlary, what	good. (F)
not, both in Personal and Criminal	Reversals of Outlaries by Writs of Er-
Cases. (C)	ror, and of Error in the Proceedings
Pleas of Outlary, good. (D)	to an Outlary. (G)
Pleas of Outlary, not good, and Par-	

(A)

In what Cases it will not lie. See *Elegit*. (A) 1.

1. **A** Djudget, that Procefs of Outlary doth not lie in Detinue. *Dyer* 223. *Proctor's* Case.
 2. An Attorney brought an Action of Debt by Bill of Privilege, and after Judgment the Defendant was outlawed, who brought a Writ of Error to reverse it, and objected, that Procefs of Outlary did not lie upon such Judgment, because there is no *Capias* in the Original Action ; and so it was adjudged. 1 *Leon.* 229. *Crew* versus *Bailes*.

(B)

Of the *Capias Utlegatum*.

1. **U**Pon an Outlary after Judgment, an *Elegit* was awarded against the Defendant, and he moved the Court for a *Superfedeas*, because *erronice emanavit*, and the Reason was, for that the Party could have no other Execution than a *Ca. fa.* for he could not have a *Fi. fa.* because the King is entitled to his Goods ; and he could not have an *Elegit*, because the King is likewise entitled to the Profits of his Lands. *Goldf.* 180. *Hill.* 43 *Eliz.*
2. By the *Capias* the Sheriff is commanded to take the Body, & *bona & catalla, quacunq; in inquisitione invenires, in manus nostras capias, ut de vero valore, &c.* and by Virtue of this Writ the Sheriff takes the Goods and sells them, and afterwards the Outlary is reversed ; in such Case, the Party shall be restored to his Goods, because the Sheriff was not commanded by the Writ to sell them. 8 *Rep. Dr. Drurie's* Case, 141. and *Cro. Eliz. Amner* versus *Lodington*, S. P. and 2 *Leon.* 92. S. C.
3. Adjudget, that where a Person is taken by a *Capias Utlegatum* at the Suit of the King, he is in Execution for the Subject, but in the second Degree, and the King may discharge his own Suit, but a Protection will not discharge him ; and when the King's Suit is discharged, then he may be in Execution at the Suit of the Subject. *Hill.* 13 *Jac. Hob.* 115. *Sir Thomas Shirley's* Case.
4. Case against the Sheriff, in which the Plaintiff declared *tam pro Domino Rege, quam pro seipso*, and sets forth, that he had T. S. in Execution upon a *Capias Utlegatum*, at the Suit of his Testator, and that the Defendant suffered him to escape ; after a Verdict for the Plaintiff, it was objected, that this Action ought to be brought in the Name of the Party alone : *Sed per Curiam*, T. S. being taken upon a *Capias Utlegatum*, 'tis a Contempt to the King to suffer him to escape ; and therefore he may be joined in the Action, but the Party shall have all the Damages. 1 *Roll. Rep.* 78. *Barrett* versus *Winchcombe*.
5. The Defendant was outlawed in *Middlesex*, the Prosecutor may take out a *Capias Utlegatum* against him, in any other County, without a *Tefiatum*. 1 *Vent.* 33.
6. The Reason why a Man taken upon a *Capias Utlegatum* shall not be in Execution at the Suit of the Party, without bringing the Body into Court, and praying that it may be so, is, because the Outlary is at the Suit of the King, and when the Party is taken upon the *Capias Utlegatum*, he is then in Execution at the King's Suit, for a Contempt of his Laws ; and even in such Case, if he escape within a Year, the Party may have an Action of Debt against the Sheriff, because

cause within that Time he might have brought a *Ca. fa.* against the Prisoner, and have charged him in Execution, which is too late for him to do after the Year, for then he must bring a *Scire facias* to shew Cause *quare Executionem non haberet*; but this is contrary to the Resolution in *Garnon's Case*, and to a Case in *B. R. Mich. 28. Car. 2. (viz.)* Debt on an Escape, in which the Plaintiff declared, that he obtained a Judgment against *W. R.* in the 13th Year of *Car. 2.* that he was outlawed in the 15th Year, and taken upon a *Capias* in the 18th of *Car. 2.* and escaped; but did not set forth, that he was in Custody, and prayed to be so at his (the Plaintiff's) Suit, without which the Imprisonment upon the *Capias Utlegatum* did not make him in Execution at his (the Plaintiff's) Suit, as was alledged; for it may be, that he intended to have another Execution, and not against his Body; but the better Opinion was, that he shall be in Execution at the Suit of the Party, until he disclaim it. *Sid. 380. Buckland versus Kelland.*

7. A *Capias Utlegatum* was pleaded, and the Plaintiff did not alledge that it was sued forth in Term-Time, but it was adjudged, that this being a judicial Writ, and it being the usual Course

* See Record. (C) Manner of Cause for such Presumption. * 1 *Lutw. 329. See Record. (C) 3. Latch 11. Contra per Dodderidge.*

8. *W. R.* was in Custody upon a *Capias Utlegatum* after Judgment, and escaped; and in a Special Verdict in an *Action of Debt*, for an Escape, upon *Nil debet*, the Case was, That the Plaintiff had outlawed *W. R.* after Judgment upon a *Ca. fa.* sued out within the Year, and two Years after the Outlary he was taken upon the *Capias Utlegatum*, and the Sheriff suffered him to escape; it was admitted, that if he had been taken upon a *Capias Utlegatum*, sued out within the Year, he would have been in Execution of the Party in the Original Action, without a Prayer; and adjudged, that so he is now, because at the *Exigent* the Plaintiff was at an End of his Process, for no Continuance or *Sci. fa.* lies after a *Capias Utlegatum*. 1 *Salk. 319. Wolfe versus Davison.* 5 *Mod. 200. S. C.*

(C)

What is forfeited by an Outlary, what not, in Personal Cases, and in Criminal.

1. **B.** brought a *Quare Impedit* against the Ordinary and Incumbent; and upon a Demurrer to the Declaration, before the same was argued, the Plaintiff was outlawed at the Suit of another Person; then the Incumbent resigned, upon Supposition, that the *Presentation* was forfeited to the Queen, and she presented him again; afterwards the Plaintiff reversed the Outlary, and having got Judgment against the Incumbent upon the Demurrer, he now brought a *Sci. fa.* to have Execution, to which the Incumbent pleaded all this Special Matter; but adjudged, that by Reversal of the Outlary, the Plaintiff was entitled to his *Presentation*, and that it was not forfeited to the Queen. *Goldf. 103. Beverly versus Cornwall.*

2. Upon an Indictment for Recusancy, the Party intending to go beyond Sea, made a Deed of Gift of all his Goods and Chattels, upon some feigned Considerations, and then he went out of the Realm, and was afterwards outlawed upon the same Indictment; it was adjudged, that the Deed of Gift was void to defeat the Queen of the Forfeiture of the Goods; and this by the Statute 13 *Eliz. cap. 5.* and the Queen was entitled to his Leases and Goods by the Forfeiture. 3 *Rep. 82. Pannefoot versus Blunt*, vouched in *Twine's Case*.

3. Debts or Duties upon simple Contract are forfeited to the King by Outlary, tho' the Party might have waged his Law: for in every *Quo minus* brought in the Exchequer by a Debtor to the King, against the Defendant, who was indebted upon a simple Contract, he shall not wage his Law, *a fortiori* where such a Debt is forfeited by Outlary. 4 *Rep. 94. In Slade's Case.*

4. One took a Bond in the Name of another, and was afterwards outlawed; adjudged, that the King shall have the Bond. 24 *Eliz. Burkett's Case.* See *Felo de se. Hix versus Cooper.*

5. A Man was outlawed, and afterwards the Queen granted him a Lease for Years, rendring Rent; then he was outlawed again, and before Seizure there was a Pardon of all Goods and Chattels forfeited; adjudged, that a Man outlawed is capable of receiving a Lease, and by the Pardon the Term which is forfeited is revived. *Owen 106. Knowles versus Powell.* *Moor 237. S. C.*

6. Judgment in Debt by Husband and Wife, as Executrix to another; the Defendant pleaded, that the Husband was outlawed; adjudged, that he did not forfeit any of the Goods which his Wife had as Executrix. 3 *Bulst. 210. Harrison versus Hicks.*

7. Adjudged, that Arrears of Rent reserved upon an Estate for Life, are not forfeited by Outlary, because they are Real, and there is no Remedy for them, but by Distress; but 'tis otherwise upon a Lease for Years. *Heth. 164.*

8. The King shall not have the Profits of Lands upon an Outlary against *Custuy que Trust*, or *Custuy que Use*, because the Estate in the Land is only in the Trustee, and he for whom he is entrusted hath no Remedy to recover them but in a Court of Equity. *Styl. 21. The King versus Holland.* See *Forfeiture. (C) per totum.*

9. The Defendant was indicted for a Murder in *Essex*, and outlawed, &c. and the Outlary being certified into *B. R.* it appeared to be erroneous, because it was *exclus est ad Comitatum*, omitting the Word *meum*; whereupon the Attorney General moved the Court, that the King having seized the Lands, and that the Outlary might not be reversed, that therefore they would award a *Certiorari* to the Coroner to certify, whether it was *Ad Comitatum*, &c. and if so, then upon his Return, to amend it; and it was granted accordingly. *Palm. 480. Plumm's Case.*

10. The Lord *Lumley* was outlawed, and a Bill was exhibited against him in the Exchequer, to discover his Real and Personal Estate, and what secret Conveyance he had made thereof; to which he demurred, because *nemo tenetur prodere seipsum*; but the Demurrer was over-ruled; for the Outlary is in Nature of a Judgment for the King, and even a Common Person may have such a Bill of Discovery to enable him to take out Execution. *Hardres 22. The Protector versus Lord Lumley.*

11. A Person outlawed made a Lease for Years of his Lands, before the Inquisition found; and afterwards, amongst other Things, these Lands were found by the Jury upon an Inquisition taken, and this Lease was pleaded in Bar to bar the King, and adjudged good; for any Estate made after the Outlary, and before the Inquisition, if for a valuable Consideration, and not in Trust, shall discharge the King's Title. *Hardr. 101. Attorney General versus Freeman.*

12. The Plaintiff obtained Judgment in *B. R.* against *Whitfield* for 500 *l.* Debt, &c. and about three Years afterwards one *Hockin* obtained another Judgment against him for 1000 *l.* upon which he was outlawed; and a little afterwards the Manor of *Burwarth*, to the Value of 120 *l. per Ann.* was seized into the Protector's Hands, and about a Month after that, the Moiety of it was extended upon the first Judgment; but *Hockin* obtained a Lease of it out of the Exchequer, upon the Extent on the Outlary; and upon an *Englyb* Bill against him and the Judgment-Debtor, it was decreed, that the Manor was of greater Value than extended, yet *Hockin* should levy no more than according to the extended Value, for that the Protector had no farther Interest in the Lands extended but to that Value of which he was to have Profits, and no more; but that *Hockin* might have a *Melius Inquirendum*, if he would, and have them extended to a greater Value, and that after this Extent upon the Outlary, any other Extent was void as to the Protector. *Hardr. 106. Masters versus Hockin and Whitfield.*

13. One *Hammond* was outlawed at the Suit of *T. S.* and his Lands were taken in Extent; afterwards *G. D.* claiming a Title to them, brought his Ejectment, and pleaded likewise to the Inquisition; and upon a Bill in the Exchequer an Injunction was prayed for the King to stay Proceedings at Law, but it was denied; for though a Person outlawed cannot after an Extent prevent the King's Title by any Alienation whatsoever, yet such Outlary gives no Privilege to the Possession of a Disseisor, but that the Disseisee may enter and bring his Ejectment; for by the Outlary the King hath no Interest in the Land it self, but only a Title to receive the Profits. *Hardr. 176. Hammond's Case.*

14. The Case was, *Tho. Brocas* was outlawed in an Action of Debt after Judgment at the Suit of *Stoner*, and an Extent being taken out, it was found by Inquisition 1 Octob. 1654. that he was seized for Life of several Lands in *Hampshire*, and thereupon they were seized into the King's Hands, and demised to the said *Stoner* under the Exchequer-Seal; the Defendants, as Tenenants, pleaded, that before this Inquisition and Seizure, the said *Brocas* by *Fine sur concessit*, &c. had granted these Lands to one *Abdy* for 500 Years, if he the said *Brocas* should so long live; that *Abdy* died, and his Executors made a Lease thereof for 400 Years, &c. To this Plea the Attorney General demurred, for that the second Lease was made since the Inquisition and Seizure; but *adjudged, that any Person who hath a Title or Right precedent to the Outlary, except it be the Person outlawed, may grant it over, but he himself cannot by his own Act defeat the King's Interest. *Nota*, this is contrary to the Course of the Exchequer. *Hardr. 422. Attorney General versus Fox, & al.*

*Plow.
Com. 543,
B.

15. One *Northey* sued *Bateman* to an Outlary before Judgment, who having 500 *l.* in the *East-India* Company, and being so found by Inquisition, it was seized by the King, and granted by him to *Northey*, in Satisfaction of his Debt, which was by Bond, &c. but the Company refusing to transfer the Stock to him, a Bill in the Exchequer was brought against them, and they were decreed to transfer it to *Northey*, which was accordingly done, and his Name entered in their Books, and *Bateman's* Name struck out; afterwards he reversed the Outlary, and the King granted Restitution *de omnibus quibus nobis non est responsum*; then *Pinfold* having a Debt due to him from *Bateman* on Bond, sued him, and had Judgment, and outlawed him after Judgment, and then the King granted this 500 *l.* Stock to *Pinfold*, and the Company refusing to transfer it to him, he brought a Bill in Equity against them and *Northey*, upon which the Court decreed, that the Stock was well transferred by the first Grant to *Northey*, which Grant was well executed by the Transfer of the Stock by the Company, and so the King was answered as to it, and by Consequence *Bateman* was not restored by the Grant *de omnibus de quibus nobis non est responsum*. 2 Lev. 49. *Pinfold versus Northey.*

16. Case, &c. upon five Promises, one whereof was upon a *Quantum meruit* for Meat, Drink, &c. found for the Defendant at his Request; the Defendant pleaded in Bar an Outlary of the Plaintiff, setting forth, that *in exigendo posita fuit ad utlegat*, &c. & ea ratione, &c. debita juris forma waviata existit; and upon Demurrer to this Plea, it was insisted for the Plaintiff, that this Outlary could not be pleaded in Bar to an *Assumpsit* upon a *Quantum meruit*, because till the Things come to be valued, there is no Certainty of the Debt, and so it cannot be forfeited;

it was doubted before *Slade's Case*, whether a Debt upon simple Contract could be forfeited upon an Outlary ; but adjudged, that this was a good Plea, for the Consideration created a Debt, tho' it was not reduced to a certain Sum ; a Plea of Outlary hath been held good in Bar to an Action of Trover, where all lies in Damages, and that is *Markham and Pitt's Case*. 3 *Leon.* 205. But the Court doubted, whether *debita juris forma variata existit* was not too general. 2 *Vent.* 282. *Webb versus Moor*. See 3 *Leon.* 196. *S. P.*

17. In a Special Verdict in Ejectment, the Case was, that *T. P.* was outlawed in a Personal Action, and levied a Fine, and the King seized the Lands in the Hands of the Conusee ; and adjudged, that such Seizure was good, if it was before the Fine levied ; but if after, then the Conusee shall hold against the King. *Raym.* 17. *Winfors versus Saywell*. See 1 *Leon.* 63. *Cro. Eliz.* 270. *Ognell's Case*. *S. P.*

18. Error to reverse an Outlary for Murder ; the Error assigned was, That in the *quinto exact'* it did not appear upon the Return of the Exigent, that the Court was held *pro Com'*, &c. besides this Outlary was against the Defendant and two more, and in the last *Exactus* 'tis *non comperuit*, but did not say, *nec eorum aliquis comperuit* ; and for these Reasons it was reversed. 3 *Mod.* 89. *Anonymous*.

19. Error to reverse an Outlary in High Treason ; the Error assigned was, that it did not appear where the *Hustings* were held ; for 'tis at a Court of *Hustings*, without saying *pro Civitate London* ; it was objected, that there ought to be a *Scire facias* to the Lords mediate and immediate, before the Outlary is reversed : *Sed per Holt Ch. Just.* 'tis not necessary in Treason, because the Forfeiture is not to them, but to the King ; the Outlary was reversed. 4 *Mod.* 366. *Sir Tho. Armstrong's Case*.

20. Upon an *English* Bill in the Exchequer, the Barons prayed the Opinion of the Judges of *C. B.* the Case was, *T. S.* was a Bankrupt, and some Time afterwards was outlawed ; the King made a Lease of the Profits of his Lands, and granted his Goods ; afterwards a Commission of Bankruptcy was taken out against him, but it was five Years after he had committed the Act of Bankruptcy ; adjudged, that by the Outlary he forfeits his Goods and Chattels, his Leases for Years, and his Trust in such Leases, and the Profits of his Freehold Lands ; but that this Outlary cannot defeat any Interest which his Creditors had acquired in his Estate, because he voluntarily suffered himself to be outlawed. 1 *Salk.* 108. *Paine versus Trap*. See *Sid.* 115. *S. P.*

In Criminal Cases.

21. The Defendant was outlawed upon five Indictments for Felony, and being brought to the Bar to receive Judgment, he produced five Writs of Error ; adjudged, that if he hath no Lands, and it is suggested on the Roll, that he hath none, in such Case the Attorney General may confess Error without a *Scire facias* to the Lords mediate and immediate, to shew Cause why he should not have Restitution ; but if there are Lands, then there must be such a *Scire facias*. 2 *Salk.* 495. *Arthur's Case*.

22. The Defendant was outlawed for a Misdemeanor, upon an Information, for seducing a young Man to marry a young Woman of a lewd Character, and he was fined 5000 *l.* and it was afterwards moved for him, that he could not be fined upon an Outlary for a Misdemeanor, because it doth not enure as a Conviction for the Offence, as it doth in Felony or Treason ; but 'tis only a Conviction for a Contempt in not pleading to the Information, which is punishable by a Forfeiture of his Goods and Chattels ; and it was adjudged accordingly. 2 *Salk.* 494. *The King versus Tippin*.

23. *T. P.* was indebted to *W. R.* by Judgment, and to *C. B.* upon Bond, and was outlawed at the Suit of the said *C. B.* upon the Bond, and his Lands seized ; and the Question was, whether *W. R.* the Judgment-Creditor, could extend those Lands ; adjudged, that the Outlary shall be preferred, unless the Judgment-Creditor could shew any Practice between the Obligor and the Obligee. 2 *Salk.* 495.

24. Adjudged, that upon an Outlary on a Judgment in Debt, the Person immediately forfeits his Goods and Chattels to the King, but not the Profits of his Lands or his Chattels Real, till Inquisition taken ; therefore an Alienation after an Outlary, and before an Inquisition, is a good Bar to the King, as to the Perception of the Profits. 1 *Salk.* 395. In the Case of *Britton and Cole*.

3 *Cro.*
431.
Lanc 79.
Hardr.
101.
Raym.
17.

(D)

Pleas of Outlary, good.

1. **D**EBT on Bond, the Defendant pleaded an Outlary in Bar, and shewed that the Plaintiff was outlawed by the Name of *B. B.* of *D.* the Plaintiff replied, that at the Time the Suit was commenced against him, upon which this Outlary was had, he was living at *B. &c.* and traversed, that he was living at *D.* adjudged a good Replication to avoid the Outlary. *Mich.* 29 *Eliz.* 1 *Leon.* 87.

2. 'Tis true, if it had been *Debt on a Bond*, there the Pleading of an Outlary in Abatement had been ill; it should have been pleaded in Bar, because a Debt on a Specialty is forfeited to the King by the Outlary; but in Trespass or in Debt upon a Contract, the Outlary is only dilatory and in Abatement of the Writ. *Owen* 22. *Smith versus Bernard*. *Cro. Eliz.* 203. *S. C.* See *Webb versus Moor contra*, that an Outlary is a good Bar, as well to an *Assumpsit* upon a *Quantum meruit* as to a Debt on a Bond.

3. In Trover, &c. the Defendant pleaded in Outlary in Bar to the Action, and held good, tho' the Plaintiff in such Action could only recover Damages, which are uncertain; yet because that Action is founded on the Property of the Goods, and these being forfeited to the Queen by the Outlary, therefore the Plea is good. 3 *Leon.* 205.

4. *Audita querela* to avoid a Statute, the Defendant pleaded an Outlary in Bar, (*viz.*) that he himself was outlawed at the Suit of *T. M.* by the Name of *Peter Griffith*, &c. and upon Demurrer it was objected, that his Name was *Piers* and not *Peter*, and that this Outlary being only by Way of Discharge, is not pleadable; but adjudged, that *Peter* and *Piers* was but one Name, and that this Outlary is pleadable; but where the Action is *ad lucrandum*, there must be Ability in the Person. 2 *Cro.* 425. *Griffith versus Middleton*. See *postea* pl. 10.

5. In Debt, &c. the Defendant pleaded, that the Plaintiff was outlawed, and this was in Abatement; the Plaintiff replied *Nul tiel Record*, upon which they were at Issue; and before the Day given to bring in the Record, the Plaintiff got the Outlary to be reversed, so that the Defendant failed of the Record at the Day; and the Question was, whether this Failure was peremptory, and adjudged that it was not, but that he should answer over. 2 *Roll. Rep.* 38. *Stubbs versus Denham*.

6. *Debt upon a Contract*; the Defendant, after an Imparlance, pleaded an Outlary in Bar; the Plaintiff replied *Nul tiel Record*, and Day being given to bring it in, he failed to produce it; the Judgment against him was absolutely, and not to answer over. *Cro. Car.* 408. *Dawson versus Lie*.

7. The Plaintiff brought an Action of Debt; the Defendant pleaded, that he (the Plaintiff) was outlawed at the Suit of *B.* in *London*: The Plaintiff replied, that there was another of the same Name in the same Parish, who was outlawed at the Suit of *B.* and traversed that he was outlawed at his Suit; and upon a Demurrer to this Replication, it was objected that it was ill, because he did not traverse that he was *eadem persona*; but adjudged, that where a Man is outlawed upon mesne Process, and never appears, there the Traverse ought to be *quod est eadem persona*; but if once he appears, and is outlawed after Judgment, there the Court had taken Notice of him, and 'tis sufficient to say, that he was not outlawed. *Palm.* 183. *Downes versus Patis*.

8. In Assault and Battery the Plaintiff recovered in *C. B.* and upon a Writ of Error in *B. R.* the Judgment was affirmed, and thereupon the Plaintiff brought a *Scire facias* against the Defendant, to shew Cause *Quare executionem non haberet*, to which the Defendant, after an Imparlance, pleaded an Outlary before the Judgment had, and this was in Bar to the Execution; and adjudged a good Plea; for tho' before the Judgment nothing is forfeited, nor until the Judgment is given, yet a certain Sum being now recovered in that Action, that is forfeited by the Outlary had against the Plaintiff; and therefore 'tis a good Plea to the Execution on that Judgment. *W. Jones* 238. *Wortley versus Spill*.

9. *Audita querela*, in which the Plaintiff declared, that he and one *P.* were bound in a Bond to the Testator, in a Bond for Payment of Money; that in an Action brought against him he was outlawed; that afterwards another Action was brought again *P.* upon the same Bond, and that Judgment was had against him, and that he was taken in Execution and paid the Debt, and was discharged by the Consent of him at whose Suit he was taken, and so prays that he may be relieved against this Judgment and Outlary: The Defendant *Protestando*, that the Debt was not paid or satisfied, pleads the Outlary in Disability; and upon Demurrer it was objected in Behalf of the Plaintiff, that this Plea was ill; that this is like the Case of a Writ of Error or Attaint, in which Outlary is not pleadable: But adjudged, that in these Cases the Judgment it self is to be reversed, and therefore the Outlary is not pleadable; for if the Judgment is erroneous, the Outlary, which is only a Superstructure on it, falls on Course; but an *Audita querela* doth not meddle with the Judgment, for it admits it to be good, but prays that no Execution may be taken, because of some equitable Matter arising afterwards, for which Reason an Outlary may be pleaded to such Action. 1 *Mod.* 224. *Higden versus Whitchurch*.

10. *W. R.* was outlawed in Debt, and taken upon the *Capias* and committed to the Fleet; afterwards the Warden of the Fleet permitted him voluntarily to escape, and the Executor of the Judgment-Creditor retook him in Execution, whereupon he brought an *Audita querela* to be discharged, and the Defendant pleaded the Outlary in Bar to this *Audita querela*; and upon a Demurrer to the Plea it was held a good Plea in Disability to the Person, because the *Audita querela* was not like a Writ of Error to reverse the Outlary, but was founded on a Wrong, (*viz.*) on the Escape; but if it had been a *Writ of Error*, there an Outlary is no good Plea in Disability *Sid.* 43. *Jason versus Kete*. See *Antea*, pl. 4. *S. P.*

11. In *Assumpsit* upon a Bill of Exchange, &c. the Defendant pleaded an Outlary in Bar; and upon a Demurrer to this Plea it was objected, that it ought to be pleaded in Abatement, because in this Action Damages are to be recovered, which are uncertain, and therefore not forfeitable by Outlary: but adjudged, that 'tis pleadable in Bar, for the Debt is certain, tho' 'tis to be recovered in Damages. 3 *Lev.* 29. *Huge versus Skinner*.

12. *Indebitatus Assumpsit* and *Quantum meruit*, for Meat, Drink, &c. The Defendant pleaded an Outlary *in Bar*, and held good, and yet in this Action Damages are only recovered, which are incertain; but 'tis the Consideration which creates the Debt or Duty, tho' the Recompence is to be had by Way of Damages. 2 Vent. 282.

13. In *Dower*, &c. the Tenant pleaded in Abatement, that in such a Term he sued the Demandant *per nomen de Jana Draycote tunc nuper de Lascoe*, and she not appearing, she was *warwed*, &c. *unde petit judicium*, &c. The Demandant replied, that *die impetrationis brevis Originalis*, upon which the Outlary was had, she lived at *Stanley in Oxfordshire*, and traversed that she lived then at *Lascoe*; and upon a Demurrer to this Replication it was insisted for the Tenant, that tho' the Outlary might for this Reason be erroneous, yet it was not void, nor so much as voidable, but by Writ of Error or by the Plea of the Party, she appearing in Custody upon the *Capias Utlegatum*; for it being a Judgment on Record, and in Force, it must be reversed in a proper Manner, which is by one of these Ways before-mentioned, but never by a Plea in a collateral Action as this is; then it was objected against this Plea, that the Outlary should be pleaded *sub pede sigilli*, which is very true, if it had been in another Court; but the Action being brought in the Court of Common Pleas, and the Outlary being likewise in that Court, it need not be pleaded *sub pede sigilli*; so the Tenant had Judgment *quod breve cassetur*. 1 Lutw. 39. *Draicott versus Curzon*.

14. Case against a Sheriff, wherein the Plaintiff declared, that *Sir Tho. Nightingale* was indebted to him in 100*l.* on Bond, &c. which being not paid, &c. the Plaintiff *implacitasset* the said *Sir Tho. Nightingale*, upon the said Bond, who for Want of an Appearance was outlawed; and upon a *Capias Utlegatum* was arrested, and being in Custody, escaped; it was objected against this Declaration, that the Plaintiff ought to have set forth the Original, upon which he proceeded to the Outlary, and not to have said *implacitasset* only. 1 Lutw. 108. *Stanton versus James*. 2 Vent. 281. S. P.

15. Covenant upon a Lease for Years, in which there was a Covenant to pay a certain Rent, and also to repair, and the Breach was assigned on both: The Defendant pleaded an Outlary *in Bar to the Whole*, and this *sub pede sigilli* of the same Court in which the Action was brought; and upon a Demurrer it was objected, that tho' an Outlary might be pleaded to the Rent, because that was certain, yet it could not be pleaded to the Repairs, because these are incertain, and so are the Damages which are to be recovered for not Repairing, and therefore cannot be forfeited by an Outlary; but adjudged, that the Plea being entire, and to the whole Declaration; and being bad in Part, (*viz.*) as to the Repairs, it shall be bad in the Whole; 'tis true, before Imparance it might have been pleaded in Bar to the Rent, and in Abatement to the Repairs, but not in Bar to both, for the Reason before-mentioned. 2 Lutw. 1510. *Clerke versus Sroggs*.

16. The Declaration was in *Trinity-Term*; the Defendant imparled to *Michaelmas-Term*, and in the long Vacation the Plaintiff was outlawed; and then in *Michaelmas-Term* the Defendant pleaded this Outlary in Bar to the Action, but did not say, that it was *after the last Continuance*, for which Reason the Plaintiff demurred; but the Plea was adjudged good; for since the Record of the Outlary doth appear, 'tis reasonable it should be pleaded. 5 Mod. 11. *Green versus Moor*.

17. Information *qui tam*, &c. against a Justice of Peace for refusing to grant his Warrant to suppress a Conventicle; the Defendant pleaded an Outlary in Disability; and upon a Demurrer it was insisted, that the Plea was not good, because the King is interested, *qui tam pro Domino Rege*, &c. *Sed per Curiam*, tho' the King is interested, yet the Informer is only Plaintiff and entitled to the Benefit, and that he was disabled by the Outlary to sue for himself, tho' not for the King. 2 Mod. 267. *Atkyns versus Bayles*.

18. Where an Outlary is pleaded, it must be *sub pede sigilli*, otherwise the Plaintiff may refuse it; but if he accept the Plea, he shall not afterwards demur for that Cause. 1 Salk. 217. In *Ferrers* and *Miller's Case*.

(E)

Pleas of Outlary, not good; and Pardons, not good.

1. A *Capias Utlegatum* was directed to the Sheriff to take *F. B.* of *London* Gen. at the Day of the Return he came in *gratis*, and pleaded in Discharge of the Outlary, that he was dwelling at *B.* in the County of *S.* at the Time of the Writ brought, and not in *London*; adjudged no good Plea, because he is out of Court and came in *gratis*, so that the Court could not tell whether he was the Defendant, or not; it might have been otherwise, if the Sheriff had returned a *Cepi Corpus*. *Dyer* 192. *Brown's Case*.

* 4 Leon. 22. *Taylor's Case*. 2. Where a Man is outlawed in *London*, the Judgment is not to be given by the Coroner, who is the Lord Mayor, but the Sheriffs by the Custom of *London*; and if the * *Exigent* is not returned, the Outlary cannot be pleaded in Disability of the Person; and in such Case the *Certiorari* shall be awarded to the Sheriffs. *Mich.* 15 *Eliz.* *Dyer* 317.

3. Where a Man is outlawed for a Fine to the King in *Trespas*, he shall not have any Benefit of a Pardon of the Outlary till the Chancellor is certified that the Plaintiff is satisfied. See 5 *Ed.* 3. *cap.* 12. *Mich.* 1 & 2 *Eliz.* *Dyer* 172.

4. Debt by Husband and Wife as Executrix, &c. the Defendant pleaded in Bar, that her Testator was outlawed at the Suit of *B. B.* which Outlary is still in Force; adjudged an ill Plea. *Goldf. 148. Dixon versus Bowden.*

5. In Replevin, there was Judgment by Default, and a Writ of Enquiry of Damages; upon the Return of which Writ the Defendant pleaded, that the Plaintiff was outlawed at the Time of the Action brought; adjudged no good Plea, because it was after Judgment in the Action. *Bendl. 17. Puttenham versus Norris.*

6. In an Action popular, &c. the Defendant pleaded, that the Plaintiff was outlawed, and demanded Judgment *si respondere debet*; the Plaintiff replied, that upon a Writ of Error brought, the Outlary was reversed, and Judgment that the Defendant should answer over; but if in Debt upon a Bond the Defendant had pleaded an Outlawry, and the Plaintiff had replied a Pardon, in such Case the Writ shall abate; but if a Pardon should be pleaded to an Outlawry in a popular Action, it may be a Question whether the Writ shall abate, because in such Actions a Moiety is given to him who will sue; and when once the Suit is begun, an Interest is vested in the Informer; and in such Case 'tis like a Debt on a Bond. 1 *And. 30. Palmer's Case.*

7. Judgment in Ejectment against two Defendants; they brought a Writ of Error; and the Defendant, who was Plaintiff in the Action, pleads an Outlary against one of them; and upon Demurrer it was adjudged, that because by the Writ of Error they were to recover nothing, but only to be restored to what they had lost, and to be discharged of the Damages, therefore it was no good Plea. 2 *Cro. 616. Bythell versus Harris.*

8. Debt upon Bond against an Administrator, who pleaded in Bar, that his Intestate was outlawed after Judgment, and died, and that the Outlary was still in Force; upon Demurrer this was adjudged no good Plea, because 'tis only argumentative that he hath no Assets from the Intestate, because he forfeited all by the Outlary, whereas he might have several Things not forfeitable; as for Instance, there may be Debts due to him upon Contract, and these are not forfeited; or he may have made an Appointment, that his Administrator shall sell such Lands which may be sold, and the Money is Assets in his Hands, or he may have Lands in Mortgage; and on the Day appointed the Mortgagor may pay the Money to the Administrator; this is Assets, and not forfeited. *Hutt. 53. Bullen versus Jervis. Cro. Eliz. 575. Woodley versus Bradwell. S. P. See Antea Shaw versus Curtis. Execution. (K)*

9. *Scire facias* upon a Judgment in Debt; the Defendant pleaded, that the Plaintiff was outlawed; adjudged, that if the Plaintiff was outlawed before the Plea to the Action, then this Plea to the *Scire facias* is not good, because he might have pleaded it in Bar to the original Action. *Noy 143.*

10. The Husband and Wife exhibited a Bill in the Exchequer, partly in their own Right, and alledged themselves to be Debtors and Accountants to the King, and partly as Administrators to the Mother of the Wife, but did not alledge her to be Debtor and Accountant: The Defendant pleaded an Outlary of the Husband in Bar; and upon Demurrer it was insisted, that the Outlary was pardoned by the general Pardon, which was very true; but yett he Plaintiff ought to have replied to shew, that he was not a Person excepted: But the Plea of Outlary was adjudged ill, (*viz.*) to alledge Outlary in the Husband, when he and his Wife sued as Administrators. *Hardr. 60. Swan & Ux' versus Porter.*

(F)

Of Returns of Outlaries, good, and not good.

1. THE Sheriff who was out of his Office returned a Proclamation upon an Exigent; adjudged, that the Outlary was void by the Statute 6 *H. 8. Dyer 42.*

2. In Returns of Outlaries the Sheriff should put his Name; but 'tis not requisite in Pleading to express his Name, for if 'tis omitted, it doth not make the Return void, but the Sheriff shall be amerced. 1 *Leon. 139. 4 Leon. 108. The Queen versus Archbishop of Canterbury. Postea (G) pl. 21. S. P.*

3. A Man was outlawed, and the Sheriff returned, that on such a Day, *omnes & singulas Proclamationes fieri feci*, when he ought to have returned, that on such a Day he made the First, and such a Day the Second, and so on to the fifth Proclamation; and this being assigned for Error, it was so adjudged. *Goldf. 97. 111. S. P.*

4. Upon an Outlary in the *Hustings* in London, which were held two Weeks after one another, whereas the *Hustings* are usually holden from three Weeks to three Weeks, the Sheriff doubted whether he might return the Party outlawed, without Danger of an Action on the Case; adjudged, that he might; and *Dyer* the Chief Justice said, that there is a Record in the Reign of *R. 2.* by which it appears, that in London they may hold their *Hustings* every Week. 2 *Leon. 14.*

5. No Man is legally outlawed, unless he is returned so by the Sheriff, and that the Exigent be returned of Record in Court. *Bendl. 27. Proffor versus Lambert.*

(G)

Of Reversals of Outlaries by Writs of Error, and of Error in the Proceedings to an Outlary. *Addition. (A)*

1. **U**PON an Indictment for Murder, before the Return of the Exigent the Party died, so that he was neither convicted or attainted; adjudged, that his Executors may bring a Writ of Error to reverse the Outlary, because the King being entitled by Matter of Record, the Outlary must be avoided by Matter of as high a Nature. 5 *Rep. Eaton's Case* vouched in *Foxley's Case* 109.

2. A Man was outlawed after Judgment, which Judgment was afterwards reversed upon a Writ of Error; adjudged, that the principal Record being reversed for Error, the Outlary which is grounded upon it shall also be reversed. *Goldf. 148. Warren's Case.*

3. Judgment in Debt for 80*l.* and the Sheriff levied 20*l.* Part thereof by *Fi. fa.* on the Goods of the Defendant, which appeared by his Return of that Writ; but it did not appear whether the Plaintiff had received it, or no; afterwards the Plaintiff sued forth a *Ca. fa.* for the whole 80*l.* upon which the Defendant was outlawed; but it was reversed by a Writ of Error, because it appeared on the Record, that the Execution was already made for 20*l.* Part of the Debt, so that the *Ca. fa.* should have been for the 60*l.* and no more. *Goldf. 148.*

4. The Defendant was outlawed in Trespass, and he moved the Court to avoid the Outlary, for that the original Writ, and the Proceedings thereon, were directed to the Sheriffs of *Worcester*, and in the Margin of the Filazer's Roll it was written *Hereford*, and in the Body of the Roll it was entered, *Idco præceptum est Vic'*; Day was given to maintain the Outlary; but the Defendant prayed, that a *Recordatur* might be made in what State the Roll then was. 2 *Leon. 120. Grove versus Sparr.*

5. Error to reverse an Outlary against Husband and Wife; adjudged, they must assign the Errors in Person; and because the Wife was gone, and the Husband could not bring her in, adjudged, that they could not assign Error. *Cro. Eliz. 611. Wade versus Smith.*

6. Judgment in Debt against two Defendants, and a *Ca. fa.* was sued forth against one of them, upon which he was outlawed, and afterwards brought a Writ of Error to reverse the Outlary; and assigned for Error, that it ought to have been awarded against both; and so it was adjudged. *Cro. Eliz. 648. Beverly versus Beverly.*

7. Lessee for Years was outlawed for a Felony; he assigned his Term to *B. B.* the Outlary was reversed, and the Assignee brought Trespass for the Profits taken between the Reversal of the Outlary and the Assignment; adjudged good, because the Outlary being reversed, it was as if there had been none. *Cro. Eliz. 270. Ognell's Case.*

8. In a Special Verdict in Ejectment, the Case was, Lessee for Years was indicted and outlawed for Recusancy; and it was found by Inquisition, that he was possessed of this Term for Years at the Time of the Outlary, and thereupon the Treasurer and Barons of the Exchequer sold the Lease for a valuable Consideration; then the Outlary was reversed, and Judgment given, that he should be restored to all which he had lost by Reason of the Outlary; the Question was, whether the Lessee might enter again on the Land; and it was insisted, that he could not, because the Term was lawfully sold and the Possession was now in another, which shall not be defeated by this subsequent Matter: *Sed per Curiam*, the Lessee shall have his Term again, for otherwise the Judgment upon the Reversal would be in vain, for by that he is to be restored to all which he lost, &c. which cannot be against the Queen, unless he have his Lease again. 1 *And. 277. Eyres versus Woodfyn.*

Cro. Eliz. 275. S. C. 9. The Testator was outlawed in Felony, and afterwards his Executor brought a Writ of Error to reverse it; and the famous *Coke*, as *Mr. Gouldsbrough* calls him, being of Counsel against the Executor, insisted, that a Person attainted of Felony (as the Testator was in this Case) could not make an Executor; but admitting he could, yet such Executor shall have a Writ of Error upon a Judgment only in a personal Action, but an Attainder is of an higher Nature, and affects the real Estate; but adjudged, that an Executor may have a Writ of Error to reverse an Attainder by Outlary, because his Testator might not be lawfully outlawed; and if so, this Writ may be brought to remove the Disability which he is under by such a wrongful Outlary; and 'tis probable he may have Goods and no Lands; and in such Case, if this Writ would not lie, the Executor must lose all the Goods; therefore *Mr. Leonard* reports, that for these Reasons it was adjudged, that the Writ would lie; and my Lord *Coke* himself cites it in **Foxley's Case* as so adjudged. 5 *Rep. 230. 1 Leon. 325. March's Case.*

10. Error to reverse an Outlary for Murder, the Error assigned was, for that *tempore promulgationis utlegariae*, and both before and after that Time the Defendant was beyond Sea, viz. at the *Illigue* in *Holland*, and this was confessed by the Attorney General; but it was objected, that the Error was not well assigned, because it ought to have been, that at the Time of the Exigent awarded he was beyond Sea; adjudged, that if a Man commits a Murder, and after the Exigent awarded against him he flieth out of the Realm, and then is outlawed, he shall reverse it for that Cause, because he fled on Purpose to avoid the Law, and therefore by his Absence he shall not

have

have the Benefit of the Law; but here, because the Attorney General had confessed, that he was beyond Sea both before and after he was outlawed; for that Cause the Outlary shall be reversed.

2 Cro. 464. *Carter's Case*.

11. Error, &c. to reverse an Outlary, for that the *Capias* was awarded against three Men and two Women, and so to the Exigent, and the Return was, *quod ad quantum Comitatum non comparuerunt*, but did not say, * *nec eorum aliquis comparuit*; also the Exigent was returned *utlegati sunt*, whereas for Women it ought to have been *waviata sunt*; and for these Reasons it was reversed. The King v. Miller. * 2 Roll. Rep. 470.

2 Cro. 358. *Middleton's Case*.

12. But it was doubted, where the Return was, that the Husband and Wife *utlegati fuerunt*, whether the Outlary might be set aside upon a Motion, or whether they ought to bring a Writ of Error, as in the former Case; but adjudged, that it might be avoided by such an Exception, on a Motion to the Court in the same Term in which they were outlawed, but not afterwards, without a Writ of Error. 2 Bullst. 213. Trin. 14 Jac.

13. Upon a Writ of Error to reverse an Outlary in a *Quo Warranto*, the Error assigned was, for that it appeared he was outlawed *per judicium Coronatorum*, and did not shew the Name of any of the Coroners; and for this Cause the Outlary was reversed. 2 Cro. 528. *Patrick's Case*. See Dyer 317. S. P. See pl. 24.

14. Error, &c. to reverse an Outlary in Debt, &c. the Errors assigned were, for that in the Palm. Original, and all the Proceedings, the Defendant was named *B. B. of B.* in the County of York, 121. S. C. and in the Exigent she is named *nuper de B.* &c. then 'tis mentioned in the Writ, that the Plaintiff recovered *versus eum*, when it ought to be *versus eam*; and for these Reasons it was reversed. 2 Cro. 576. *Gargrave versus Merchant*.

15. Error, &c. to reverse an Outlary, for that the Exigent was returned on the same Day it Palm. bears Date, when the Party had all that Day to come in; and for that Cause it was reversed. 278. S. C. 2 Cro. 660. *Archer versus Dalbie*.

16. One *Earl* was outlawed, but it was reversed, for that the Names of the Coroners were not put to the Judgment of Outlary, as they ought in all Counties, except in London. 1 Roll. Rep. 266. *Earle's Case*.

17. The Defendant was indicted by the Name of *William John George*, and in the Exigent he was named *William George*, leaving out *John*; and upon a Writ of Error, to reverse this Outlary, it was adjudged erroneous; and for that Cause it was reversed. 1 Roll. Rep. 313. *The King versus George*.

18. Husband and Wife were outlawed; it was objected, that the Wife ought to be waived, and that the Husband and Wife *exactus fuit*, when it should be *exacti*; this was held to be erroneous, but it cannot be reversed of another Term, without a Writ of Error. 1 Roll. Rep. 407. *Huiman's Case*.

19. *Alder* was outlawed for Murder, and it was moved for Error, that the Sheriff returned, *ad Com' meum Ten'um apud D. in the County of Northumberland*, when it should be *in Comitatu meo Northumbriae Ten'um*, for a Man may be Sheriff of two Counties; this was adjudged Error. 2 Roll. Rep. 52. *Robert Alder's Case*.

20. In Outlary, the Judgment was *Ideo per judicium T. S. Coronatoris utlegatus est*, and did not say, *Coronatoris Comitatus pradiet'*; and for that Reason the Outlary was reversed. 2 Roll. Rep. 82.

21. Proclamations issued according to the Statute, and the Sheriff returned, *Ad Com' meum ten't, &c. proclamari feci*, but had not set his Name to this Return; now, tho' it appeared to be done by the Sheriff, yet, because of this Omission, it was held erroneous. Moor 65. *Antea* (F) pl. 2. S. P.

22. Upon an Outlary in Debt, the Defendant in the Original Writ was named *W. R. de C. in Com' Denbigh*; he came into Court by *Cepi Corpus*, and objected against the Outlary, for that the Addition was wrong, he being named *W. R. de C.* when he lived at *D.* at the Time of the issuing the Writ; the Court held, that he should say, that he did not live at *C.* at the Day of the Writ issued forth, nor at any Time afterwards. Moor 70.

23. Before the Return of the Exigent, &c. the Defendant brought a *Superfedeas*, but did not deliver it to the Sheriff before the *quinto exactus*; yet if the Party is returned outlawed, it shall be reversed for that Reason. Moor 72.

24. Upon a Motion to reverse an Outlary, for that it appeared to be *per judicium A. B. & C. Armigeros*, omitting *Coronatores, & Comitatus pradiet'*; it was agreed by the Court, that it was erroneous, and that the Judgment was void; but they would not reverse it, without a Writ of Error. Palm. 43. See pl. 12. Palm. 121. *Markham versus Gargrave*, S. P. 2 Cro. 576. S. C. (C) pl. 13. S. C.

25. Sir *William Read* was outlawed upon an Indictment for not repairing a Bridge, and being very old, and living in *Devonshire*; it was moved, that he might have a Writ of Error to reverse it by Attorney, and not appear in Person, to which the Court inclined; but now, per Statute 5 Willi. cap. 18. he need not appear in Person. Palm. 194. *Sir Wm. Read's Case*.

26. It was reversed, because the Proclamations were, *Ad Comitatum meum ten' in Com.* instead of *pro Com'*; for antiently one Sheriff had several Counties. 1 Vent. 108.

27. An Outlary in Trespass was reversed, for that it was *Ulegat'* instead of *Uligat'*. 1 Lev. 164. *The King versus Wormes*.

28. By the Statute of Recusancy an *Outlary* of a *Recusant* is not to be reversed for want of Form; but yet 1 *Hilli.* 3. &c. it was adjudged, that it should, and this was in the Case of the Wife of *Srjeant Trindar*; but an *Indictment* or *Information* for Recusancy shall not be quashed for Form, unless the Defendant traverses the Fact, and gives Bail. 5 *Mod.* 141. *The King versus Hill.*

29. The Defendant was actually in Execution in the *Fleet* at the Suit of the Plaintiff in another Action, and yet he outlawed him, tho' he knew he was in the *Fleet*; and upon *Affidavit* of this Matter he was ordered to reverse the Outlary at his (the Plaintiff's) own Charge. 2 *Salk.* 495. *Adlam versus Colbatch.* 2 *Vent.* 46. *S. P.*

30. The like Motion was made upon *Affidavit*, that the Defendant lived publicly; but it was not granted, because the Charge is small in *C. B.* to reverse an Outlary, (*viz.*) but 16 s. 8 d. but in *B. R.* 'tis very chargeable. 2 *Salk.* 495. *Lee versus Millard.*

31. *T. P.* was outlawed in two Actions of 10 s. and 40 l. and upon Reversal of the Outlary; the Court took Special Bail for the first, and an Appearance for the other; the Person outlawed may now reverse it by Attorney, *per Stat.* 4 & 5 *Hill. & Mar.* except for Treason or Felony, and then he must appear in Person. 2 *Salk.* 496. See *Stat.* 31 *Eliz. cap.* 3.

32. Two were outlawed, one of them moved, that upon filing Common Bail he might have Leave to reverse the Outlary; adjudged, that the Writ of Error to reverse it must be brought in the Name of both the Defendants; for where one appears, the other must be summoned and se-
vered, and then it may be reversed as to him who appears, but then he must give Bail to appear and answer the Action; if he comes in *gratis* upon the Return of the *Exigent*, or before, he may be admitted by Motion to reverse it, without putting in Bail; but if he comes in by *Capi Corpus*, then he must appear in Person, as at Common Law, before he shall be admitted to reverse it, or he must give Bail to the Sheriff, to appear upon the Return of the *Capi Corpus*. 2 *Salk.* 496. *Symmons versus Bingoe and Cook.*

33. By the Statute 4 & 5 *W. cap.* 18. any Person outlawed in *B. R.* shall not be compelled to appear in Person to reverse the same, but may appear by Attorney, and reverse it, without Bail, except where Special Bail shall be ordered by Court; and if taken by the *Capias*, the Sheriff may discharge him by taking an Appearance under the Hand of an Attorney, to appear and reverse the Outlary; and where Special Bail is required, the Sheriff may take the Defendant's Bond, with one or more Sureties, in double the Sum, for which Special Bail is required to appear.

Oyer.

(A)

1. **D** E B T upon Bond dated 27 Aprilis 2 Annæ; the Defendant craved Oyer of the Original, which was, *Teste* 16 Aprilis 2 Annæ, and then pleaded, that the Writ was sued forth before the Date of the Bond; the Plaintiff replied, and set forth another Writ *in hæc verba*, on which he had declared; the Defendant rejoined, and prayed Judgment, whether the Plaintiff should be admitted to alledge another Writ than what was read to him upon the Craving Oyer; and upon Demurrer to this Rejoinder, there were three Judges of Opinion, that the Replication was good, because the Original being filed, it was the Act of the Court to have it read upon the Defendant's Craving Oyer, and therefore what is done by the Court shall not hinder the Plaintiff from shewing the true Writ; that the Craving Oyer of an Original is not like the Craving Oyer of a Deed, because the Deed is always produced by the Plaintiff; 'tis the Act of the Party, and therefore he shall never be admitted to say, that 'tis not his Deed; but the Filing a Writ, and having it read upon Oyer demanded, is the Act of the Court; but it may not be the same on which the Declaration is grounded, because there is often a Variance between the one and the other. 2 *Lutw.* 1641. *Simpson versus Garfide.*

1 *Vent.*
289.

2. Debt for Scavage, and declared upon a Grant from *Ed.* 4. The Defendant imparled, and in the next Term demanded Oyer of the Grant, which he ought not to do after an Imparlance; the Plaintiff demurred, but the Defendant had Judgment, because what he had pleaded was no Plea; and if so, then it cannot warrant this Demurrer. 2 *Lev.* 142. *Mayor of London versus Goree.*

Mod. Ca.
225.

3. The Court held, that if *T. S.* give a Bail-Bond by the Name of *R. S.* to the Sheriff, and he is sued by the Name of *R. S.* he may plead *Misnomer*, and the Plaintiff may reply, that the Defendant gave Bond by the Name of *R. S.* and demand Judgment, if against his own Deed he shall be admitted to say, that his Name is *T. S.* and then the Defendant may rejoin, and say, that he made no such Deed; but this must be without craving Oyer of the Deed, for if he doth he admits his Name to be *R. S.* 1 *Salk.* 7. *Linch versus Hook.* See *Misnomer.* (A) 16. *S. P.*

4. Covenant by an Apprentice against his Master, for not teaching such Trade as in an Indenture mentioned; the Defendant instead of craving *Oyer* of that Indenture, sets forth another, and pleads Performance of the Covenants therein; and upon a Demurrer to this Plea, it was adjudged ill, because the Defendant ought to crave *Oyer* of the Plaintiff's Indenture, on which he had declared, and cannot set forth another. *Mod. Cases* 154. *Foxon* versus *Moseley*.

Paraphernalia.

(A)

What it is, and where to be allowed.

i. **P**araphernalia is a Word compounded of these two Greek Words, (*viz.*) *Para*, which is in *English* *Above*, and *Perna*, which is in *English* a *Dowry*; so that it signifies some Thing which a Woman is to have above her Dowry, and that is her necessary Apparel, and Things which are suitable and convenient to her Degree, and the Quality of her Husband deceased; as for instance, The Viscount Bindon died possessed of Jewels to the Value of 500 Marks, and his Executor brought an Action of *Detinue* against the Viscountess, his Widow, for detaining these Jewels from him; the Defendant justified her Detaining these Jewels as her *Paraphernalia*; adjudged, that *Paraphernalia* ought to be allowed to a Widow, having Regard to her Quality and Degree; and that in this Case the late Husband of the Defendant being a Viscount, she shall be allowed the Jewels to the Value of 500 Marks, which is a good Allowance to her as her *Paraphernalia*. 2 *Leon.* 166. *Viscountess Bindon's Case*. Moor 213. S. C.

2. Where the Husband delivered a Piece of Silk or Velvet, to make Apparel, and he died before it was made; she may retain it against his Executor, because she had it by the actual Delivery of him; but she cannot detain it against his Creditors; and tho' she had it not by the actual Delivery of her Husband, yet, if she had it in her Possession at the Time of his Decease, and it was necessary and convenient for her Use, she may detain it. 1 *Roll. Abr.* 911. *Harewell* versus *Harewell*.

3. The Lord Audley's Widow married Serjeant Davis, but before as well as after her Marriage, she usually wore a Chain of Diamonds and Pearls, and the Serjeant devised the Use thereof to her during her Widowhood, she giving Security to leave them to his Daughter, and died; the Question was, Whether she might retain them for her *Paraphernalia*; upon which Question the Court was divided; for two Judges held, that she might detain them, because they were convenient for a Woman of her Quality; but two other Judges were of a contrary Opinion, for many Things may be convenient, which are not necessary; now the *Paraphernalia* ought not to be only convenient, but necessary, otherwise the Widow shall not detain them against the express Devise of her Husband; but Justice Jones, who reports the same Case, tells us, that three Judges were of Opinion, that the Widow might detain necessary and convenient Apparel, and likewise Ornaments, against the Devise of her Husband, and that he cannot dispose them by Will, tho' he might have sold them in his Life-Time, for immediately upon his Death the Property is vested in the Widow. *Cro. Car* 347. *Hastings* versus *Douglass*. W. Jones 332.

Pardons.

Pardons general, how to be construed.	Forfeitures, good. (D)
(A)	Pardons of Actions, Suits, Fines and Forfeitures, not good. (E)
Pardons general of Murders, Felonies and other Crimes, and Forfeitures for the same, good. (B)	Pardons Special of Felonies, good, and not good. (F)
Pardons of Felonies and other Crimes, not good. (C)	Pardons Special of Offences, good. (G)
Pardons of Actions, Suits, Fines and	Of Special Pardons. (H)

(A)

How to be construed.

1. **T**HE Obligee was bound to appear before the High Commissioners, and not to depart without their License ; in an Action of Debt brought on the Bond, the Obligor pleaded the General Pardon, in which there was an Exception of all Bonds, except Bonds for Appearance : Now the Obligor having departed without License, tho' it was not expressly mentioned in the Pardon, yet he insisted, that he ought to be discharged by this Exception ; but adjudged, that that Clause depended on his Appearance, and therefore the Pardon did not extend to it. 2 *Leon. 179. Paschall's Case.*

2. Two entered into a Recognisance, and afterwards the Conusee was outlawed, then came the General Pardon, out of which were excepted all Debts due to the Queen, by Condemnation, *Recognisance*, or otherwise, and except all Debts, &c. which are already forfeited by Reason of any *Outlawry* ; adjudged, that Debts which accrued to her by *Outlawry*, are not included in the first Exception, because there is a special Saving of them in the second Exception. 5 *Rep. 50. Wirral's Case.*

3. The Exception in a General Pardon was, of all Offences for which no Suit in the Star-Chamber now is, and at the last Day of the Session of Parliament, shall be there *depending* ; a Bill was exhibited before the Parliament met, and Process awarded, which was returnable after the Session ended ; adjudged, that the Suit was *depending*, because the Process issueth, and is returnable in the same Court, and therefore the Suit shall be said to be there depending ; for the Court hath the Record ; but where the Original comes out of another Court, as for instance, out of the Court of Chancery, returnable in the King's Bench, the Court hath no Record of it before 'tis returned. 5 *Rep. 47. G. Littleton's Case.*

4. The Defendant was outlawed after Judgment, and died, then came the General Pardon, and his Executors made Satisfaction, and without any Process against them pleaded the Pardon, and averred, that they were not excepted ; adjudged, that the Executors shall take the Advantage of a General Pardon, and because no *Sci. fa.* or *Capias Urlegatum* lies against them, therefore they may come in *gratis* without Process, and plead it. 6 *Rep. 79. Sir Edw. Phitton's Case.*

5. In a Writ of Entry, &c. the Defendant pleaded *non disseisvit*, and after this Plea pleaded there was a General Pardon *Anno 35 Eliz.* and after the Pardon and several Continuances, there was a Verdict for the Plaintiff, and Judgment, the Entry whereof was, that the Defendant was not in *miser cordia*, because he was pardoned ; and upon a Writ of Error brought, it was assigned for Error, that the Defendant was *not amerced* ; adjudged, that the Defendant is amerced, partly for Delay, and partly for the Wrong which he hath done ; but chiefly for the Wrong, which in this Case was done before the Pardon, and therefore 'tis pardoned ; and the Delay likewise was partly before the Pardon, and partly after, by the Defendant's Delay in Pleading, so that by this Pardon the Amerciament is pardoned. *Moor 394. Hawle versus Vaughan.*

6. In a *Quare Impedit* by the Queen, who made Title to present by Lapse, for that the Vicar of B. which was a Benefice, with Cure, &c. and above 8 *l. per Ann.* took a second Benefice, with Cure, &c. and above that Value, whereby the first became void, and remained so for *two Years*, &c. The Defendant pleaded the General Pardon, and that he was not excepted, nor the said Cause of Lapse, and that the former Vicar being Incumbent, resigned to R. W. who upon the said Resignation presented the now Defendant, who was admitted, and inducted before the Writ brought ;

brought; the Attorney General replied, setting forth the Exception in the Pardon, by which all Titles and Actions of *Quare Impedit* are excepted, other than such which the King might have, by Reason of any Lapse incurred *ultra* three Years last past of any Benefice, whereof an Incumbent was then in Possession, either by *Presentation* or *Collation*, and that the said Church being void by *Lapse*, *R. W.* presented, and traversed that it was void by Resignation; and upon Demurrer it was adjudged in the Exchequer-Chamber, that the Pardon did not dispense with Pluralities, and that the Words in the Exception did extend only to such who were then legal Incumbents, which the Defendant was not, because he was an Incumbent by Usurpation. *Cro. Car.* 258. *The King versus Archbishop of Canterbury and Priest.*

7. Adjudged, that a General Pardon being by Parliament, shall set aside a Judgment, and that such a Pardon shall relate to the first Day of the Parliament; but 'tis otherwise of a Special Pardon or Pardon of Grace, and such a Pardon shall relate only from its Date. *Latch* 22. *Burton's Case.* Dyer 23.
Eliz.S.P.

8. One *Underwood* was indebted to *Parker* the King's Receiver, and gave a Bond in the King's Name, conditioned to pay the Debt, being 300*l.* afterwards, the Money being not paid, the Lands and Goods of *Underwood* were extended, and returned in a Schedule; but by Rule of Court the Goods were restored to *Underwood* upon his giving Security to abide the Order of the Court; and accordingly the said *Underwood* and the now Defendant *Waring* entered into a Recognisance of 600*l.* to King *Car.* 1. to abide the Order of Court, which Order being not obeyed, &c. a *Scire facias* was brought on that Recognisance against *Waring*, who pleaded the Act of General Pardon, in one Clause whereof, all Recognisances, Obligations, and other Securities entered into since the 25th of *March* 1640, by any Receiver, &c. are excepted; and in another Clause, All Bonds taken in his late Majesty's Name, before *May* 1642, for Securing the proper Debt of any Receiver of the Revenue, are likewise excepted; and upon Demurrer to this Plea the Question was, whether this Recognisance was a Bond within the Intent and Meaning of this second Exception in the Pardon; it was insisted for the Plaintiff, that it was not; because there is a great Difference between a Recognisance and a Bond; the one hath the Party's Seal, the other hath not; to one *Non est factum* is a good Plea, to the other not; besides, Exceptions out of General Pardons must be taken extensively and most beneficially for the Subject, because they restrain the Favour of the Act of Grace: But adjudged, that a Bond and a Recognisance are the same in Substance, for both are obligatory; 'tis true, one cannot properly be said to be the other in Pleading, but it will be so within the Meaning of an Act of Grace; and a Recognisance is in its Nature no more than a Bond on Record. *Hardr.* 366. *Attorney General versus Waring.*

9. In the Time of the Usurpation, one *Gurdon* was made Master of the Mint by the Keepers of the Liberties, &c. and there were Articles between them, by which *Gurdon* covenanted to pay Wages to the Under-Officers there, and was to have 400*l.* per Annum Salary; and Wages being due to *Hodgkins* an Officer of the Mint, at the Restoration of the King, and all publick Debts, Duties and Securities being vested in him, they were all discharged by the Act of General Pardon, except what was therein excepted; and now a Bill in the Exchequer being exhibited against *Gurdon* by the Attorney General, at the Relation of *Hodgkins*, for Wages due to him; upon a Demurrer to the Bill by *Gurdon*, it was insisted for the Plaintiff, that this Covenant was pardoned, because the King had it in Trust for the Benefit of other Persons; besides, it was excepted by the Words, (*viz.*) Except the Accounts of Persons who have received any of the Rents, &c. of Hereditaments, of or belonging, &c. and the Profit of the Mint is an Hereditament, being an ancient Revenue of the Crown: 'Tis excepted likewise by the Words Recognisances, Bonds, and other Securities, &c. entered into by any Receiver, &c. or other Accountant in the Court of Exchequer, and the Defendant is an Accountant, &c. by his Patent: But adjudged, that this Covenant is pardoned, because now in the Eye of the Law, 'tis as if it had been made with the King; and tho' he hath it in Trust, yet 'tis not saved by the Act, neither is it saved by the Exceptions, because the first Exception is only as to ordinary Accountants for the Rents and Hereditaments; and this is not an Account of the Revenue of any Hereditament, but of the Profits of an Office, neither is it within the Exception of Bonds and other Securities, &c. given by any Receiver or other Accountant in the Exchequer; for tho' the Defendant hath given Security, yet the Matter doth not lie properly in Account but in Covenant; and the Account intended in this Exception is such as is ordinary and common, and well known in the Exchequer, and not that which arises upon any collateral Means. *Hardr.* 371. *Attorney General versus Gurdon.*

10. Information in the Exchequer against the Heir and Tertenant of the Lands of *Sir Roger Palmer*, late Cofferer of the House to the late King *Charles*, for 63139*l.* received by him as Cofferer, &c. in one Year, &c. to which the Defendant pleaded the Act of General Pardon 12 *Car.* 2. and that the said Sum is not therein excepted: The Attorney General replied, and set forth the Exception of all Offences in detaining, imbeziling or purloining any Goods, Monies, Chattels, &c. of the late King, and another Exception of all Issues, Fines, Rents and other publick Duties levied or received by any Sheriff, &c. or other Officer, to or for the Use of the late King, and not accounted for and discharged, and that 44853*l.* Part of the Sum above-mentioned is not accounted for by the said *Sir Roger Palmer*, and by him received as Cofferer aforesaid, &c. and avers these Monies so received were the Monies of the late King, and not paid or laid out for his Use, and so are excepted out of the Act; and upon a Demurrer to this Replication, the Question was, whether it was excepted by either of these Clauses; and adjudged, that it was not, for that *Acts * 1 And^o

* Cro. Car. 258. W. Jones 334. Cro. Car. 324. Bell's Case. of General Pardon are to be taken *beneficially* for the Subjects, and all Exceptions out of them are to be taken *strictly*: In * *Preist's Case* there was in a General Pardon an Exception of *Quare Impeditis*, where there was *no Incumbent*; and yet where there is an *Incumbent de facto by a Plurality*, tho' the Statute makes the first living void, it was adjudged, that such *void Incumbency* was not within the Exception; so where an *† Exception* was of *Taking and Imbeziling the King's Goods*, it was adjudged, that *Felony* in Imbeziling them was not excepted; so in the principal Case, the Exception of all Offences in detaining or imbeziling the King's Goods, Monies, Chattels, &c. must be intended only of such Goods and Money as were once actually in the King's Possession, and wrongfully taken from him in the Civil Wars; nor is it within the Exception of all Issues and other publick Duties received by *any Sheriff or other Officer*, because a Cofferer is an Officer and Person of a higher Nature than any that are named in that Exception; and a Superior shall not be included where an inferior is first named, as appears in 2 Rep. in the Archbishop of Canterbury's Case; and so the Plea was allowed to be good. *Hindr. 440. Attorney General versus Sir Roger Palmer.*

11. An Attachment against an Attorney for ill Practise; and upon a Motion it was referred to a Pronotary to tax Costs, which was done, and then came the General Pardon which discharged the Contempt; now, tho' these Costs were taxed before the Pardon, yet the Court inclined that they were discharged by the Pardon, because these were not Costs upon a judicial Proceeding; but upon a Kind of Compolition with the Offender, who had submitted to pay Costs to the Party grieved, and so not like Costs taxed in the Spiritual Court *pro reformatione morum*, as in the 5th Rep. 51. 3 Cro. 6. but yet in a Suit in Equity brought in the *Dutchy Court*, Costs were taxed upon a Contempt before the Pardon; and by the Opinion of two Judges, Assistants to the *Chancellor of the Dutchy*, these Costs were not discharged, because it was in a *Court of Equity*, where Costs are given at the Pleasure of the Judge. 2 Vent. 194.

12. By the Act of General Pardon 2 Will. &c. it is provided, that *Process of Outlary shall not be stayed, unless the Defendant put in Bail, where Bail by Law is necessary, and bring a Scire facias against the Party at whose Suit he is outlawed*; it was ruled upon a Motion, that the Defendant shall pay Costs of the Outlary to the Plaintiff before he shall have the Benefit of the Pardon, the Outlary being upon *mesne Process* before the Pardon. 2 Vent. 210.

13. By the Act of General Pardon, 2 Will. All Suits for Dilapidations are excepted, unless commenced, or depending before the 20th Day of March last, and a Suit was commenced in the Spiritual Court since that Time, by the Successor against the Executor of the last Incumbent; and upon a Motion for a Prohibition, the Court held, that this Exception must be intended of such Suits as might be in that Court *ex officio against the Dilapidator himself*, to punish him, as being guilty of a Crime against the Ecclesiastical Law, which is pardoned by the Act, unless the Suit be commenced before that Day; otherwise, if the Executor of a Dilapidator should be pardoned, that would be to translate the Charge from a Wrong-doer to the succeeding Incumbent who was Innocent, and which the Parliament could never intend; the Prohibition was denied. 2 Vent. 216.

14. Case for calling the Plaintiff *Traytor*, &c. the Defendant justified, for that on the 29th of Septemb. 1659, the Plaintiff was in Arms as a Soldier against the King, under the Command of Capt. Ceely; and upon a Demurrer to this Plea, the Plaintiff supposing that he was restored by the General Pardon, the Defendant had Judgment, because the Plaintiff ought to have shewed, that he was not a Person excepted. Raym. 23. *Harris's Case*. See *Cuddington versus Wilkins*.

15. In a *Quare Impedit*, the Case was, The King was entitled to a Presentation by Virtue of the Statute 31 Eliz. cap. 6. on a simoniacal Agreement, and accordingly did present; afterwards by a General Pardon, the King restored all Goods and Chattels, &c. forfeited, &c. *Per Curiam*, the right Patron is not restored, for the Presentation is not comprehended under the Words Goods and Chattels; but here is an Interest vested in the King which shall be de vested by the Pardon. 2 Mod. 52. *The King versus Turvill*.

16. Information upon the Statute 29 & 30 Car. 2. cap. 1. for importing *French Lace*, &c. upon Not guilty pleaded, the King had a Verdict, and afterwards there was a General Pardon, by which all Offences committed against the King were pardoned, except Offences by which the King was deceived in answering his Revenues, &c. the Question was, whether the Forfeiture, which was 100 l. was pardoned; it was insisted that it was not, because by the Verdict an Interest was vested in the King, which shall not be de vested either by a General or Special Pardon, without Words of Restitution; and so it was adjudged in *Toom's Case*; but there seems to be a Difference between the Cases, for in that Case the Debt which was due to *Tooms* was actually vested in the King by Inquisition found that he was *Felo de se*, and returned in B. R. but in the principal Case nothing vested in the King by the Verdict, nor until after Judgment, because it might be reversed for Error. 3 Mod. 241. *The King versus Johnson*.

17. Indictment against the Owner of the Glass-house at *Limbeth*, for maintaining that House, being a Nuisance; he was convicted and fined, then came the Act of General Pardon; and it was moved that he Defendant might be discharged both as to the Fine and the Abatement of the Nuisance; adjudged, that he shall be discharged by the Pardon as to one, but not as to the other, be a case that is a Grievance to the People. 2 Salk. 458. *The King versus Wilcox*.

18. On a Trial at Bar against the Defendant for High Treason, the Defendant objected against *Arvo Smith* for that he had stood in the Pillory, being convicted in an Information for a Libel; it was adjudged that he was restored by the Act of General Pardon 2 Will; and in this Case the Court distinguished, that the Disability was the Consequence of the infamous Judgment, and did

not

not arise from the Nature of the Crime; for if the Defendant is convicted of Cheating, and hath Judgment to stand in the Pillory, he cannot be a Witness; otherwise where he is not adjudged to the Pillory; now, where the Disability is the Consequence of the Judgment, the King may restore the Party by a Special Pardon, but not where the Disability is Part of the Judgment itself; as where a Man is convicted of Perjury upon the Statute, 'tis Part of the Judgment, that *imposterum non sit receptus ut testis*. *Co. Ent.* 368. but even in such Case a General Pardon will restore him. 2 *Salk.* 689. *The King versus Crosby.*

19. The Defendant was convicted of Deer-stealing, and the Judgment was *quod forisfaciet* 30*l.* *Dyer* 327 the Question was, whether this Conviction was pardoned by the General Pardon, it being not a final Judgment; the better Opinion was, that this was more than an interlocutory Judgment, because a Writ of Error would lie on it; and that it was not pardoned, because an Interest was vested in the Party grieved, for he was to have 10*l.* by the Statute; and the Punishment of the Queen in this Case is by Way of Satisfaction, and not for Example to others. 1 *Salk.* 383. *The Queen versus Barrett.*

(B)

Of Murders, Felonies, and other Crimes, and Forfeitures for the same, good.

1. **U**PON an Indictment for Striking and giving a mortal Wound to *B.* on the 12th Day of February; the Defendant, upon his Arraignment, pleaded the General Pardon, by which all Felonies, Offences before and unto the 14th Day of February, were pardoned; now, the Party did not die till the 18th of June following. yet it was adjudged that the Pardon did discharge him, because the Stroke and the Wound was the Offence against the Queen, and that being pardoned, all Things ensuing the said Offence were likewise pardoned. *Col's Case.* *Mich.* 13 *Eliz.* *Plowd.* *Com.* 401. see 1 *Eliz.* *Dyer* 99, and 4 *Rep.* 42. In *Hydon's Case.*

2. In Appeal, the Defendant was found guilty of Manslaughter; adjudged, that the King might pardon the *Burning in the Hand*, because it was no Part of the Judgment, for 'tis only to shew whether he had the Benefit of his Clergy, or not. 5 *Rep.* 20. *Biggin's Case.* 3 *Mariae,* *Dyer* 201. 9 *Eliz.* *Dyer*, *Masgrave's Case.* 15 *Eliz.* *Dyer,* *Taverner's Case.*

3. A Pardon committed Adultery, Anno 11 *Eliz.* for which he was deprived the Year following Latch; and by the General Pardon 2 April, 13 *Eliz.* the Offence of Adultery committed before the 14th Day of February last past was pardoned; adjudged, that by the Pardon the Sentence of Deprivation is made void, for that being founded on the Adultery, and that being pardoned, by Consequence all that depended on it is likewise discharged. 6 *Rep.* 13. *Burton's Case,* called the *Case of Pardons.* *Latch* 22. *S. C.* *Palm.* 412. *Harris versus White* *S. P.* *Latch* 81. *S. C.*

4. Action on the Case for calling the Plaintiff Thief, &c. the Defendant justified, for that the Plaintiff stole Sheep, &c. the Plaintiff replied, and set forth a General Pardon granted such a Time; and farther said, that if Felony was committed by him, it was before the Pardon; and upon Demurrer adjudged, that both the Punishment and the Fault were taken away, and the Party is cleared of the Offence by the Pardon. 1 *Brownl.* 10. *Cuddington versus Wilkyns.* *Hob.* 67. *Moor* 81. *862, 872. S. C.*

5. By a General Pardon all Felonies were pardoned, but Burglary was excepted; adjudged, that the Attainder of one for Burglary is excepted, because Burglary is the Foundation of the Attainder; and that Offence being excepted, all Dependencies on it are in like Manner excepted. 6 *Rep.* 13. *Cases of Pardons.*

6. One *Lucas* pleaded his Pardon for the Murder of *Sir William Brook*, by which the King pardoned *feloniam & feloniam interfectionem, &c. non obstante statuto de* 13 *Ric.* 2. the Reason of this *Non obstante* was, because before that Statute Murder was pardoned by the Name of Felony, but by that Statute 'tis prohibited to pardon Murder, therefore the Pardon of Felony ought to be *Non obstante* that Statute. *Moor* 752. *Lucas's Case.*

7. The Defendant was convicted of *Bawdry*, for assisting one in the Years 1623 and 1624, to commit Adultery with the Countess of *Purbeck*, and was fined 200*l.* &c. the Question upon a Motion for a Prohibition was, whether by the General Pardon 21 *Jac.* this Offence was pardoned, because the Sentence came after the Pardon; adjudged that it was pardoned, because it was for Offences before the Pardon; but if Part of the Offence had been since the Pardon, yet the Fine being entire, and the Time both before and after being involved together, a Prohibition shall go. *Cro. Car.* 80. *Isabel Peel's Case.* Prohibition. (E) 29 *S. C.*

8. The Defendant was indicted for feloniously Stealing the Plate of King *James*, whereas in Truth it was the Plate of Queen *Anne*, for which she procured his Pardon; and afterwards he was indicted again for the same Plate; then came the General Pardon 21 *Jac.* in which there was a Special Exception of the Goods of the King, and whether he should have the Benefit of that Pardon, without Pleading it, and praying to be discharged, was the Question; adjudged, that it was excepted, and therefore the Court advised him to plead. *Hill.* 11 *Car.* *Cro. Car.* 324. *Bell's Case.* *Moor* 770. *Dagg versus Penkevel.* *S. P.*

9. The Case was, one *Gately* was attainted of Murder and executed; and afterwards it was found by Inquisition, that the Defendant was indebted to him in 30*l.* whereupon a *Scire facias*

was brought against the Defendant, who pleaded, that she was not indebted, &c. *modo & forma*, &c. upon which they were at Issue; and the Cause coming on to be tried before the Chief Baron Hale, the Defendant would have given the Act of general Pardon in Evidence; but held clearly, that she could not upon this Issue, but that it ought to have been pleaded; and if that had been done, it would have been a Bar, for the Act excepts only the Offence, but the Forfeiture is pardoned. *Hardr. 421. The King versus Bernard.*

10. *Felo de se*, afterwards came a General Pardon, by which all *Felonies* were pardoned except Murder; and after this Pardon an Inquisition was taken by the Sheriff and returned, that the *Felo de se* had a Term for Years which was worth 100 *l.* adjudged, that this was pardoned, because nothing vested in the King till Inquisition found, which being after the Pardon, is discharged by it. *Sid. 150. The King versus Ward.* See *Toombs versus Etherington.*

(C)

Of felonies and other Crimes, not good.

1. UPON an Indictment for Piracy, the Defendant stood mute, and had Judgment to be pressed; afterwards all Pains, Contempts and Executions were pardoned by a General Pardon, but Piracies were excepted; adjudged, that the Party might be indicted again for the same Piracy, because the Judgment was not for that Offence, but for the Contempt in standing Mute. *Dyer 308. Cobham's Case.*

2. A Bill was exhibited in the Star-Chamber for a Riot five Years before the General Pardon, by which all Penalties and Forfeitures are excepted, for or by Reason of any Offence, for which any Bill hath been exhibited within eight Years before the last Day of that Session of Parliament; adjudged, that the Party being convicted of the Riot, tho' he could not be committed, or suffer any corporal Punishment by Reason of this Pardon, yet the Queen might proceed for the Fine, for that is not excepted; but if the Bill had been exhibited before that Time, then the Offence it self and all Incidents, had been excepted. *5 Rep. 46. Franklin's Case.*

3. Sentence was given in the Spiritual Court for defamatory Words, which was confirmed in an Appeal to the Arches, and 12 *d.* Costs, then came the General Pardon, and afterwards the Defendant appealed to the Delegates, and there the Sentence was likewise affirmed and greater Costs given; adjudged, that those Costs given by the Delegates were not taken away by the Pardon, tho' the Offence was; therefore they might proceed for those Costs, but not for the Offence. *Winch 125. Davis versus Hawkins.*

4. Judgment against the Defendant, upon an Indictment on the Statute of Usury; he pleaded the Coronation Pardon, by which all usurious Takings, &c. were pardoned; this Pardon had no Relation to any certain Time, and therefore shall not relate to an Offence committed before the Pardon; but when it relates to a Time certain, there, tho' the Judgment is after the Fact and before the Pardon, yet that shall take Place. *Latch 141 Davie's Case.*

5. One killed another with a Gun *per infortunum*; adjudged, that he could not plead the General Pardon, but must get a Special Pardon, because 'tis not an Offence pardoned by the General Pardon. *Style 337.*

6. In Ejectment for the Rectory of *Ammerham*, there was a Trial at Bar, and the Evidence for the Plaintiff was, that the Defendant was *simoniace promotus*, which was admitted to be true; but it was insisted for him, that the Simony was pardoned by the Act of General Pardon; 'tis true, *Simony* is not mentioned in the Statute, but 'tis pardoned by these General Words, (*viz.*) the King pardoned *every Thing that he could or might pardon*; and if by these Words Simony is pardoned, then all the Consequences thereof are likewise pardoned; but adjudged, that if the Simony is pardoned, yet that shall not relate to restore the Person to the Church which was void by Simony; but Simony is not pardoned by these Words, because 'tis *malum in se*; for if Simony should be pardoned by these general Words, then if a Brother should marry his own Sister, there would be the same Reason for a Pardon. *Sid. 170. Snow versus Phillips 220. S. C.*

(D)

Of Actions, Suits, fines and forfeitures, good.

1. THE Ancestor died seised of Lands held *in Capite*; his Heir, without tendring any Livery, and without any Office found, entered and took the Profits; and being cited into the Court of Wards, to shew Cause why he did not tender his Livery, and why he entered before Office found; he pleaded the General Pardon, which pardoned all Entries and Intrusions, &c. adjudged, that by these Words the Suing out of Livery is pardoned. *Pasch. 8 Eliz. Dyer 249. 11 Eliz. Dyer 284. S. P.*

2. There being a Plea depending in a Writ of Entry, a General Pardon came before Judgment, by which all Fines, Amerciaments and Contempts were pardoned; afterwards the Demandant had Judgment, but the Entry was, *Non in misericordia quia pardonatur*; and upon a Writ of Er-

ror brought, the Error assigned was, that the Tenant ought to be amerced ; but adjudged, that since the original Cause of the Amerciament was the Wrong and Contempt of the Tenant for not rendring the Land to the Demandant, and all Contempts being pardoned, by Consequence the Amerciament, which depended on it, must be pardoned. 5 Rep. 49. *Vaughan's Case*.

3. A Bill was exhibited in the Star-Chamber for a Riot ; afterwards there came a General Pardon, by which all Offences, &c. were excepted, for which any Suit or Bill within eight Years before was exhibited in the Star-Chamber, and *there remaining to be prosecuted* the last Day of the Parliament ; afterwards the Plaintiff died, and the Attorney General prosecuted for this Offence ; adjudged, that the Offence was pardoned, and these Words, *remaining to be prosecuted*, ought to be construed with this Addition, (*viz.*) remaining to be prosecuted by the Party. 5 Rep. 48. *Drywood's Case*. Hutt. 79. * *Beverly versus Powel*. S. P.

* W. Jon.
89. S. C

4. Information on the Statute 5 Eliz. for converting 300 Acres of arable Land into Pasture, and for continuing the same so converted several Years ; the Defendant pleaded Not guilty, as to the Conversion, and the General Pardon 23 Eliz. as to the Continuance ; and upon Demurrer to this Plea, it was objected, that it did not extend to the Continuance, for the Conversion was excepted in the Pardon, which must not be intended the bare Act of Conversion, but the Continuance thereof so converted, which made but one Offence ; but on the other Side it was argued, that these are different Offences, and the Conversion being only excepted out of the Pardon, therefore it must extend to the Continuance. 1 Leon. 274. *Cleypole's Case*.

5. Indictment upon the Statute of Forcible Entry, the Issue was joined, but before the Cause was tried, there came a General Pardon, by which the Offence and Fine to the King were pardoned, but afterwards Restitution was awarded ; adjudged, that the Offence being pardoned, they could not proceed any farther upon this Indictment. 2 Cro. 149. *Fawcett's Case*. Yelv. 99. S. C.

6. Trespafs 20 June, with a Continuando till 6 Novemb. following ; the Plaintiff had Judgment, which was entered *Nihil de fine quia pardonatur* ; upon a Writ of Error brought, the Error assigned was, that the Judgment ought to be *quod capiatur*, because by the Pardon all Offences before 25 of September only were pardoned, and this Trespafs being continued till 6th of November, that was not pardoned, but only the Trespafs from 20 Junii to the 25th of September after ; but adjudged, that the Judgment is well entered ; for the Trespafs being done by the first unlawful Entry with Force, and that being pardoned, all which depends on it is pardoned ; for the first Entry makes the Trespafs. Yelv. 126. *Strickland versus Thorpe*.

7. A scandalous Bill was exhibited against the Bishop of Chichester, in Michaelmas-Term, 19 Jac. some Time afterwards there was a General Pardon, and after that the Plaintiff was fined, and Sentence against him for 100 l. Damages to the Bishop ; adjudged, that this General Pardon coming between the Bill and the Sentence, the Plaintiff is discharged both of the Fine and Damages, because the Sentence being already given, he hath no Time to plead it. Cro. Car. 48. *Morley versus Bishop of Chichester*.

8. When Sentence is given in the Spiritual Court, and Costs taxed, the Pardon shall not discharge such Costs, because the Party hath an Interest in them ; but if the Pardon come before the Sentence, then 'tis otherwise ; and tho' the Party appeal, which is a Kind of Suspension of the Sentence, yet by that first Sentence the Party hath an Interest vested in him, which shall not be de vested by the Pardon. 5 Rep. 51. *Hall's Case*. Cro. Car. 6. *Doctor Brickenden's Case*. S. P.

9. Upon a Sentence of Defamation in the Spiritual Court, the Defendant appealed to the Arches, then came a General Pardon, which pardoned all Offences, &c. beyond the Time in which the Words were alledged to be spoken, which the Defendant perceiving, did not proceed in his Appeal, and for that Reason the Court of Arches taxed Costs against him ; adjudged, that he did right in not prosecuting the Appeal after the Pardon, because the Original Offence was the Foundation of the Appeal, and that being pardoned, he had not Occasion to proceed in the Appeal ; and therefore the Court did wrong in taxing Costs for not proceeding. Latch. 155. *Lewis versus Whitton*.

10. Sentence in the Spiritual Court, and a Year afterwards the Costs were taxed ; then came a General Pardon, by which all Offences, &c. were pardoned, which were committed or done before such a Day, &c. which was after the Sentence, but before the Costs were taxed ; adjudged, that the Costs were discharged ; but if they had been taxed before the Day to which the Pardon did relate, then they could not be discharged. Latch. 190. *Palmer versus Warner*. Cro. Car. 33. *Baldwin versus Richards*. S. P. Cro. Car. 144. *Codrington versus Redman*, S. P. and 142. *Huges's Case*. S. P.

11. Error to reverse a Judgment in Debt, &c. the Defendant in Error pleaded, that the Plaintiff was excommunicated, &c. the Plaintiff replied, that after the Excommunication, by a General Pardon, all Contempts, &c. were pardoned, and averred, that neither the Offence nor his Person were excepted ; the Court seemed to be of Opinion, that by this Pardon the Excommunication was discharged. 8 Rep. 68. *Trollop's Case*. Cro. Car. 144. *Codrington versus Redman*. S. P.

12. It was found by Office, that the Testator being seised in Fee of Lands held in Capite, devised the same from his Right Heir, and died seised, B. his next Heir, being under Age, and that during his Minority, E. W. received the Profits ; then came a General Pardon, and resolved, that Taking the Profits was no Intrusion, because there was no Office found to entitle the King, but that the same were discharged by the General Pardon. Lea 48. *Warham St. Leiger's Case*.

(E)

Of all Actions, Suits and Fines, not good.

1. **T**ENANT *in Capite* died seised, and an Office was found accordingly, and that his Heir entered, and took the Profits both before the Office found, and afterwards, then came a General Pardon, by which all *Intrusions, &c.* were pardoned; adjudged, it was not good, without the Words *Issues and Profits*. *Trin. 12 Eliz. Dyer 286.*

2. In a Special Verdict in Ejectment, the Case was, *Sir James Bagg* being seised in Fee, entered into a Statute of 10000 *l.* to *Sir Paul Pindar*, and being a Collector of the New Impost, about two Years afterwards was found *upon Account* in Arrear to the King in 22500 *l.* and being so indebted died, and about three Years after, the Tenements in Question were seised into the King's Hands, *tenendum quousque* the King should be satisfied; who being thus possessed by Virtue of the Seizure and Extent, granted the same to one *Carey and his Heirs*, in Trust for *R. Bagg*, the Heir of *Sir James*: Afterwards, by the Act of General Pardon, the King pardoned *all Sums of Money*, and other Things, that he could pardon; but *Accounts* of Receivers and Collectors are excepted; but the Heirs and Executors of Accountants shall not be charged for any Thing contained in that Exception, but only for such Sums of Money as remain upon Accounts *already stated*; about a Year after this General Pardon the Heir at Law of *Sir James Bagg* pleaded it in the Exchequer in Discharge of the 22500 *l.* and it being confessed by the Attorney General, Judgment was given, that the Estate should be discharged; and some Years afterwards, one *Woolstenholme*, who was Executor of *Sir Paul Pindar*, extended the Lands upon his Statute for 10000 *l.* who demised to the Plaintiff, and the Defendant claimed under the Conveyance of *Carey*, and the Heir of *Sir James Bagg*; adjudged, that the Grant of the King to *Carey* was void, because he had no more than a *Chattel Interest* in the Lands by Virtue of his Extent, and therefore the Grant to *Carey in Fee* must be void, because the King was deceived in his Grant; but if it had been good, the Debt due to the King did not pass, because it was a Grant of the Lands, whereas a Chose in Action must be granted by special Words. *See Audita querela. (B) 15. and Release. (B) 10.* Adjudged, that this Debt stated was not pardoned, but that it still remains due to the King, notwithstanding the Discharge and Allowance in the Exchequer, for that is always with a *salvo jure*; if so, then neither the Plaintiff or Defendant have any Title, but the Defendant being in Possession, Judgment was given for him. *3 Lev. 134. Travel versus Carteret.*

(F)

Of Felonies good, and not good.

1. **D**EBT on a Bond, the Defendant pleaded, that after he entered into the Bond the Plaintiff was attainted of Coining, and set forth the Attainder at Length; the Plaintiff in his Replication confessed the Attainder, but that the Queen pardoned him, by which Pardon she restored to him *all his Goods and Chattels*; it was a Question, whether this Debt due to him on Bond was included in those Words. *Goldf. 114. Mich. 40 Eliz.*

2. The Defendant being indicted for Treason, produced a Special Pardon, without any Writ of Allowance; adjudged, that in Case of Treason the Pardon shall be allowed without that Writ, but not in Felony. *Cro. Eliz. 814. Linly Sir Henry's Case.*

3. *Cole* was indicted for a *Burglary*, and convicted, and afterwards pardoned; and not long after he was guilty of the Breach of the Peace, by Assaulting and Beating another Man; all which was suggested to the Court, and thereupon a Motion was made, that he might be executed, because the Pardon was only conditional, *Ita quod he behaved himself well, &c.* and *Ivey Clerk* of the Crown, informed the Court, that one *Whiddon* was hanged in the Queen's Reign for the same Cause; but no Rule was made in this Case. *Moor 466. Cole's Case.*

4. The Defendant was convicted of Manlaughter, and had his Clergy, and pleaded a Pardon dated 31 *Octob.* by which the Burning in the Hand was pardoned, and all other *Misdemeanors* by him done before the 8th Day of *August*, and there was a special Clause in it, that *he should not find Sureties for his Good Behaviour*: Now, tho' he had committed several Misdemeanors after the said 8th Day of *August*; yet his Pardon was allowed, and he found no Sureties, &c. *Mimms Sir Matthew's Case. Cro. Car. 433.*

5. The Defendant was attainted of Felony, and pleaded a Pardon, which was in these Words, *Pardonavimus, remisimus & relaxavimus*, and now claimed to be restored to his Goods and Chattels forfeited to the King; but adjudged, that the same being vested in the King by the Attainder, the Words in the Pardon will not amount to a Surrender, and therefore he cannot be restored without the Word *restituimus*. *Style 43. Chappell versus Drew.*

3

(G)

Of Offences, good.

1. **T**HE Husband purchased Lands in *Capite* to him and *his Wife*, and to his Heirs, *without License*; the Queen pardoned all Offences for any Alienation made *to him*, without mentioning *his Wife*; adjudged good, tho' she was not mentioned. *Dyer* 196. *Callin Sir Robert's Case*.

2. A Parson was prosecuted in the High Commission-Court for Incontinency; but before Sentence he procured a Pardon, and afterwards they proceeded against him for Cofts; adjudged, that tho' another is Plaintiff in this Suit, and so likewise in the Spiritual Court, yet they are the Suits of the King, and he may pardon them; and this Pardon being before Sentence, they shall not proceed for Cofts. 2 *Cro.* 335. *Watt's Case*.

3. The Defendant was convicted upon an Indictment on the Statute 27 *Ed.* 3. *cap.* 1. for a *Præmunire*, in which the Judgment is, that he shall loose his Lands and Goods, and be out of the King's Protection; afterwards he got a Pardon in these Words, *Pardonamus omnes & singulas transgressiones offensives & contemptus*; adjudged, that by these Words the *Præmunire* was pardoned. 2 *Bull.* 299. *Mildmay Sr Anthony's Case*.

4. *Sir John Bennet*, who was Judge of the Prerogative Court, was sentenced in the Star-Chamber for Bribery, &c. and fined and imprisoned, and another obtained his Office, afterwards he brought an *Affise* for the said Office, and produced the King's Pardon after Sentence, wherein all the Special Matter was recited, and all Penalties and Punishments by Reason thereof, and all Disabilities, were pardoned; adjudged, that the Pardon had taken away the Force of the Sentence, and that he might proceed in the *Affise*. *Cro. Car.* 40. *Bennet Sir John versus Dr. Tisdale*.

5. The Defendant was convicted upon an Indictment for Striking in *Westminster-Hall*, sitting the Courts, which Indictment was, that he *vulneravit, verberavit & percussit H.* afterwards he was pardoned, and it was objected against the Allowance of the Pardon, because it varied from the Indictment; for the Word *percussit* was not in the Pardon; but adjudged, that since it was in the Recital, tho' not in the pardoning Part, 'tis good; and so it had been, if it had not been recited, because *vulneravit* is a more extensive Word than *percussit*; besides, the Offence is pardoned by these general Words, *omnia malefacta in indictamento prædicto conten'ta*. *Sid.* 211. In the Case of the King and *Bocknam*. See 2 *Cro.* 516.

(H)

Of Special Pardons.

1. **I**N a Special Verdict in an Action on the Case, it was found, that *Dr. Manwarring* was impeached by the House of Commons, and by the Judgment of the House of Lords was *disabled* to hold any Spiritual Promotion; afterwards he was pardoned of all Treasons, Felonies and *Disabilities*, incurred, &c. but the Pardon did not recite the Judgment against him in Parliament, and there was no *Non Obstante* in it; it was objected, that by a Pardon of all *Disabilities*, such as are inflicted by Judgment in Parliament, are not pardoned, for that Word is too general, therefore the *Disabilities* should be named; the Case was not adjudged. *Hudr.* 154. *Thoroughgood versus Herbert*.

2. The Defendant was convicted of Murder, and pleaded the King's Pardon under the Great Seal, and the Court would not allow it, without a Writ of Allowance directed to the Judges, for that is a Record, and remains in Court as a Warrant to them for the allowing it; but if there had been a *Non Obstante* in the Pardon, they would have allowed it without a Writ. *Sid.* 41. *Howard's Case*.

3. The Defendant was indicted for the Murder of one *Perkins*, and also for a Robbery, which he confessed, and pleaded his Pardon, which was of all Murders, Robberies, &c. *Non Obstante* the Statute 13 *R.* 2. but the Court would not allow it; for after the said Statute a general *Non obstante* will not do, without a Recital of the Effect of the Indictment, that it may appear, the King was apprised of the Fact. *Sid.* 366. *The King versus Dudley*.

4. The Defendant being convicted of Barretry, produced a Pardon of all Treasons, Murders, Felonies, and all Penalties, Forfeitures and *Offences*; adjudged, that the Word *Offences* includes all which are not Capital. 1 *Mod.* 102. *Angell's Case*.

5. The Defendant being convicted for robbing on the Highway, pleaded a Pardon, which was generally of all Robberies, (but it did not recite the Indictment and Verdict of his being found guilty of this Robbery) and concluded with *Non Obstante* the Statute; adjudged, that this General Pardon was not good, without a Recital of the Indictment and Conviction, so he procured another Pardon. *Sid.* 430. *The King versus Maddox*. See the Case of the King versus *Dudley*. *S. P.* See 3 *Mod.* 38. 4 *Mod.* 63. *S. P.*

6. The Defendants were convicted for Murder, and now pleaded their Pardon; but the Word *Murdrum* was not in the Pardon, so that the Offence was expressed by these Words,

* T. Jon. * *felonica interfectio, non obstante Statut.* 10 Ed. 3. and 13. R. 2. *Et per Curiam*, the Pardon was allowed. 3 Mod. 37. *The King versus Coney & al.*
 Lord
 Gerrard's Case. 10 Ed. 3. cap. 3. 13 R. 2. cap. 1.

7. *Foxworthy* pleaded his Pardon, and it was allowed; and now his Creditors moved, that they might have Leave to charge him with Actions *in Custodia*; which was denied, because 'tis not reasonable, that the Pardon, which was only for his Benefit, should put them in a better Condition than otherwise they would have been, if he had not been pardoned, for then he must be hanged. 2 Salk. 500. *Foxworthy's Case*.

4 Mod. 63. 8. *Parsons* being attainted for the Murder of Mr. *Wade* pleaded the King's Pardon, which was for the Murder, &c. by express Words, without any *Non Obstante*, for that was now taken away by the Statute *W. & M.* and he produced the Writ of Allowance, certifying, that he had found Sureties for the Peace; it was objected against the Allowance of the Pardon, because this Crime could not be pardoned by Law; but adjudged, that there was as good Reason for the King to pardon an Indictment for Murder, as 'tis for the Party to discharge an Appeal for the same Crime; that the Statute 2 Ed. 3. cap. 3. did not prohibit the Pardoning Murder; it only meant, that the King should be fully informed before he did pardon it; for before the Statute of *Gloucester*, cap. 9. it was usual for Criminals of this Nature to apply to the Lord Chancellor, and by false *Suggestions* to procure Pardons with general Words in them; and this was the Occasion of these restrictive Statutes; 'tis true, by the Statute 13 R. 2. cap. 2 great Difficulties were put upon Suitors for a Pardon of Murder, but about three Years after, (*viz.*) by the Statute 16 R. 2. cap. 26. the former Act was repealed, which shews, that there is a Necessity that the King should have Power to pardon Murder. 2 Salk. 499. *Parson's Case*.

Parish.

(A)

1. UPON Evidence to a Jury, the Case was, that *Hemsted* Parish contains two Villages, *Barrington* and another, that *Barrington* had a Chapel of Ease, wherein they usually buried the Dead, and that it had been a long Time a Parish of it self by Reputation, but in Truth was only a Member of the Parish of *Hemsted*; that *Barrington* had likewise usually chused Overseers of their own Poor, and the Question was, whether such Overseers had Power to distrain for a Poor Tax within the Statute 43 Eliz. because that Statute enables only Overseers of every Parish to distrain; and *Barrington* is only a Parish in Reputation; & *per Curiam*, Parishes in Reputation are within the Statute as well as other Parishes, especially where it hath been the constant Usage of such Parishes to chuse their own Overseers. 2 Roll. Rep. 160. *Weldon versus Walker*.

Parliament. See Acts of Parliament.

Parson.

Parson.

Of Actions against them. (A) | Of their Privileges, &c. (B)

(A)

Of Actions against them. See *Clergymen*. (B) per totum.

1. **I**Nformation against him upon the Statute 21 *H. 8. cap. 13.* for Renting a Farm, the Forfeiture is 10*l.* per Month; the Defendant pleaded in Bar, that he had not sufficient Glebe for pasturing his Cattle, nor Corn for his Family; the Plaintiff replied, that he used the Farm for the Time mentioned in the Information, and traversed, that the Defendant had spent the Product thereof in his Family. 1 *Lutw.* 134.

2. Action against a Parson for Non-residence, grounded on the seventeenth Paragraph of the Statute 21 *H. 8. cap. 13.* the Defendant pleaded in Bar that he is a Layman, and traversed, that he was a Clergyman. 1 *Lutw.* 138.

(B)

Of their Privileges, &c.

1. **H**E ought not to appear at the Sheriff's Tourn or at the Leet, without an absolute Necessity; and if he is distrained for not appearing, he may have a Writ out of the Chancery for his Discharge. *F. N. B.* 160.

2. My Lord *Coke* was of Opinion, that at Common Law a Parson could not be arrested, and that he had seen a Report in the Reign of Queen *Mary*, grounded on the Statutes 50 *Ed. 3. cap. 5.* and 1 *H. 2. cap. 15.* which Statutes are in Affirmance of the Common Law, and in Maintenance of the Liberties of the Church; that a Parson ought not be arrested in going, staying, or returning to celebrate Divine Service, nor any other Person who attended him in such Service; and that if he was, then in such Case the Party grieved might have an Action founded on these Statutes, against him who arrested him. 12 *Rep.* 100.

Partition.

Of Partitions by Writ and by Deed. (A) | Between Coparceners. (C)
By Tenants in Common, not good. (B) | Between Jointenants. (D)

(A)

Of Partitions by Writ and by Deed.

1. **A** Writ of Partition may be brought upon the Statute 32 H. 8. by Jointenants and Tenants in Common for Years, and so ruled. *Mich. 3 & 4 Maria, Bendl. 30.*

2. Three Coparceners of Lands; one of them aliened her Part, another brought a Writ of Partition against the other and the Alienee, upon the Statute 31 H. 8. adjudged, that the Writ shall abate, because they being in by Descent, the Writ in such Case did lie at Common Law. *Mich. 8 Eliz. Dyer 243.*

3. So where there were three Coparceners of a Reversion after an Estate for Life; one of the Sisters aliened her Part to another by Grant; then the Tenant for Life died, and the eldest Sister entered on the Whole; adjudged, that the Grantee and the other Coparcener could not join in a Writ of Partition against her, because that Coparcener is entitled by the Common Law, being in by Descent; but the Grantee is entitled by the Statute 31 H. 8. but 'tis a Question whether the Entry of the eldest Sister did not give Seisin to the Grantee, as she did to the other, because of the Privy of Blood. *Hill. 3 Maria, Dyer 128. 7 Eliz. Dyer 243. Mich. 7 & 8 Eliz. Bendl.*

4. In a Writ of Partition, the Defendant pleaded, that he himself formerly brought a Writ of Partition against the now Plaintiff, and had Judgment to have Partition, and this was a good Plea; but the Question was, whether it should be pleaded in Bar or Abatement, or by Way of Estoppel. *Mich. 1 Mar. Dyer 92. Hest versus Maile.*

5. Where two Persons hold Lands *pro indiviso*, and one of them would have his Part in Severalty, and the other will not agree to make Partition by Deed; in such Case there lies the Writ *de partitione facienda* against him who refuseth; 'tis directed to the Sheriff, and he must be present when the Partition is made, for so he is commanded by the Writ; and if 'tis objected before the Return of the Writ, that he was not present, it may be examined by the Court; but after the Writ is returned and filed, 'tis too late. *Mich. 25 Eliz. Cro. Eliz. 9. Clay's Case.*

6. Two Jointenants are with Warranty, and Partition was made between them by Writ, by Virtue of the Statute 31 H. 8. cap. 1. adjudged, that the Warranty doth still remain, because they are compellable by the Statute to make Partition, and they have pursued it; but if they had made Partition by Deed without Writ, in such Case the Partition doth remain at Common Law, and by Consequence the Warranty is gone. *6 Rep. Morrice's Case.*

7. There are two Statutes which concern Partition by Writ, (*viz.*) 31 H. 8. cap. 1. and 32 H. 8. cap. 32. one gives Partition of an Estate of *Inheritance*, and the other of an *Estate for Life or Years*; and Error was brought upon a Judgment in Partition, because the Plaintiff did not shew upon what Statute he grounded his Action, and likewise because he declared, that he held ** infimul & pro indiviso, &c.* and doth not shew what Estate he so held; adjudged, that he ought to shew that he is seised of such an Estate of which he may have a Writ of Partition by the Statute, and upon which Statute he founded his Action. *Goldf. 84. Stransum versus Colborne. Godb. 84.*

8. On a Writ of Partition upon the Statute 32 H. 8. cap. 32. Judgment was *quod partitio fiat*, and a Writ directed to the Sheriff to make equal Partition, who returned the Partition made by the Jury; one of the Defendants would have avoided this Return, upon a Suggestion that the Partition was not equal, and so would have a new Writ; but adjudged, that tho' 'tis unequal, since it was made by Writ, 'tis not to be avoided; but if it had been by Deed it might have been avoided by Entry. *1 Inst. 171.*

9. The Writ was general upon the Statute 31 H. 8. that they did hold *infimul & pro indiviso manerium de B. & terras & visum franci plegii*, and that the Defendant denied to make Partition, *contra formam Statuti*; the Defendant pleaded *quod non tenuit infimul, &c.* thereupon they were at Issue, and the Jury found, that the Plaintiffs held one Moiety *in Fee*, and that the Defendant

* 3 Leon.
312.

was *Tenant in Tail* of the other Moiety, Remainder to his right Heirs; adjudged, that this general Writ was good, because the Statute doth not prescribe in what Form it shall be made, but leaves it to the Clerks; and such Writs between Jointenants and Tenants in Common of Inheritances have always been allowed good since the Statute; and tho' Partition is demanded of a *View of Frankpledge*, which cannot be divided, yet the Profits thereof may be divided, or may be allotted to one entirely, and the Lands to another. *Cro. Eliz.* 759. *Moor Sir George ver-
sus Onflow.*

10. In a Writ of Partition against several, upon the Statute 32 H. 8. the Plaintiff declared, that he and the Defendants held 400 Acres of Land *in Common*; then he set forth their particular Parts, but did not shew what Title they had; and after a Judgment for the Plaintiff, and a Writ of Error brought, this was assigned for Error, but adjudged good, because he who bringeth the Action may not know the Title of the others, for every one may come in by a several Title. *Cro. Eliz.* 64. *Windham ver-
sus Yates.* *Mich.* 29 *Eliz.* *Cheyney ver-
sus Berry.* *S. P.*

11. A Writ of Partition was awarded to the Sheriff to make Partition of such Lands, whereupon Part of the Lands were allotted to one in Severalty, and the Jury would not assist him to make Partition of the other Part; all which appearing upon his Return, the Court was moved for an Attachment against the Jury, and a new Writ to the Sheriff, but no Rule was made. *Godb.* 265. *Bagnell ver-
sus Harvey.*

12. In a Writ of Partition of two Parts, without saying, *into Three to be divided*; it was moved, that this was erroneous; but adjudged, that it was not; for when Parts are demanded, 'tis intended all the Parts but one, and that one remains, and no more. *Mich.* 7 *Jac.* 2 *Brownl.* 275. *Baylie ver-
sus Sir Henry Cleer.*

13. In a Writ of Partition, the Judgment was, *Quod partitio fiat*, and before it was executed by the Sheriff, a Writ of Error was brought; adjudged, that it doth not lie upon this first Judgment, for this is not like other real Actions, where Error lies before the *Habere facias Seisium* is returned, for in such Case the Judgment is final; but 'tis not so in this Case, for here must be another Judgment, (*viz.*) *quod partitio stabilis maneat*, which cannot be till the Partition is made and returned by the Sheriff. *Warwick Countess ver-
sus Berkley.* See *Dyer* 67

Noy 71.
S. C.
Hedl. 36.
S. C.

14. No Damages can be recovered on a Writ of Partition, neither will any Writ of Inquiry lie for them, and yet the Writ and Declaration concludes *ad damnum*. *Hetley* 35, and *Noy* 71, in the *Countess of Warwick's Case*.

15. A Writ of *Estrepement* is an original Writ in a real Action, and 'tis in Nature of a Prohibition to the Tenant to commit Waste pending the Action; it was a Question, whether such a Writ would lie between Tenants in Common; but now 'tis adjudged, that the Writ will lie, for it was granted for all that the Defendant had confessed to be held in Common. *Noy* 143. *Bailie ver-
sus Knighon.*

16. A Writ of Partition was taken forth, directed to the Sheriff, who made Partition, but was not upon the Land; the Sheriff made his Return; but a Motion was made, that it might not be filed, but that a new Writ might be awarded, because the Sheriff was not on the Land as he ought to be; the Court stayed the Filing, and examined the Sheriff, who confessed, that he was not there, so a new Writ was awarded; but if the Return had been filed, the Court could not have examined the Matter. *Cro. Car.* 9, 10.

17. In Partition, the Plaintiff declared, that *T. W.* being seised in Fee, &c. devised the Tenements to his Wife for Life, and after her Decease to his Son *Thomas* and his Heirs; and if he die without Issue, then to his Daughters *Mary* and *Elizabeth*, and their Heirs, and to the Heirs of the Survivor; the Testator died, and *Thomas* the Son died without Issue; that *Mary* married the Plaintiff *Hicks*, and *Elizabeth* married one *Thomas Witchell*, that *Thomas* and *Elizabeth*, and the Widow of the Testator joined in Fine of one Moiety and declared the Uses to the Widow for Life, and after her Decease to *Thomas*, the Husband, for Life, then to Trustees to support contingent Remainders, &c. that the Widow died, and that *Mary Hicks* entered on one Moiety and was seised thereof in Fee, and that *Thomas*, the Husband of her Sister *Elizabeth* was seised of the other Moiety by Virtue of the said Fine for his Life, and so she the said *Mary* and the Defendant *Thomas* held the Premises in Manner as aforesaid *in simul & pro indiviso*, whereupon the Plaintiff prayed, that Partition might be made, and that they might hold in Severalty, &c. upon Demurrer to this Declaration, the Question was, whether the Writ should be general, as this was, or whether it ought to be special; and adjudged, that 'tis good, as this was, being general, tho' it was otherwise adjudged in *Sir Geo. Moor and Onflow's Case*, where it was held, that if Partition is to be made between one who hath an Estate of Inheritance and another who hath a particular Estate for Life; that the Writ ought to be framed upon the Statute, and to be made Special, setting forth the particular Estate. 2 *Lutw.* 1015. *Hicks ver-
sus Witchell.*

(B)

By Tenants in Common, not good.

Cro. Eliz. 95. S. C. 1. **T**enants in Common of an House and Close adjoining; they being both in the House made Partition both of the same and the Close, without Deed, viz. that one should have the House and the other the Close; adjudged, that because they were not in the Close when the Partition was made, 'tis void as to that, and by Consequence void likewise as to the House.

1 Leon. 103. *Dodson versus Preist*.

2. Two were Tenants in Common of a Manor, one of them purchased a Freehold of Lands so intermixed with the Demesnes of the Manor, that they could scarce be known; in a Writ of Partition brought by the other, it was held, that the Purchaser must shew the Bounds of his new purchased Lands, and that the other need not shew the Bounds of the Manor; but if there is no Evidence given on either Side, and the Jury make Partition, 'tis good, for they are bound to give their Verdict. *Dyer* 265. *Cook versus Wootton*.

See the Statute 8 & 9 Will. 3. cap. 31. made perpetual per Statute 3 & 4 Anna, cap. 18.

(C)

Between Coparceners.

1. **P**artition may be made between Coparceners of Inheritances, which are entire and devisable, as of an Advowson, Rent-charge, or such like; but 'tis otherwise of Inheritances, which are entire and indivisible, as of Common without Number, or such incertain Profits out of Lands, for in such Case the eldest Coparcener shall have them, and the youngest shall have Contribution from her out of some other Inheritance left by the Ancestor; but if there is no such Inheritance, then the eldest shall have those incertain Profits for one Time, and the youngest for another Time. 5 Mar. *Dyer* 153. Mich. 25 Eliz. *The Earl of Huntingdon's Case*.

2. If two Coparceners be of an Advowson, and they agree to present by Turns, this is a good Partition as to the Possession; but if they are put out of the Inheritance, they shall join in a Writ of Right. 1 Rep. 87. In *Corbet's Case*.

3. Where there are Coparceners of an Advowson, the eldest hath the Privilege to present first, but not in respect of her Person, but Estate; so if one Coparcener hath a Rent granted to her upon a Partition made, to make her Part equal with the other, she may distrain for the Arrears of such Rent of common Right, and so shall the Grantee of such Rent, because 'tis not annexed to her Person only, but to her Estate. 3 Rep. 32. In *Walker's Case*.

4. So if six Acres in Fee, and of equal Value, descend to two Coparceners, and upon Partition each of them hath three Acres allotted for her Share, and afterwards B. recovers one of the Acres by a Title Paramount; the Sister of whom that Acre was recovered shall not recover in Value of her other Sister, (viz.) a whole Acre, which she had lost but only a Moiety of an Acre, so as each of them shall have an equal Part, because they both came in by Descent, which is an Act in Law, and therefore the Law will have their Parts to be equal. 4 Rep. 121. In *Bustard's Case*.

5. Partition cannot be made between Coparceners of Franchises entire, such as Goods of Fe-lons or outlawed Persons, Waifs, Estrays, and such like Hereditaments which are casual. 5 Rep. 3. In *Lord Mountjoy's Case*, p. 25. *Goldf. S. P.*

6. So if there are three Coparceners, and they make Partition, and one of them grants a Rent of 20 s. per Annum out of her Part, to make her Sisters Parts equal; the Sisters to whom this Rent was granted are not Jointenants of it, but the Rent is in Nature of Coparcenary; and the Moiety thereof, after the Death of one of the Grantees, shall descend to her Issue, and shall not succeed to the other, because it comes in Recompence of the Land, and therefore shall partake of the Nature of the Land. 5 Rep. 7. In *Justice Windham's Case*.

7. If an Advowson is appendant to a Manor which descends to Coparceners, and they make Partition of the Manor without mentioning the Advowson, the same is still appendant, and they shall present by Turns. 8 Rep. 79. *Wiat Wild's Case*.

8. If there are two Coparceners of a Manor, and upon Partition made, each of them hath Demesnes and Services allotted; in such Case each of them hath a Manor, because they being in by Descent, are compellable by the Common Law to make Partition; but 'tis not so in the Case of Jointenants, for they are in by Purchase and are not compellable by the Common Law to make Partition, and for that Reason a Rent cannot be reserved to make their Parts equal. 1 Leon. 26. *Murph versus Smith*.

9. Writ of Error to reverse a Judgment in Partition; upon in *nullo est erratum* pleaded, these Errors were assigned, The Writ was to make Partition of several Manors, of a View of Frankpledge, of 400 Acres of Wood, and of several other Things, and that the Sheriff go to the Advowson, &c. and in the Partition there was no Mention of the View of Frankpledge, and it could not be supplied by the Partition of the Manors *cum pertinentiis*, because it was distinct of it self, and

not

not Appurtenant to any Manor ; upon the Return of the Sheriff he doth not conclude, that the Lands of which he made Partition are all the Lands comprehended in the Writ ; and the Demand is of 400 Acres of Wood, which the Sheriff did not mention in the Partition, but only that he made Partition of a Park, *una cum omnibus arboribus* to the same belonging, which cannot be the Wood ; and the Writ is, that he should go to the Advowson, which cannot be, because 'tis incorporeal ; there was no Judgment given. *Raym. 172. Danby versus Palmes. Siderfin* tells us, the Judgment was reversed.

10. In a Writ of Partition between Tenants in Common upon the Statute 31 *H. 8. cap. 1.* the Tenant pleads *Antient Demesne*, and adjudged a good Plea. *Raym. 249. Pont versus Pont.*

11. *Indebitatus Assumpsit* for 750 *l.* laid out to the Use of the Defendant ; the Case upon the Evidence appeared to be, That the Defendant and *T. P.* were Partners in farming the Excise, that the Money was laid out by the Plaintiff on the Behalf of the said Partners, and that the Defendant promised to pay it out of the first Profits he received ; & *per Curiam*, this Action will not lie against one Partner alone ; 'tis true the other was dead, but that ought to be shewed in the Pleading ; besides, the Promise was not to pay the Money absolutely, as the Plaintiff had declared ; but *sub modo*, (*viz.*) out of the first Profits, so that the Evidence did not maintain this Declaration ; the Plaintiff was Nonsuit. 2 *Mod. 279. Tiffard versus Warcupp.*

12. *Covenant* between Partners, that there shall be no Survivorship between them ; this doth not sever the Joint Interest in Law, yet the Survivor hath a Remedy in a Court of Equity. 1 *Vent. 41.*

13. At a Trial at Bar the Case was, Coparceners made a Partition to present to a Church by Turns, and an Usurpation was made upon the Turn of one of them, and upon a *Quare Impedit* brought, the Question was, whether this put them all out of Possession till they recovered their Right again, or whether the Sister, who had the next Turn, should present upon the next Avoidance ; and the Court held, that this put them all out of Possession, and they would not let the Matter be found Specially, but made a Case of it for the Opinion of the Judges. 2 *Vent. 39.*

(D)

Between Jointenants.

1. **L**ease for Years to two, provided, that if they die within the Term, then it shall cease ; the Lessees made a Partition, and then one of them died ; adjudged, that his Executor shall have his Share, and that it shall not cease during the Life of the surviving Lessee. *Mich. 3 Ed. 6 Dyer 67. See 4 Rep. 73. In Burrough's Case.*

2. Error to reverse a Judgment in Partition ; the Error assigned was, that the Writ of Partition was insufficient ; for it was, that the Plaintiff *in simul & pro indiviso tenet* with the Defendant, and doth not shew of what Estate, or of whose Inheritance ; adjudged, that in such a Writ 'tis not necessary ; but 'tis otherwise where the Partition is to be made between Tenants in Common. *Pasch. 30 Eliz. 2. 1 Leon. 118. Yates's Case.*

3. The Testator being seised of Lands in Fee, and having a Son and Daughter, devised his Lands to his Wife for Life, and after her Decease, that the same should remain to his Issue ; the Daughter married, and she and her Husband brought a Writ of Partition against the Son, for that they, *in simul & pro indiviso tenent*, &c. The Son pleaded *Non tenuit in simul*, &c. and it was adjudged for him ; for he did not hold *in simul & pro indiviso* with his Sister, because the Devise to the Issue made it doubtful, and in such Case it shall not extend to all the Issue ; but the Words shall be construed as the Law would have given it, (*viz.*) to the Son, and not to the Daughter. *Cro. Eliz. 742. Tayler versus Sayer.* 2 And. 134. S. C.

4. Two Jointenants for Years, one of them suffered a Stranger to enjoy his Moiety with him, the other brought a Writ of Partition against him and the Stranger, supposing that his Companion had granted a Share of his Part to the Stranger ; but he shewed, that he was only Tenant at Will to him, so that the Writ abated ; but adjudged, that he might have a new Writ by *Journey's Accounts*, because the Possession of the Stranger was a good Colour for bringing the first Writ. 2 *Cro. 218. Bedle versus Clerke.*

Pawns.

See *Property*. (A) 5. (B) 10. *Tender*. (A) 8.

(A)

ADjudged, that where a Pawn-Broker refuses to deliver the Goods upon a Tender of the Money, the Pawnee may be indicted, because the Goods may be delivered to him in such a secret Manner, that the Owner may not have Evidence to prove the Pawning; that if Goods are lost after the Tender of the Money, the Pawnee is liable to make them Good to the Owner, because the Property is now determined, and after the Tender he is a wrongful Detainer; and he who keeps Goods wrongfully must answer for them at all Events; but if they are lost before a Tender, 'tis otherwise, if his Care of Keeping them was exact, and without any Default in him; for the Law requires nothing extraordinary of him, but only, that he shall use an Ordinary Care in Keeping the Goods, that they may be restored upon Payment of the Money for which they were deposited; and in such Case, if the Goods are lost, the Pawnee hath still his Remedy against the Pawner for the Money.

Then as to the Using the Goods pawned, the Law is, that if they are such Goods as will be the worse for it, as Cloths, &c. the Pawnee cannot use them; but if they are Jewels, Watches, &c. which will not be the worse for wearing or using, in such Case he may make use of them; but then it must be at his Peril, for if he is robbed in wearing them, he is answerable to the Owner, because the Pawn is in Nature of a *Depositum*, which cannot be used but at the Peril of the Pawnee; and it was the Using which occasioned the Loss.

If the Pawn is of such a Nature, that the Keeping is a Charge to the Pawnee; as a Cow or Horse, &c. he may milk the Cow, or ride the Horse, and this shall go in Recompence for his Charge in Keeping. 2 *Salk.* 522. *Coggs versus Bernard.*

See the Books following, for what Interest the Pawnee hath in the Goods pawned to him, (*viz.*) 1 *Bulst.* 29. *Yelv.* 178. *Owen* 123. 2 *Cro.* 244. 1 *Roll. Rep.* 181.

Pawn. See *Property*. (B)

Peculiar.

See *Administration*. (C)

(A)

THIS is where a particular Parish or Place is exempted from the Jurisdiction of the Bishop of the Diocese, and another Person hath Power to grant Administration or Probates of Wills of those who die in that Place; and of these Peculiars there are several Sorts.

2. *Royal Peculiars*, which are the King's Free Chapels, and are subject to his Jurisdiction alone.

3. *Archbishops Peculiars*, of which there are several in the Province of the Archbishop of Canterbury, and in several Counties within that Province; it being an ancient Privilege of that See, that wherever any Manors or Advowsons belonged to the Archbishop, they immediately were exempted from the Ordinary Jurisdiction of the Bishop of the Diocese where these Manors and Advowsons were, and became subject to the peculiar Jurisdiction of that Archbishop alone.

4. The Peculiars of *Deans and Chapters*, and these were certain Places where the Bishops by ancient *Compositions* had parted with their Jurisdiction to *Deans and Chapters*, in Cases of Administration and Probate of Wills; and tho' such *Compositions* may be now lost, yet a long and continual Usage of this Jurisdiction by such Deans and Chapters, will run into a *Prescription*, and give them a good Title to it; and such are the *Deans and Chapter of St. Paul's, and Litchfield.*

5. There were also *Peculiars* belonging to Monasteries; for the Abbots of the great and rich Monasteries had obtained a Jurisdiction either from their Bishop, or from the Pope, to grant Administrations in particular Places belonging to their Abbies; and when any Administration or Probate was granted by any of these *Peculiars*, the Plaintiff in his Declaration need not set forth, by what Authority they had this Jurisdiction, either by *Prescription* or *Composition*, or otherwise, for it was sufficient, that he alledge it was granted to him by such a Person *loci ejus Ordinarius*.

6. Libel in the Bishop's Court for Tithes; the Defendant suggested for a Prohibition, that the Tithes did arise within a *Peculiar*, and that it was contrary to the Statute of *H. 8.* to sue for them in the Bishop's Court, for that in the *Peculiar* the Archdeacon had Authority by Commission from the Archbishop; 'tis true, if he had Authority by Commission, this shall not take away the Jurisdiction of the Bishop; but if he had Authority by *Prescription*, it shall; but in the Principal Case 'tis not shewn, by what Commission he had Authority, whether exclusive or concurrent with the Bishop; and for that Reason a Consultation was granted. *2 Roll. Rep. 357. Gaftrill versus Jones.*

7. A *Peculiar* in *Berks*, which belonged to the Bishop of *Salisbury*, had transmitted a Cause to the Arches, which by the Statute ought to be to the immediate Ordinary, and not *per saltum*; which is very true, and therefore a Prohibition shall be granted upon a Suggestion, that this *Peculiar* belongs to the Ordinary; but if that was not suggested, then a Prohibition should not go, because some *Peculiars* belong to the Archbishop of the Province, and not to the Ordinary; and therefore where a Man dies Intestate, leaving Goods in several *Peculiars*, the Archbishop grants Administration. *Sid. 90. Tull versus Osberton* See *Hob. 186. 5 Mod. 239.*

8. In a Special Verdict in Ejectment, the Case was, that the Rectory of *Hemsworth* in *Yorkshire*, had been Time out of Mind parcel of the Prebend of *Langhton* in the Morn, and not within the Province of *York*, but in the peculiar Jurisdiction of the Prebend of *Langhton*, belonging to the Dean and Chapter of *York*, who Time out of Mind had used to institute to that Church, it being a Church with Cure of Souls; that the Church being in the Duke of *Norfolk*, as Patron, presented the Defendant, who was thereupon instituted by the Archbishop of *York*; the Plaintiff made a Title by Lapse, upon the Presentation of the King, and Institution of the Dean and Chapter; the Question was, whether the Institution by the Archbishop was good, it being in a *Peculiar*; and adjudged, that it was; for 'tis not void, but voidable, and every Archbishop hath two concurrent Jurisdictions in Cases relating to the Clergy; the one as Ordinary with the Bishop, the other as Superintendant throughout his Province of Things Ecclesiastical, that is to supply the Defects of the Bishop; therefore this Institution by the Archbishop shall be intended to be done in Default of the Ordinary, till the contrary appears upon Examination. *3 Lev. 211. Wrighton versus Brown.* See *Sir Timothy Hutton's Case.*

9. Libel in the Consistory-Court of *H.* for prophaning the Church-Yard; the Defendant suggested for a Prohibition, that they refused him a Copy of the Libel; that the supposed Prophanation was by the Defendant as Coroner, in doing the Duty of his Office by digging up a Corpse, for a View; that the Church was within such a *Peculiar*, and consequently not within the Jurisdiction of the Consistory-Court; but a Prohibition was denied, because the Suggestion was for two Things, which require different Prohibitions; the one is a Prohibition *quousque* they grant a Copy of the Libel, which, immediately upon granting it, is discharged without any Writ of Consultation; the other two Causes are upon the Merits, and in such Cases a peremptory Prohibition is granted, by which that Court is bound till a Writ of Consultation is awarded; but as to *Peculiars*, 'tis true, there are several which are not subject to the Jurisdiction of the Bishop of the Diocese, and such cannot transmit a Cause to him, because that must be to the immediate Ordinary, which the Bishop of the Diocese is not; thus the Dean and Chapter of *Salisbury* have a large *Peculiar* within that very Diocese, but as much out of the Jurisdiction of that Bishop as the Diocese of *London* is: There are *Peculiars* of *Archdeacons*, which are not properly *Peculiars*, but rather *Subordinate Jurisdictions*, and a *Peculiar*, *quatenus* such, is *prima facie* to be understood of him who hath a co-ordinate Jurisdiction with the Bishop: Now in the principal Case the Defendant hath suggested, that this Church is within the *Peculiar* of, &c. but doth not say, what Sort of *Peculiar* it is; therefore it would be improper to determine that Matter upon a Motion; 'tis true, if the Suggestion had been Right, it had been proper for a Prohibition. *Mod. Cases 308.*

Prohibition. (F) 25.

* Latch 180. Noy 89.

* Hob. 185.

Peers and Peerage.

See *Nobility*.

(A)

1. **I**ndictment was found at *Hick's Hall* against *Charles Knollys*, for the Murder of *Captain Lawson*, which being removed into *B. R.* the Defendant pleaded in Abatement, that *Wm. Knollys, Viscount Wallingford*, was by Letters Patents, dated 18 Aug. 2 Car. 1. created *Earl of Banbury*, to him and the Heirs Males of his Body, and so derives a Title to himself of the said Honour by Descent, as Heir Ma'e, &c. & hoc paratus est verificare; the Attorney General replied, that on 14th of Decemb. 4 Willi. the said Defendant petitioned the Lords, &c. then assembled in Parliament, to be tried by his Peers, and that the Lords disallowed his Peerage, and dismissed his Petition; the Defendant demurred, and the Attorney General joined in Demurrer, and the Defendant had Judgment; First, it was said, that before the Reign of *Ed. 3.* there were but two Titles of Nobility, (viz.) *Earls and Barons*; that *Earls* were always created by *Letters Patents*, but *Barons* were originally by *Tenure*, then by *Writ*, and last of all by *Patent*; that an Earldom consisted in Office for the Defence of the Kingdom, and for that Purpose the Earl was bound to attend and assist the King in his Wars, and is therefore called *Comes*, not a *Comitatu*, over which he presides, but a *Comitando Regem*; and his Earldom likewise consisted in very great Possessions and Rents; that the Defendant had a Title to his Honour by a legal Conveyance, and that it was under the Protection of the Common Law, and could not be taken from him but by legal Means; that the Judicial Power of the Parliament, which consists of the Lords Spiritual and Temporal, and Commons, (and of which the King is supreme) consists in the Peers, but is virtually the Judgment of the King; that these Letters Patents creating *Wm. Knollys* an Earl were not vacated by the Lords disallowing the Defendant's Peerage, or by dismissing his Petition, because that was no Judgment, there being no Plea depending before them; for the Defendant did not petition to hold or enjoy any Thing, but supposed himself in Possession of the Honour by Descent; which being Matter of Fact, for that very Reason, (if no other) the Lords had no Jurisdiction, because 'tis below the Dignity of the supreme Judicature, to try Matter of Fact, for such is this Descent; besides the Title of the Earldom was not before them, and a Court can never give Judgment in a Thing not depending, or which doth not come before them in a judicial Way; moreover every Judgment ought to be compleat and formal, which this is not, for 'tis only a Dismission of the Petition; it doth not say *quod abinde excludatur* of his Honour. Lastly, this is an Inheritance, and therefore not originally determinable in Parliament; and no Precedent can be shewed to determine this Point; for if Inheritances were there to be determined, without their having any Jurisdiction, they would have an uncontrollable Power. 2 *Salk. 509. The King versus Lord Knollys.*

2. The Lord *Banbury* was taken upon a *Latitat* by the Name of *Charles Knollis Esq;* and the Court of *B. R.* was moved for a *Supersedeas*, he offering to produce the Letters Patents of Creation, and an *Affidavit*, that he was the Person; but it was ruled, that since he had never sat in Parliament, they would not take Notice of his Peerage, and therefore would not suffer it to be tried upon a Motion. 2 *Salk. 512. Lord Banbury's Case.*

3. Upon a Bill exhibited against the Lord *Stourton*, it was ordered, that he should be examined upon Interrogatories concerning his Title; and it was insisted, that he ought to answer only upon his Honour; it was ruled, that an answer to a Bill is upon Honour; but where he is to answer Interrogatories, or make an *Affidavit*, or be examined as a Witness, he must be upon his Oath. 2 *Salk. 512. Sir Tho. Meers versus Lord Stourton.*

4. *Per Curiam*, where a Peer is Party, either Plaintiff or Defendant, there must be two or more Knights on the Jury. 2 *Mod. 182. Countess of Northumberland's Case.*

Pension.

(A)

Where, and in what Court recoverable, and of Pensions in general.

1. **A** Vicar sued in the Spiritual Court for a *Pension*, and set forth in his Libel, that there were *two Churches*, and that he was Vicar of both, which Churches extended into two Towns, and that whereas he and his Predecessors, for forty, fifty and sixty Years, have used and ought to say Prayers in one Church one Sunday, and in the other Church the next Sunday *alternis vicibus*; it was agreed, that he should say Service in each Church every Sunday, and have *4l. viz. 40s.* for each Parish, to be taxed amongst the Inhabitants of the respective Parishes, and that *W. R. &c.* was taxed towards the Payment of *40s.* but had not paid it; he suggested for a Prohibition, that the Vicar had alledged a Prescription but for sixty Years; adjudged, 'tis not necessary to alledge any Prescription, for it shall be intended, unless the contrary is shewed; and this Libel being for a Pension, which is merely spiritual, and triable in the Ecclesiastical Court, and Sentence given, which was afterwards affirmed in an Appeal; a Consultation was now granted. *Pasch. 21 Eliz. Cro. Eliz. 666. Gilby versus Williams.*

2. A Spiritual Person may sue in the Spiritual Court for a Pension originally granted and confirmed by the Ordinary; but where 'tis granted by a temporal Person to a Clerk, he cannot; as if one grant an Annuity to a Parson, he must sue for it in the temporal Courts. *Cro. Eliz. 675. Colier's Case.*

3. If a Parson or Vicar have a Pension out of another Church, and 'tis not paid, he may sue for it in the Spiritual Court, or he may have a Writ of Annuity at Common Law for a Pension, which they and their Predecessors had Time out of Mind; but if once they bring a *Writ of Annuity*, and declare upon the *Prescription*, they shall not afterwards sue for it in the Spiritual Court by the Name of a Pension; if they do, a Prohibition lieth; and 'tis plain, that they may bring a Writ of Annuity, because a Pension issuing out of a Rectory is the same Thing as a Rent, for it may be demanded in a Writ of Entry, and a Common Recovery may be suffered of it. See *Godb. 196. Sprat versus Nicholson. Postea Tithes. (P) 3. S. C. See Poph. 23. Crocker versus Dormer. S. P.*

4. Upon a Bill in the Exchequer for a Pension of *53 s. 4d.* yearly, issuing out of the Vicarage of *St. Stephens in Norwich*, and payable to the Dean and Chapter of *Norwich*, who were Patrons thereof; it was held, that tho' there was no Vicarage-House, nor Glebe nor Tithes, but only *Easter-Offerings*, Burials and Christenings, yet the Vicar is chargeable, tho' he hath nothing but these casual Profits, and that a Suit may be brought in this Court for a Pension by Prescription, or at Common Law by a Writ of Annuity, as well as in the Spiritual Court. *Hardr. 230. Dean and Chapter of Norwich versus Collins. See pl. 6.*

5. Upon a Bill in the Exchequer for an yearly Pension of *2 l. 10 s.* issuing out of Lands of an Hospital, granted to the Defendant, and now in Arrear for several Years; it was adjudged, that Pensions reserved by the King, or granted to him out of Lands, are in the Nature of Rents, and determinable in this Court, and may be extinguished by Unity of Possession; but those which are vested in the Crown by the Statute *26 H. 8. cap. 3.* are of another Nature and collateral to the Land, and not lost by Unity, &c. no more than Proxies. *Hardres 388. Bishop of Ely versus Clare-Hall.*

6. Where a Parson hath a Pension by Prescription, he may bring a Writ of Annuity, or libel in the Spiritual Court; but if he brings a Writ of Annuity, he shall never after sue in the Spiritual Court, because he hath determined his Election. *1 Mod. 218. Barry versus Trebeswicke.*

7. In a Prohibition, the Plaintiff suggested, that by the Statute *28 H. 8. cap. 16.* All Bulls, &c. of the Pope shall be void, and shall not be pleaded or allowed in any Court; and yet that the Defendant libelled against him (the Plaintiff) for a Pension, setting forth in his Libel, that the Church of *Rillington* was appropriated *per Sanctissimum patrem Clementem Divina Providentia Papam sextum Anno 1443*, to the Abbey of *Bellard*, and that upon the Appropriation the Abbot granted to such a Bishop a Pension: But a Prohibition was denied, because the Bull and the Appropriation are only *Inducements* to the Title, which is founded on a Grant of the Pension, and that it was necessary to set forth the Appropriation, because till then the Abbot could not grant any Pension, therefore it ought to appear how the Appropriation was made. *2 Lev. 251. Ethington versus Archbishop of York.*

8. Upon a Motion for a Prohibition, the Court was of Opinion, that where a Man claims a Pension by Prescription, 'tis in his Election to sue for it in the Spiritual Court as a Pension, or at Common Law as an Annuity; and that the Books cited by my Lord Coke in *2 Inst. 491.*

do not warrant his Opinion, that the Suit shall be only at Common Law; tho' two Judges now, (*viz.*) *Twisden* and *Windham* held it must be only at Common Law. *Sid.* 146. See *pl.* 11.

9. Libel for a Pension, the Plaintiff suggested for a Prohibition, that the Lands out of which it was demanded were Monastery Lands; and came to the King by the Dissolution, &c. who granted the Lands, &c. and that they should be discharged of all Pensions, under which Grant the Plaintiff claimed; but the Prohibition was denied, until the Grant, which was Matter of Record, should be produced. 1 *Vent.* 120.

10. Libel for a Pension, the Plaintiff suggested for a Prohibition, that he was Lessee of the Rectory out of which the Pension was demanded, and that the Lord *Biron* had three Parts of Four of this Rectory, therefore the Suit ought not to be brought against him alone; adjudged, that in our Law this might be a good Plea in Abatement; but in their Law it may be otherwise, therefore if they do not proceed according to it, the Party may appeal; so a Prohibition was denied. 1 *Vent.* 335. 2 *Cro.* 159, 270. *S. P.*

11. Libel in the Spiritual Court for a Pension, to which the Plaintiff made a Title by Prescription; and a Prohibition was prayed, for that the Court had no Cognisance of Prescriptions; but adjudged, that they having Cognisance of the Principal, it shall draw the Accessary. 1 *Vent.* 3. *Bishop of Lincoln versus Smith*; 'tis true, if the Prescription is denied, then a Prohibition shall go to try it. 1 *Vent.* 265. 1 *Lew.* 128. *S. P.* 1 *Mod.* 218. *S. P.* See *pl.* 8.

12. Adjudged, that a Pension out of an Appropriation, tho' by Prescription is suable in the Spiritual Court, because such a Pension must begin by the Grant of Spiritual Persons; and therefore if the Duty is traversed, it may be tried there. 1 *Salk.* 58. *Smith versus Wallis*. See *Cro. Eliz.* 810.

13. The Curate of a Chapel of Ease in the Parish of *Preston*, libelled against the Vicar of that Parish, for the Arrears of a Pension, which he claimed by Prescription; but a Prohibition was granted, because the Curate is removable at the Will of the Parson, and therefore cannot prescribe; he must bring a *Quantum meruit*. 2 *Salk.* 506. *Birch versus Wood*.

Perjury. See Indictment. (Y) per totum.

Pipe. See Exchequer.

Pleas.

Amounting to the general Issue, not good. (A)

Pleas of Payment of a less Sum in Satisfaction of a greater, good, and not good; and of Payment without an Acquittance. (B)

Of Pleadings concerning the Jurisdiction of the Court. (C)

Pleas not answering the Declaration but in Part. (E)

Not good for the Incertainty; too general and argumentative; and where they are good. (F)

Not good where the Estate and Title are not set forth, and where good without it. (G)

Time of Pleading, and of full Defence. (H)

Where a Plea is double, where not. (I)

Plea of another Action depending, or a former Recovery for the same Cause, good, and not good. (K)

Pleas *de injuria sua propria*, good, and not good. (L)

Pleas which go to the Disability of the Person, good, and not good; and of

Pleas which make the Trial impossible. (M)

Of Pleas in Abatement and in Bar. (N)

Pleas after Imparance, not good. (O)

Consuance of Pleas and Privileges, good. (P)

Consuance of Pleas and Privileges, not good. (Q)

Where *profert hic in Curia* is necessary; and where not. (R)

Where a Plea must be averred, with *hoc paratus est verificare*, where not; and of *semper paratus*, and of Conclusion of Pleas to the Country. (S)

Of Pleas which amount to a Confession of the Plaintiff's Demand, and amounting to a negative Pregnant. (T)

Of Pleas and Pleadings *inter alia*, and *separalia placita* and *per nomen*, and where they are not positive, but dilatory. (V)

Where in Pleading more is demanded than due, and where less is demanded. (W)

Of pleading Records. (X)

(A)

Amounting to the general Issue, not good.

1. **I**N *Trover*, the Defendant pleaded a Sale in a Market overt, and so justified the Conversion, not good, because it amounts to the general Issue. 2 *Cro.* 165. *Johns versus Williams.* 1 *Roll. Rep.* 397. *Row versus Thompson.* S. P.

2. In *Trover*, the Defendant pleaded, that before the Plaintiff suggested that the Goods came to the Defendant's Hands, one B. G. was possessed thereof, and sold them to the Defendant, but did not deliver them, and afterwards sold the same Goods to the Plaintiff, by Reason whereof the Plaintiff was possessed and afterwards lost them, and they came to the Defendant's Hands, who converted them, as it was lawful for him to do; adjudged no good Plea, because it amounted to the general Issue. 1 *Brownl.* 5. *Austin versus Austin.*

3. In *Trover* and Conversion for so many Hogsheads of Cyder in *London*; the Defendant pleaded, that they were delivered to him to redeliver to another in the *County of Oxford*, to be spent in his House, and * traversed, that he converted them at *London*, or elsewhere out of the *County of Oxford*; and upon Demurrer to this Plea it was adjudged † ill, because it amounted only to the general Issue, not guilty. *Trin.* 14 *Jac.* 3 *Bull.* 209. *Phillips versus Wicks.*

1 *Roll. Rep.* 395.
* See *Traverse*. (D)
† The justification is not local, but transitory, therefore the Plea is ill.

4. Case, upon a Promise to pay 10 *l.* yearly to the Plaintiff, by the Father of the Defendant, if he would marry the Daughter of T. S. and he alledged, that he did marry her; the Defendant pleaded, that he promised conditionally, if the said Plaintiff's Father gave him 1000 *l.* in Marriage with the Daughter of T. S. but that the Plaintiff's Father had not given him 1000 *l.* and traversed, that he promised *modo & forma*; and upon a Demurrer to this Plea it was adjudged ill, because it amounted to no more than the general Issue. 2 *Roll. Rep.* 350. *Barret versus Barret.*

5. In

5. In an Action on the Case, the Substance of the Plaintiff's Declaration was, that the Defendant put his Cattle on such Lands, by Reason whereof the Plaintiff had not sufficient Common; the Defendant pleads, that he put in his Cattle rightfully, and that the Plaintiff had sufficient Common; and upon a special Demurrer to this Plea it was agreed, that it amounted to the general Issue; but 'tis not for that Reason bad, for if it contain Matter of Law, there is no Cause of Demurrer; for 'tis the same Thing to have the Doubt in Law before the Court in Pleading, as to have it before them on a Special Verdict: And *per Curiam*, the Defendant may disclose the Matter in Law in Pleading cheaper than to have a Special Verdict. 2 *Mod.* 274. *Birch versus Wilson*.

6. Case, &c. upon a Bill of Exchange; the Defendant pleaded, that after he had accepted the Bill, he gave the Plaintiff a Bond in Discharge thereof; and upon a Demurrer to this Plea it was adjudged ill, because the Debt on the Bill was extinguished by the Bond, therefore this Plea amounted to the general Issue; the Defendant ought to have pleaded *Non assumpsit*, and to have given the Bond in Evidence. 5 *Mod.* 314. *Hackshaw versus Clerke*.

7. Case, &c. for exhibiting a Petition against him to the King in Council, for erecting Cottages in *Kingwood* Chace; that he was compelled to appear at great Expence, and was afterwards discharged; the Defendant pleads, that the Chace was injured by erecting Cottages, by digging Pits, and by the Plaintiff's making a Warren there, &c. and upon a Demurrer to this Plea it was objected, that it amounted to no more than the general Issue, for the Declaration was, that the Defendant had falsely charged the Plaintiff before the King in Council, which is Matter of Fact, to which he need not plead specially, but Not guilty, of which Opinion was the Court, and advised the Plaintiff to waive his Demurrer, and the Defendant to plead the general Issue. 3 *Mod.* 166. *Newton versus Creswick*.

8. In Trespass, &c. the Defendant pleaded and set forth a Right by Prescription, for the Bishop of *Salisbury* to grant Replevins in such a Manor, and that the Horse, for the Taking whereof this Action was brought, was the Horse of *W. R.* and being impounded, the Defendant took him by Replevin; adjudged, this Plea is no more than the general Issue, for the Impounding by the Plaintiff did not gain any Possession, because the Horse was then in Custody of the Law; so that this Plea admitting no Possession in the Plaintiff, by Consequence he hath no Colour of Action. 1 *Salk.* 394. *Holler versus Bush*.

9. Adjudged, that where an Action of Debt is brought, the Defendant may have a Release, because it admits the Debt, which is a Colour of Action, and yet if he had pleaded *Nil debet*, he might have given it in Evidence; so in *Assumpsit* the Defendant may plead Payment, because it admits the Promise, tho' he might have given it in Evidence upon the general Issue. 1 *Salk.* 394. *Hutton versus Morfe*.

10. In *Assumpsit*, the Defendant pleaded, that he had performed all Things which on his Part ought to be performed; it was adjudged, that this amounts only to the general Issue; this seems contrary to the Case last mentioned, because by this Plea the Promise is admitted, and the Performance of all Things, &c. is but a Discharge of that Promise. 1 *Salk.* 394. *Sea versus Taylor*.

(B)

Of Payment of a less Sum in Satisfaction of a greater, good, and not good; and of Payment without an Acquittance. See *Pinnell's Case*.

1. **D**EBT on a Bill, in which there was a Proviso, that it should not be paid until *B. G.* had recovered in an Action then depending against the now Plaintiff, on a Bond of 200 *l.* conditioned to save him harmless, or hath made an End of the Suit; the Defendant pleaded, that no End was made of the Suit on the Bond of 200 *l.* but that the same was still depending; the Plaintiff replied, that an End was made of the Suit on the Bond of 200 *l.* by Composition and Payment of 20 *l.* which was accepted in full Satisfaction of the Action; after a Verdict for the Plaintiff it was objected, that 20 *l.* would not be a Satisfaction for 200 *l.* which is true, if it was paid after the Day when the 200 *l.* became due, but here it was paid to end the Suit, and accepted in full Satisfaction of the Action of 200 *l.* and before it was due, and not in full Satisfaction of the Sum of 200 *l.* 3 *Bull.* 301. *Thompson versus Butcher*. See Deeds. (A) 13. *S. C.*

2. Debt by an Executor upon a Bond given to the Testator; the Defendant pleaded Payment of a less Sum than mentioned in the Bond to the Testator himself, which he accepted in full Satisfaction of the Bond; adjudged, that it was the best Way to take Issue upon the Payment and not upon the Acceptance. *Style* 239. *Bois versus Cranfeild*, and 263. *Dowse versus Masters*. *S. P.*

3. Judgment against the Defendant upon a Bond of 400 *l.* and a *Sci. fa.* was brought against him, to shew Cause why he should not have Execution for 300 *l.* without shewing that the other 100 *l.* was paid: The Defendant moved, that the *Sci. fa.* might be abated for this Reason, but he was ordered to plead it; the Court being of Opinion, that it shall not be intended that the other 100 *l.* was paid to the Plaintiff, he having brought his Action for no more than 300 *l.* but said, that if Debt be brought upon a Bond for 20 *l.* and upon Oyer it appears to be a Bond for 40 *l.* and the Plaintiff doth not shew how the other 20 *l.* is satisfied, 'tis not good; and that there was no Difference between an Action of Debt on a Bond, and a *Sci. fa.* on a Judgment as to this Matter. *Godb.* 79.

4. Covenant, &c. upon a Lease of an House, in which there was a Covenant to pay Rent, and to repair; and the Breach assigned was, that the Defendant had not paid 31 *l.* for Rent then in arrear, nor repaired; the Defendant, as to the Rent, pleads in Bar, that he paid to the Plaintiff 5 *l.* 5 *s.* before the Action brought, *which he accepted in full Satisfaction of all Rent*; but according to *Pinnell's Case* it should be likewise alledged, that the Plaintiff paid it in full Satisfaction, &c. because the Manner of Payment must be directed by him who pays, and not by him who receives it. 1 *Lutw.* 347. *Brook versus Foweraker*.

(C)

Of Pleadings concerning the Jurisdiction of Courts. See *Justification*.

1. **I**N a Writ of Entry *sur Disseisin*, the Tenant pleaded, that the House in Demand was within the City of London, which is an antient City; and that *H. 3.* granted to the Citizens, &c. that they should not be impleaded for their Lands or Tenements, without the Walls of the said City, &c. and he farther pleaded, *Quod illis rectum teneatur infra Civitatem prædictam secundum consuetudinem*, &c. adjudged, that this Plea was ill, because the Tenant did not shew before whom they should be impleaded by Virtue of their Custom; he ought to have said, that the Citizens, &c. ought to have been impleaded for their Lands and Tenements there, before the Lord Mayor, &c. in the Court of *Hustings*. 3 *Leon.* 148.

2. Some Jurisdictions are limited to the Persons; as in the Case of the *Marshalsea*, where, if an Action of Debt or Covenant is brought, both the Plaintiff and Defendant must live *within the Verge*; but in an Action of Trespass 'tis sufficient, if one of them live within the *Verge*. 10 *Rep.* 68. *Case of the Marshalsea*.

3. Trespass, &c. the Defendant justified, for that the Plaintiff was a common Baker, dwelling in *B.* and that it was presented in a Leet in *B.* that he sold Bread against the Assise, &c. whereupon he was amerced, and the Amerciament assessed to 10 *s.* and that by Virtue of a Precept of the Court, he did distrain for it, &c. adjudged, that the Plea was ill, because it doth not appear, that the Offence was committed within the Jurisdiction of the Leet, which shall never be intended unless pleaded; besides, the Plea is absurd, for it sets forth, that the Plaintiff was amerced, but doth not say in what Sum. *Hob.* 129. *Wilson versus Hardingham*.

4. In Debt, &c. the Defendant pleaded the Jurisdiction of the Court granted by King *Edw. 6.* to the Tinnars in *Cornwall*, that they should not be sued but only in the Court of *Stannaries*, for any Cause arising within the *Stannaries*; then he set forth, that he is a Tinner, and that the Cause of Action did arise within the Jurisdiction of that Court; adjudged a good Plea, but that he ought to set forth the Grant, because he is Privy to it. *Moor* 849. *Buckham versus Denbridge*.

5. But where it doth not appear in the Declaration, it must appear in the Plea, which if the Court refuse, being rendered *before Impar lance*, and sworn; or if the Court receive the Plea, and afterwards proceed, 'tis *coram non judice*, and both Judge and Officer are liable to an Action: 'Tis true, where Actions are brought in Inferior Courts, the Plaintiff must entitle the Court to a Jurisdiction, by shewing in his Declaration, that the Cause of Action did arise *infra jurisdictionem*; but 'tis otherwise where a Defendant justifies for a supposed Trespass, under any Warrant or Judgment given in such Court, for all the Proceedings shall be intended regular till the contrary is shewn; therefore in Assault and Battery against a Constable, and two others, they justified under a Presentment at a Leet, and a Warrant made by the Steward, directed to the Constable, who with the other two Persons came to the House of the Plaintiff to execute it, and there the Plaintiff assaulted them; whereupon the Constable commanded those two Persons to lay hold on him, and they *molliter manus imposuerunt*, &c. *quæ est eadem*, &c. and upon Demurrer to this Justification amongst other Objections, it was insisted, that the Defendants had not shewn in their Plea, that the House where the Wrong was supposed to be done, was *infra jurisdictionem* of the Leet; but adjudged, that the Presentment at the Leet, and the Constable's Commanding the other two Defendants to assist him in the Execution of the Warrant, was the Substance of the Justification, and the other Matter was but an Inducement to it. *Moor* 847. *Curtis's Case*.

6. It hath been a Question, whether a Judge or Officer is liable to an Action for proceeding in a Cause, or executing Process in Causes arising * out of the Jurisdiction of the Court; and as to that 'tis to be considered, that some Jurisdictions are limited to the Subject Matter, as the Commissioners of Excise have Power to lay Impositions on Strong Waters; and therefore if they adjudge Low Wines to be Strong Waters, they exceed their Jurisdiction, and 'tis * void; and in such Case, those who act under them are not privileged. *Hudr.* 480. *Terry versus Huntington*.

* 4 Mod.
347.

Crump v.
Holford.

* *Hardr.*
478. *Pan-*
pillon v.

Buckner. S. P.

7. Some Jurisdictions are limited to the Place; as that of the Justices of Peace about the Confirming the Poor Rates, which must be for the Relief of the Poor of the Parishes where they live. *Cro. Car.* 394.

8. Where the Person in pleading is to set forth the Jurisdiction of any Court, 'tis sufficient if he only say *Curia tenta, &c.* without setting forth all the Formalities, how, and before whom it held. *Godb.* 277. *Webb versus Tuck.*

9. If it appear in the Declaration it self, that the Cause of Action did not arise within the Jurisdiction of the Court, then all the Proceedings are *coram non judice*; and that was the Judgment in the Case of *Richardson versus Bernard.* *March* 8.

10. In Trespass, &c. and Imprisonment *quousque* he paid 60 *l.* the Defendant pleaded to the Jurisdiction of *B. R.* for that the Trespass, if any, was done by the Command of the Parliament, (the Defendant being their Serjeant at Arms) and commanded by them to bring the Plaintiff before the House for divers Misdemeanors by him committed, concerning the choosing the Knights of a Shire to sit in *Parliament*, and that the Matter ought to be determined there, and not elsewhere, & *hoc, &c. unde non intendit quod Curia hic cognoscere velit aut debeat*; and upon a Demurrer to this Plea the Court would not hear any Argument to maintain it; but the Defendant was ruled to answer over. *T. Jones* 208. *Verdon versus Topham.*

11. So where the Defendant justified under a *Warrant out of the Court of Admiralty*, and did not aver, that it was a *maritime Cause*; adjudged, that the Justification was good, for 'tis sufficient to shew the Warrant, which the Officer is bound to obey, and is not obliged to shew, that the Cause of Action did arise *infra jurisdictionem.* 2 *Lev.* 131. *Ac. Case.* (V) 19. *S. P.*

12. In Trespass, Assault, Battery and False Imprisonment; the Defendants justified under a Plaint levied against the now Plaintiff in an Inferior Court for a Debt of 20 *l.* and Process thereon, &c. without averring, that the Cause of Action did arise within the Jurisdiction of the Court, and upon Demurrer this was held a good Justification, without such Averment. 2 *Lutw.* 935, 1506. *Gwynn versus Pool.*

13. Prohibition to the Court of *Woodstreet Compter*, to an Action of Debt, for that *before any Imparance* the Defendant pleaded, that the Cause of Action arised out of the Jurisdiction, and offered to swear his Plea; but that Court refused it; whereupon a Prohibition was granted. 1 *Mod. St.* 1 Vent. 333. *Raym.* 180. *St. Aulin versus Cox.*

14. Debt in *London*, the Defendant moved for a Prohibition, suggesting, that he tendered a Plea below, that the Cause of Action did arise out of the Jurisdiction, &c. and offered to make Oath of it; 'tis true, he tendered such Plea after the Court was up, whereas it ought to be *sedente Curia & in propria persona*; and now offering to make *Affidavit* in *B. R.* of the Truth of his Plea, it was denied, because he must make it in that very Court whose Jurisdiction is ousted thereby. *Mod. Cases* 146. *Sparks versus Wood.*

(E)

Not answering the Declaration, but only Part. See *Arbitrament.* (N) *Covenant.* (D) *False Imprisonment.* (B) *Traverse.* (B) *per totum.* *Trespass.* (K)

1. **I**N Ejectment, the Plaintiff declared on a Lease, as if made of Lands which were Freehold; the Defendant pleaded, that the Lessor was a Copyholder in Fee, and that he surrendered to the Use of him the said Defendant in Fee, who was admitted; and upon Demurrer it was adjudged, that the Plea was not good, because it proves the Lands to be Copyhold, and doth not answer the Declaration, which was for a Freehold. *Cro. Eliz.* 728. *Kensley versus Richardson.*

2. Debt against Husband and Wife, Executrix of the last Will of *B. B. nuper diē B. B. of London, Taylor*; the Defendants pleaded in Bar a Judgment obtained against them in the Court of King's Bench, as Executrix of the last Will of *B. B. nuper diē E. B. of London, Barber Surgeon*; and upon Demurrer, this was adjudged no good Plea, for the Testator shall not be intended to be one and the same Person. *Goldf.* 111. *Gomerfall versus Hooker.*

3. Trespass, &c. for Breaking his Close 8 *May*, and eating up the Grass, *Equis, Bobus & Vacci*, with a *Continuando* to the 25th of *June* following; the Defendant prescribed, for Common of Pasture for two Geldings from the first of *May* until the Grass there growing be cut and made into Hay, and so justifies the Putting in the Geldings, and their Continuing there till the 20th of *June*, and averred, that the Grass was not cut down until the aforesaid 20th of *June*; adjudged, that this Plea is not good, because the Trespass is laid to be done *Equis, Bobus & Vacci*, and the Defendant justifies only for two *Horses*, and says nothing of the *Oxen and Cows*; besides, 'tis alledged to be done 8 *May*, with a *Continuando* to the 25th of *June*, and the Defendant justifies only to the 20th of *June*, and says nothing to the five last Days. 2 *Cro.* 27. *Thornhill versus Laffells.* *March* 21. *Buckly versus Skinner.* *S. P.*

4. In Trespafs for Breaking his Houfe, and entering into his Lands, &c. the Defendant pleaded, that his Testator was Lessee for Life of the Lands, and that he died, and the Defendant being his Executor, suffered the Cattle to go there for six Days, and so justified with an Averment, that he could procure no other Place within that Time, &c. adjudged, that the Plea was ill, because he had only set forth a Lease of the Lands, and said nothing as to the Houfe mentioned in the Declaration. 2 Cro. 204. *Stodden versus Harvey*.

5. In Trespafs for an Assault and Battery against two Defendants, and that *tantas minas de vita imposuerunt*, that he did not dare to go about his Business; the Defendants pleaded *Son assault demesne*, and said nothing as to the Threatning, which being assigned for Error, after a Judgment, it was affirmed, because the Threatning was only laid to encrease the Damages; and it was not the Substance of the Action. Moor 704. *Penruddock versus Errington*.

6. Trespafs, &c. for a Battery on his Servant *per quod servitium amisit*; the Defendant justified, for that he was possessed of an House, &c. to which there was an antient Light Time out of Mind, and that the Defendant's Servant intending to build an House on certain Waste Ground adjoining, had set up some Timber for that Purpose, which House, if it had been built, would have stopped the Defendant's Light; and for that it would have been a Nuisance, he (standing in his own House) did thrust away the Servant with a Stick, and threw down the Timber, &c. and upon a Demurrer to this Plea, it was objected, that it was ill, because he justified the Battery, and said nothing as to the Loss of Service: *Sed per Curiam*, 'tis well enough, because the Loss of Service is only the Consequence of the Battery, which is the Principal. 1 Roll. Rep. 393. *Norris versus Baker*.

7. In Trespafs for Breaking his Close, and carrying away two Cart-Loads of Timber; the Defendant in his Plea made a Title to the Close, and so justified the Taking the Timber; and upon a Demurrer to this Plea, it was adjudged ill, because the Defendant did not answer to the *Two Loads of Timber*; 'tis true, if the Timber had been growing on the Land, then by making a Title to the Land, he had a Title to the Timber; but it doth not appear either by the Declaration or Plea, that it was growing, or that the Taking was Damage-feasant on the Land; so that Part of the Declaration is not answered. 1 Roll. Rep. 406. *Dens versus Dens*.

8. *Replevin*, &c. the Defendant avowed, that the Dean and Chapter of *Westminster* were seised *in jure Collegii*, but did not say, *to them and their Successors*, nor of what Estate they were seised; and that they made a Lease for ninety-nine Years, &c. under which Lease he claimed, &c. and upon Demurrer it was held ill, for the Reasons before-mentioned. Latch 121. *Wood versus Newman*. *Postea* Pleas (G) 4. S. C. reported by *Mosse versus Newman*. Poph. 165. S. C.

9. Trespafs for Taking a Load of Fetches; the Defendant pleaded, that Part thereof did grow upon White Acre, and Part upon Black Acre, and so derived a Title to both, &c. and upon Demurrer adjudged ill, because he did not shew how many Fetches grew upon each Acre. Latch 174. *Serwood's Case*.

10. In Trespafs for an Assault and Battery, &c. on the last Day of October, 6 Car. &c. the Defendant justified, for that 13 August 6 Car. a *supplicavit* issued out of Chancery, and thereupon a Warrant was directed to the Defendant, who by Virtue thereof arrested the Plaintiff 21 Septemb. following, &c. the Plaintiff made an ill Replication, to which the Defendant demurred; but then it was objected against the Plea, that it was not good, because the Plaintiff had declared for an Assault on the last Day of October, and the Defendant did neither answer or Traverse that Day in his Plea; but it was adjudged good. Mich. 7 Car. Cro. Car. 165. *Tiler versus Wall*. S. C. See Traverse (A) 12. S. P. Justification.

11. In Covenant the Plaintiff declared, that he covenanted with the Defendant to sail to *D. in Ireland*, and there to take in 280 Men from the Defendant, and transport them to *Jamaica*; and that the Defendant covenanted to have 280 Men ready, and to pay 5 l. per Man, for their Transportation, and says, that the Defendant had not 280 Men there, but only 180, and that the Plaintiff transported them, but the Defendant had not paid the Money; the Defendant pleads, that he had 280 Men there ready, which he tendered to the Plaintiff, and that he would not receive them; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Defendant had not answered the Carrying the 180 Men, and the Non-payment of the Money for the Carrying them; so that it answered only Part of the Declaration. 1 Lev. 16. *Thompson versus Noell*.

12. In Trespafs for an Assault, Battery and Imprisonment; the Defendant pleads, that the Trespafs, Assault and Imprisonment were done such a Day, and then pleads the Statute of Limitations, &c. and there being a Replication, Rejoinder and a Demurrer, it was objected, that the Plea was ill, because there was no Answer to the Battery; but adjudged, that *Transgressio pradiet* is an Answer to the Whole. 1 Lev. 31. *Prideaux versus Webber*.

13. Debt on Bond, conditioned to deliver Goods on such a Day; the Defendant pleaded, that he delivered them according to the Form of the Condition; and upon Demurrer, it was adjudged, that he ought to have pleaded expressly according to the very Words of the Condition, that he did deliver the Goods on the said Day, and not generally, as he did by this Plea. 1 Lev. 145. *Brooks versus Dean*.

14. The Plaintiff being Treasurer at an Horse-Race, delivered to the Defendant a Piece of Plate, upon a Supposition, that his Horse had won the Race, and the Defendant entered into a Bill Penal of 40 l. reciting this Matter, and to pay it to the Plaintiff, if he the Defendant did not redeliver the Plate to the Plaintiff, if within three Months after the Date of the Bill, it should

sufficiently *appear to the Ld. Brudenell*, that *Cripple* was not the proper Horse of the Defendant for one Month before the Race; and now in an Action of Debt brought on this Bill, reciting all this Matter, the Plaintiff averred, that within three Months after the Date of this Bill, it *sufficiently appeared before the Ld. Brudenell* by three credible Witnesses, that *Cripple* was not the proper Horse of the Defendant, &c. The Defendant pleaded, that the Horse called *Cripple* was his proper Horse at the Time, and a Month before the Race; there was a Replication and Rejoinder, which concluded to the Countrey; and upon a Demurrer it was adjudged, that the Plea was ill, because it did not answer the Declaration; for when the Parties had agreed in what Manner and before whom it *should appear*, that the Horse called *Cripple* was the Defendant's Horse, it ought to be determined in that Manner, and not by a Trial on an Action on the Case, as this would be by this Pleading: Now here the Declaration was, that it did sufficiently *appear before the Lord Brudenell*, that *Cripple* was not the Defendant's Horse, and the Plea is, that *Cripple* was his proper Horse, which doth not answer the Declaration. 3 Lev. 240. *Beayn* versus *Beal*.

15. Assault, Battery and False Imprisonment, till the Plaintiff had paid 11 *l.* 10 *s.* the Defendant justified under an Execution, and a Warrant thereon for 11 *l.* and did not mention the 10 *s.* and upon a Demurrer to this Plea, it was adjudged ill, because it appeared by the Declaration, that the Defendant took more than was warranted by the Execution. 2 *M.d.* 177. *Harding* versus *Ferne*.

16. Covenant upon Articles of Agreement, and the Breach assigned was for Non-payment of Rent reserved upon a Lease of an House, which Rent the Defendant covenanted to pay, but had not; the Defendant pleaded, that after the Executing the Articles, the Plaintiff had pulled down and carried away a Pent-house, which was fixed to the House, and was Part thereof, and detained it before any Rent was due, & *adhuc detinet*; and this he pleaded in Bar to the Action; and upon a Demurrer to this Plea the Plaintiff had Judgment, for it was no Answer to the Non payment of the Rent; 'tis not a Suspension of it, but a meer Trespass, for which the Defendant might have brought an Action. *Trin. Jones* 148. *Roper* versus *Loyd*.

17. In Replevin for Taking *Bona, Catalla & Averia*, &c. the Defendant made Cognisance for Taking *Averia* only, for that a Rent-Charge of 100 *l. per Annum* was granted to him out of the said Lands, payable half yearly, at *Michaelmas* and *Lady-Day*, &c. and that 33 *l.* Part of 50 *l.* for half a Year's Rent was in Arrear, for which he distrained, &c. and upon a Demurrer to this Cognisance, it was held ill, because it was only an Answer to the Taking of live Cattle, (*viz.*) *Averia*, and no Answer to the *Bona & Catalla*; and it was for 33 *l.* Part of 50 *l.* and did not shew how the Residue, (*viz.*) 17 *l.* was satisfied. 4 *Mod.* 402. *Hunt* versus *Braines*.

(F)

Not good for Uncertainty; too general and argumentative, and where good.

1. **Q**uare Impedit against the Bishop, and against *Bury* the Patron, and *Lingard* the Incumbent; the Patron pleaded, and Issue was taken, but he died before the Trial; the Incumbent pleaded another Plea, and Issue was joined, and afterwards, and before Trial, he pleaded, that the Queen by Letters Patents presented *Clerk* to the Bishop, to be Incumbent, &c. who was admitted, instituted and inducted, and that *Lingard* was instituted and inducted, &c. and so prays Judgment, if the Court will proceed to take the Inquest between the Queen and him; and upon a Demurrer to this Plea it was adjudged ill, because he did not shew how he being Incumbent, avoided the Benefice; and it shall not be intended, that he was out of the Benefice unless he shew it; and if he is Incumbent, then 'tis impossible that *Clerke* should be so likewise; but 'tis an argumentative Plea, for he pleads that he is Incumbent, *ergo Clerk* is not; and for that Reason 'tis ill. 2 *And.* 178. *The Queen* versus *Bury and Lingard*.

2. In Replevin, the Defendant justified for Common appendant to a Manor or Messuage, called *Cursall*, upon which they were at Issue; and it was objected, that it was uncertain by this Plea to which the Common did belong, either to the Manor, or to the Messuage; & *per Curiam*, a Repleader was awarded; so in Trespass the Plaintiff made a new Assignment in an Acre *terre five prati*; and upon Not guilty pleaded, *per Curiam*, the Writ abated for this Uncertainty. 1 *And.* 31.

Yelv. 180. 3. In Ejectment, the Plaintiff declared of Lands in *B.* and in two other Villages; the Defendant pleaded Entry and Expulsion into and from a Close, Parcel of the Premises, and did not shew in which of the Villages the Close was; and upon Demurrer it was held ill for that Reason, for 'tis so uncertain, that there cannot be Trial for want of the Place. 2 *Cro.* 261. *Hawkins* versus *Moor*. 1 *Brownl.* 139. *Thompson* versus *Collier*. S. P.

4. In Trover for two Loads of Corn, the Defendant justified the Taking by the Command of *H.* to whom Part of the Land did belong on which the Corn did grow, and by the Command of *P.* to whom the other Part of the Land did belong; and because he did not shew

particularly how much did grow on the Lands of each of those Persons, this Plea was ill. *Poph. 208.*

5. In Trespass, Assault and Battery, the Defendant pleaded, that he *was possessed* of an House for a Term of Years, and that the Plaintiff would have thrust him out, and thereupon he (the Defendant) *molliter manus imposuit*, and so justifies in Defence of his Possession; and upon Demurrer to this Plea, the Defendant had Judgment, for tho' the Defendant did not shew who made the Lease for Years, or for how many Years he was possessed, or any particular Estate, yet his Plea was good, because the *Possession for Years* was but an Inducement to his Justification; and it was the Possession and not the *Title*, which was the principal Matter. *Cro. Car. 138. Skevill versus Averie.*

6. Debt for Rent brought against an Assignee of a Lease for Years, who pleaded *quoad 20 l.* Part of the Rent, *Nil debet*; and as to the Residue of the Rent, that he had assigned the Lease to another, &c. this Plea was adjudged ill, because the Defendant did not particularly shew in what Year the 20 l. was due. *Sid. 338.*

7. Debt upon Bond, conditioned, to make Satisfaction for all Goods that an Apprentice shall Waste; there was a Plea, and in the Replication the Plaintiff assigned a Breach, that the Apprentice had wasted several Goods to the Value of 100 l. and upon a Demurrer to this Replication it was objected, that it was too general, for he ought to shew what the Goods were; which is very true, if it had been in an Action of Covenant, or in any other Action where Damages are to be recovered, but not in an Action of Debt on a Bond where the Penalty is to be recovered upon any Breach of the Condition. *1 Lev. 94. French versus Peirce.*

8. *Assumpsit*, &c. for that the Defendant being bound in a Bond, conditioned for Payment of Money, Part whereof was not paid, he promised, that if he did not make it appear before *T. S.* that it was paid, he would pay it; which he had not done: The Defendant pleaded, that he did make it appear before *T. S.* that it was paid; and upon Demurrer to this Plea the Plaintiff had Judgment, because he did not shew *how* he made it appear; and in Error in *B. R.* this Judgment was affirmed. *2 Lev. 125. Wilson versus Done.*

9. Error of a Judgment in Debt on Bond, conditioned to pay *all the clear Profits* of a Coal-mine; the Defendant pleaded Performance according to the Condition; the Plaintiff replied, that the *Profits* amounted to 20 l. which the Defendant had not paid: The Defendant rejoins there were no *clear Profits*, upon which they were at Issue, and a Verdict for the Plaintiff, and in which the Jury found there were *clear Profits in Manner and Form, as the Plaintiff had replied*, &c. and now the Error assigned was in the Replication where the Profits were mentioned, (*viz.*) 20 l. but did not say *clear Profits*; 'tis true the Jury found that there were clear Profits *in Manner and Form as the Plaintiff had replied*, when nothing of clear Profits is mentioned in the Replication, for which Reason the Judgment was reversed. *2 Lev. 135. Howard versus Wickliffe.*

10. *Quantum meruit* and *Indebitatus Assumpsit* for Goods sold and delivered to the Defendant, who pleaded *Infancy* in Bar to the Action; the Plaintiff replied, that *Parcel of the Goods* sold were for necessary Clothes of the Infant, and the Residue was for Meat and Drink, &c. the Defendant rejoined, that *Parcel*, &c. was not for Clothes, and *Parcel* was not for Meat and Drink, & *de hoc ponit se super Patriam*, &c. and upon a Demurrer to the Rejoinder, after some Exceptions to it, which were not allowed, the Defendant objected against the Replication, because the Defendant had not distinguished which Goods were for Apparel and which for Food, and so it was uncertain; and this was held a good Exception. *1 Lutw. Rep. 239. Swinburne versus Ogle.* Issues joined. (A) 35. S. C.

11. *Indebitatus Assumpsit*; the Defendant pleads in Abatement, that the Promise was for Carrying the Goods of the Defendant to such a Place, and if there was any such Contract it was made with the Plaintiff and *T. P.* and upon a Demurrer to this Plea it was held ill, because it looks more like an Affidavit to change the *Venue* than a Plea; besides, he ought to have averred, that *T. P.* was living. *1 Vent. 183. Butcher versus Cowper.*

12. Covenant, &c. wherein the Plaintiff declared upon a Demise of a Passage over a River, with Liberty to take Toll, rendring 45 l. *per Annum*, and that tho' the Defendant *had enjoyed the said Passage*, &c. yet he had not paid the Rent; the Defendant pleaded, that the River, &c. was free and common, &c. to pass with Boats; and that the Plaintiff, both at the Time of Making the Lease, or at any other Time, had nothing of Passage or Toll on the said River to grant to the Defendant, &c. and upon Demurrer, three Judges against *Ventris* held it *to be double*; but he was of Opinion, that the Alledging that the Plaintiff had nothing of Passage or Toll on the River, was only the Consequence, that it was a free and common River; for if the River was free, then the Plaintiff could not be entitled to Toll; like *Calfe* and *Newil's Case*, which was a *Scire facias* against the Bail; the Defendant pleaded, that the Principal *rendered himself to Prison* before the *Scire facias* brought, and *died in Prison*; now either of these Matters had been a good Plea to the *Scire facias*; but yet both together were held not to be double; however, the whole Court resolved this Plea was ill, because the Plaintiff having alledged, that the Defendant *enjoyed the Passage*; and it not appearing to the contrary, the Rent must be paid so long as he enjoyed; therefore he should have *traversed the Enjoyment*. *2 Vent. 67. Bainton versus Bobber.*

13. In Debt for Rent, the Plaintiff declared upon *two Demises* of a Messuage and Lands, &c. The Defendant pleaded in Bar, that *tempore demissionis*, the Plaintiff *nil habuit in tenementis*; the Plaintiff replied, that before the several Demises, &c. the Lord *Wotton* leased the Premises to

the Plaintiff for forty Years, *haben' jus & titulum & plenam potestatem* to demise the same for forty-one Years, by Virtue whereof the Plaintiff entered; and upon Demurrer to this Replication it was objected to be ill, because the Plaintiff did not set forth what Estate the Lord *Wotton* had when he made this Lease; for 'tis not sufficient to alledge, that he had *plenam potestatem* to demise; he should have shewed, that he was seised in Fee, or of some other Estate, by Virtue whereof he had Power to make a Lease; and so is *Glasses's* Case, which see in *Replication*. (B) 13. and to this Opinion the Court inclined: Then the Plaintiff excepted to the Plea in Bar, for that there were two Demises alledged in the Declaration, and the Defendant pleaded *tempore dimission' nil habuit*, which might be very true in Respect to one Demise but not to the other; therefore it should be *temporibus dimission'* and not *tempore*, for that relates to one Demise and no more; but adjudged, that tho' the Word *Tempore* might serve, yet the Defendant ought to have pleaded distinctly, (*viz.*) that the Plaintiff *Nil habuit at the Time of the first Demise*, and so at the Time of the second Demise; for as 'tis pleaded, 'tis very uncertain, whether the Plaintiff had a Title or not when each of these Leases were made. 2 *Vent.* 253, 270. *Harris* versus *Parker*.

14. In *Replevin*, &c. the Defendant avowed, for that the Place where, &c. was Parcel of the Manor of *F.* &c. and that the Mayor, Bailiffs and Commonalty of *Coventry*, and one *Millon* and others were seised in Fee thereof; and being so seised by a Lease made between them of one Part, and one *Bassnet* of the other Part, *testatum existit*, that the said Corporation and the natural Persons had demised the said Manor to the said *Bassnet*, &c. it was adjudged, that this Plea was ill, because the Avowant had not laid the Lease in *Bassnet* by an exprefs Averment in Fact, that it was made to him, but only by a *testatum existit*, which is not good Pleading, because not positive. 2 *Saund.* 319. In *Bennet* and *Holbeck's* Case.

15. In *Assumpsit*, the Defendant *cognovit actionem*, but in Bar to Execution of his Person, Apparel, Bedding, Tools, &c. he pleaded the Statute 2 & 3 *Annæ*, cap. 16. for Discharge of poor Prisoners. setting forth, that he was actually a Prisoner in the *Marshalsey* such a Day and Year, and was *liber & d.* discharged by the Justices at such a Sessions *juxta formam Statuti*; and upon Demurrer to this Plea it was insisted, that the Declaration was ill, for that it did not appear that he performed the Justice: besides, the Defendant did not shew all his Qualifications to bring him within the Act, adjudged, that the Defendant ought in his Plea to set forth all the Circumstances of his Case in a certain Manner, to bring him within the Act, and that he ought not to put it upon the Plaintiff, who is a Stranger. 2 *Salk.* 521. *Turner* versus *Bale*.

16. In *Covenant*, the Plaintiff declared, that he was *seised in Fee*, and that by Indenture made between him and his Wife of the one Part, and the Defendant of the other, *testatum existit*, that they demised, &c. it was objected, that this Declaration was uncertain, for it sets forth, that the Husband was *seised in Fee*; if so, the Husband and Wife could not demise, because he was sole seised; but adjudged, that the *Testatum existit* is not an Averment of the Demise, 'tis only a Rehearsal, and no more. 2 *Salk.* 515. *Woodward* versus *Cliffe*.

(G)

Not good Where the Estate and Title are not set forth, and good without it.
See *Property*. (C) per totum.

1. **W**Here the Plaintiff declared, that *possessionatus fuit*, the Declaration was held good; but 'tis not so in a Plea, because no Issue can be taken upon it. 1 *Roll. Rep.* 394.

2. Case, &c. wherein the Plaintiff declared, that in Consideration he would *license* the Defendant to depasture ten Sheep in a Field called *Tredown*, from *September* to *April*, that he would pay for the said Pasture as much as it was worth; and sets forth, that he did *license* the Defendant to depasture his Sheep, and that it was worth so much; it was objected against this Declaration, that the Plaintiff did not shew what Estate he had in this Plea, that it might appear he had Power to license the Defendant, &c. *Sed per Curiam*, if this Objection had been after a Verdict, as it was now upon a Demurrer, it would not have been allowed, because the Plaintiff must have proved, that he had Authority to license the Defendant: Judgment for the Plaintiff. 2 *Roll. Rep.* 435. *King* versus *Stephens*.

3. In *Trespas*, the Defendant pleaded in Bar, that *possessionatus fuit* of a Piece of Ground, called the *Market Baulk* at *Melton*, and so justified the Taking, &c. *Damage-seafant*; and upon Demurrer it was held, that *possessionatus fuit* was ill, without shewing the Commencement of his Estate. 2 *Lutw.* 1489. *Pell* versus *Garlick*. *Trespas*. (K) 14. 'tis true, where a Title may come in Question, such a Plea is not good; but the Matter of this Plea is collateral to the Title; and it hath been several Times adjudged, that in *Trespas* the Defendant may justify upon *his Possession*, because that is a good Title against all Wrong-doers; but it may be otherwise in *Replevin*. *Cro. Car.* 138. 2 *Mod.* 70. 3 *Mod.* 132. 4 *Mod.* 419. *S. P.*

4. In *Replevin*, the Defendant avowed, for that *B. B.* was seised *in jure Collegii*, &c. but did not say *in Dominico suo ut de feodo*; and upon a Demurrer, for that Reason it was adjudged, that the Defendant should have pleaded, that they were seised in Fee; for tho' a Dean and Chapter, in Point of Creation, have a Fee, yet in Pleading it must be shewed specially what Estate they have, because they may have an Estate for the Life of another; and this being in an Avowry,

shall

shall be taken strictly. *Poph. 165. Mosse versus Newman. Latch 121. S. C. reported between Wood and Newman. March 1. S. P.*

5. Covenant on a Deed not indented, in which the Plaintiff declared on a Lease of Lands made to the Defendant, rendring Rent, and a Covenant to pay it, and assigns the Breach in Non-payment, &c. The Defendant, by Protestation that he did not enter and enjoy the Lands, &c. pleads, that the Plaintiff *Nil habuit in Tenementis tempore dimissionis*; the Plaintiff replied, that *Habuit bonum titulum unde potuit dimittere*; and upon a Demurrer to this Replication, it was adjudged ill, because he did not set forth what Title he had. *3 Lev. 193. Aylt versus Williams. See Glasse versus Gill. S. P.*

6. Debt upon Bond, conditioned for Performance of Articles, in which the Defendant *granted and agreed* with the Plaintiff, his Heirs and Assigns, that he should always have a Way, &c. thro' the Defendant's Close, &c. in Consideration whereof the Plaintiff *granted and agreed* to pay the Defendant *6 d. per Annum*, and the Defendant covenanted, that *John Seller*, his Son, should confirm it when of Age; the Defendant pleaded, that his Son *John* was not of Age, and that he had performed all the Residue; the Plaintiff replied, that *John* the Son, since the Articles, (being Tenant to his Father of this Close) had stopped the Way; and upon Demurrer it was held, that this was a good Grant of the Way, and not a Covenant only to enjoy it; but that the Replication was ill, because the Plaintiff did not set forth, that the Son had a Title to stop it, for if he had not, then 'tis only a Trespass, for which the Plaintiff might have his Remedy by an Action of Trespass, and not by an Action of Debt against the Covenantor. *3 Lev. 305. Holmes versus Seller.*

7. Case, &c. in which the Plaintiff declared, that he was *possessed of a Tenement*, and of a Close of Pasture in *Shepton Mallet*, and that he had Right of Common in *Mendip Forrest*, & *de jure debuisset habere communiam tanquam ad tenementum prad' spectan'*: Upon a Demurrer to this Declaration it was objected, that in this Case the Right and Title was in Question, and that the Action was not founded on the Possession, because *de jure debuisset habere communiam*, imports a Right: *Sed per Holt Ch. Just.* this Declaration is good, and that the Plaintiff need not set forth any Title by Grant or Prescription, because 'tis an Action founded upon the Right of Possession against a Wrong-doer, to which a Title, if it had been set forth, would have been only an Inducement; it stands indifferent to the Defendant, whether the Plaintiff is Owner of the Soil, or not, his Business is to answer the Wrong done, and for which he is charged; 'tis true, if it had been in Trespass for distraining Cattle, and the Defendant had pleaded that he was Owner of the Soil, and so justified, &c. The Plaintiff in his Replication must have shewed a Title; in the principal Case the Judgment was affirmed. *4 Mod. 418. Birt versus Srode.*

8. In *Replevin*, the Defendant *avowed*, for that *T. P.* was possessed of a Messuage, and set forth the Commencement of his Lease, and that he demised to the Plaintiff, rendring Rent, &c. and for *Rent arrear* he *avowed*; the Plaintiff demurred to this Plea, because the Avowant did not shew who granted the Lease to *T. P.* and for this Reason it was held ill; 'tis true, in *Debt for Rent* 'tis sufficient for the Defendant to plead *non dimisit* or *nil debet*; but an Avowry differs from a Declaration in several Things, for there can be no general Issue taken in an Avowry, but some Special Matter must be traversed; and therefore, because it doth not appear out of what Estate this Term was derived, Judgment was given for the Plaintiff; now, the Reason why the Commencement of particular Estates must be shewed in Pleading is, because they are created by the Agreement of the Parties out of the original Estate; and the Court must judge, whether the primitive Estate and the Agreement are sufficient to produce the particular Estate. *2 Salk. 562. Scilly versus Dally. See Cro. Car. 571.*

(H)

Time of Pleading, and of full Defence.

1. **W**Here the Defendant appears upon a Recognisance on the first Day of the Term, and an Information is exhibited against him for a Crime, if 'tis in *Middlesex*, he shall have the whole Term to plead; if in another County, then he shall not be compelled to plead till the next Term; so where he comes in by *Capi Corpus*, or upon an Outlary, he shall plead presently, because he hath been guilty of a Contempt. *2 Salk. 514.*

2. Upon an *Habeas Corpus* returnable in *Michaelmas-Term*, if the Declaration is delivered before *Crastinum Animarum*, the Defendant must plead to issue and try the Cause; but on a *Capi Corpus* he is only to plead to enter; so in *Easter-Term*, if the Declaration be delivered before *minsem Pasche*. *2 Salk. 515. Hall versus Englestone.*

3. Where a Declaration is delivered against one in Custody, he shall have the whole Term to plead in Abatement. *2 Salk. 515.*

4. Before a Joinder in Demurrer, the Defendant may waive his special Plea and plead the general Issue; but where there is a Rule to plead, so as to stand by it, and the Defendant pleads a special Plea, and the Plaintiff demurs, he shall not then waive that special Plea and plead to issue. *2 Salk. 515.*

5. The Defendant pleaded a false Plea in Abatement, *viz.* that the Plaintiff was dead; it was moved, that the Attorney might swear it, but not granted, for the Court cannot compel him in any

any Cafe so to do, but where 'tis a foreign Plea; but they ordered him to plead so as he would stand by it; and if he did that, they would enquire into the Truth of this Plea; and if they found it a Trick and Deceit, they would fine him, for 'tis against his Oath to plead a false Plea: *Note*, They never order a Defendant to plead peremptorily till all the Rules are out. 2 *Salk.* 515. *Pearce versus Blake.*

6. Where Judgment in Ejectment is signed in a Country Cause for Want of a Plea, but no Possession delivered, a Judge in his Chamber, before the Assises, may compel the Plaintiff to accept a Plea. 2 *Salk.* 516.

7. Ruled, that where a Bill is filed against an Officer of the Court, 'tis sufficient if there are but four Days within Term (reckoning Sundays and Holydays) for him to plead. 2 *Salk.* 517. *Pasmore versus Serjeant Goodwin.*

8. Ruled, that where the Plaintiff amends and gives an Imparance, there shall be new Rules given to plead, but if there is no Imparance then no new Rules. 2 *Salk.* 517.

9. In an Action of Trespass, the Plaintiff signed Judgment for Want of a Plea; the Defendant, before the Assises, offered a fair Plea, which the Plaintiff refused, but proceeded to a Writ of Enquiry; and upon a Motion to set aside the Judgment; and that the Plaintiff should be obliged to accept a Plea and go to Trial, it was granted; for where a special Plea contains Matter of Title, and is fair, and the Special Matter not questionable, the Court will interpose. 2 *Salk.* 518. *Wood versus Cleveland.*

10. Ruled, that there is no Difference between a voluntary Appearance and an Appearance upon a *Capi Corpus*; so if the Plaintiff is contented with a voluntary Appearance in Ease of the Defendant, by not arresting him, there is no Reason why he should be in a worse Condition than if he had arrested him; so that if a Writ is taken out, and the Defendant appears voluntarily, he shall plead according to the Return of the Writ; and if the Writ is before *menssem Paschæ*, he shall plead to enter; but if after *menssem Paschæ*, he shall have an Imparance till next Term. 2 *Salk.* 518.

11. In Ejectment, the Defendant *venit & dicit*, that the Land is antient Demesne; and upon a special Demurrer to this Plea, because there was no full Defence, it was ruled, that the Plaintiff might have refused to accept it; but if he receives it, he admits a Defence. 1 *Salk.* 217. *Ferrer versus Miller.* See Outlary.

(I)

Where a Plea is double, where not. See *Double Plea per totum.*

1. **F**ormedon in the Descender, wherein the Demandant declared of a Gift in Tail made to his Father, &c. The Tenant pleaded, that the elder Brother of the Demandant had *Issue a Daughter*, who levied a Fine to him with Proclamations, under which he claimed; and upon Demurrer it was objected, that this Plea was double, consisting of two Parts, the one, that the elder Brother had *Issue a Daughter*; the other, that she *levied a Fine*; but adjudged good, and not double, because he cannot come to the one without shewing the other. *Goldf.* 88. *White's Cafe.*

2. In Detinue, &c. the Defendant pleaded, that after the Goods were delivered to him by the Plaintiff, *she married the Lord Audley*; and that, during the Coverture, *the Husband released* to him (the Defendant) all Actions, &c. upon Demurrer to this Plea it was objected, that it was double, having pleaded two Things, (*viz*) *the Property of the Husband by the Intermarriage, and his Release*, when each of them are a good Bar to the Action; but adjudged, that the Defendant could never plead the *Release* if he had not pleaded the Marriage, for it was that which gave the Husband the Property. *Moor* 25. *Lady Audley's Cafe.*

3. In Replevin, the Defendant avowed for Rent arrear, setting forth, that a *Fine* was levied *inter alia* of the Rent, to the Use of T. S. and also a *Recovery*, &c. the Plaintiff replied, in Bar to the Avowry, *Nient comprise in the Fine or Recovery*; and upon Demurrer to this Replication it was insisted, that it was double, for it may be found that the Rent was comprised in the Fine and not in the Recovery; and so it was ruled. 1 *Roll. Rep.* 72. *Parris versus Yeaton.*

4. Adjudged, that where the Defendant pleads a Double Plea, and the Plaintiff demurs generally, if the Plea is sufficient in Matter, the Defendant shall have Judgment, because the Duplicity is helped by the Statute 27 H. 8. but if he demur specially *propter duplicitem*, 'tis otherwise. 2 *Roll. Rep.* 306. *Johnson versus Norris.*

5. The Condition of a Bond to deliver 200 Weight of Hops on a certain Day and Place, in Consideration of 10 *l.* already paid, and 10 *l.* more at the Delivery, and the Plaintiff was to *chuse* them out of twenty-four Bags, of the Obligor's own Growing: *Proviso*, if the Obligee should dislike his Bargain, then he should lose the 10 *l.* already paid; in an Action of Debt on this Bond, the Defendant pleaded, that he was *ready to deliver* the Hops, and that the Plaintiff had not *chose* them; and upon Demurrer it was objected, that this Plea was double; but adjudged it was not, for the Pleading, that he was *ready to deliver* the Hops, was but an Inducement to the subsequent Matter, which was the Chusing them by the Plaintiff, and upon that he chiefly relied, neither ought he to aver, that he had twenty-four Bags of his own Growing; for being bound to deliver them, he is estopped to say, that he had not so many Hops; besides, the Plaintiff ought to do the first Act, which is to require the Defendant to shew him twenty-four Bags of Hops, that he make his Choice. *March* 74. *Brook versus Booth.*

6. Trespafs for an Assault, Battery and Wounding; the Defendant traversed the Wounding, upon which they were at Issue; and as to the Beating he pleaded, that the Plaintiff was his Servant, and that for neglecting his Service *melliter manus imposuit*; and farther he pleaded, that on such Day and Place the Plaintiff *released* to him (the Defendant) all Actions, &c. and upon a Demurrer to this Plea it was insisted, that it was double; for admitting, that neither of them was in Bar to the Action, yet, because distinct Issues may be taken upon them, 'tis double; that Pleas may be double, not only where each is a Bar in its self, but where several Matters are pleaded, one in Bar, and the other in Abatement; or where none of these Matters, or all put together, are in Bar, or where one of them is in Bar, and the other is not; for which Reason the Plaintiff had Judgment; besides, that Part of this Plea wherein the Defendant set forth, that the Plaintiff was his Servant, is ill, because he doth not set forth in what Place, for how long Time, or in what Employment he was *retained*, all which is issuable, it being the very Substance of the Bar; now to say, that he was his Servant generally, gives him no Authority to beat him; for a Steward or Butler, or even a Chaplain, are Servants, and if they are negligent the Law hath provided a Remedy to turn them out of their Service, but not to beat them; the Time of Service is likewise very material, because he may be a Servant at Will; and if so, then a Neglect of that Service is a Determination of his Will; 'tis true, in an Action *per quod servitium amissit*, neither the Time or the Retainer are set forth; but the Reason is, because those are only Inducements to the Action, but in the principal Case the Retainer is the very Foundation of the Bar. *Sid. 175. Bleek versus Groove.*

7. Debt upon Bond; the Defendant craved Oyer of the Condition, which was to pay 40 l. by quarterly Payments every Year, *so long as the Defendant should continue Register to the Archdeacon of Colchester*; then he pleads, that the Register's Office was granted to A. B. and C for their Lives, and that he enjoyed the said Office so long as they lived, and no longer, and that so long he paid the said 40 l. yearly by quarterly Payments; the Plaintiff replied, that the Defendant *did enjoy the said Office longer, and that he had not paid the Money, &c.* and upon a Demurrer to this Replication, it was objected, that it was double; but adjudged, that it was not; for the Defendant cannot take Issue upon the Payment of the Money, because that had been a Departure from his Plea. *1 Mod. 227. Gaile versus Betts*

8. Debt upon Bond conditioned to pay all Costs of Suit, which the Plaintiff's Attorney should charge and to discharge the Plaintiff thereof; the Defendant pleaded, that he had paid it; the Plaintiff replied, that the Attorney charged him so much, &c. which the Defendant had not paid, *nor discharged him* (the Plaintiff) thereof; it was objected, that the Replication was double, (*viz.*) that the Defendant had not paid the Charges, nor discharged the Plaintiff thereof; but adjudged, that the Payment of the Money had been a certain Discharge of the Plaintiff, which not being paid, the Plaintiff was not discharged; but if it had been double the Defendant could not take Advantage of it without demurring, but instead of that he rejoined, &c. *1 Lutw. 419. Parkes versus Middleton.*

9. In Trespafs for Taking *quatuor Pullos*, and for Breaking his Close, called the *Lay of Ground at Moulton*; the Defendant pleaded, he was possessed of a Piece of Ground, called the *Market-Baulk in Moulton*, and so justified the Taking Damage-feasant; and as to the Rest he pleads, that there are several Closes in Moulton called *Lay of Ground*, but none without some other Addition, and that the *locus in quo, &c.* is called *Garlicks Lay of Ground*, and so justifies, for that it was his Freehold; and upon Demurrer, it was objected, that this Plea was double as to the Trespafs in the *Lay of Ground*; first, by alledging, that there is a Close of that Name; and then justifying in a Close called *Garlick's Lay of Ground*; but adjudged, that the former Part of the Plea was only introductory to the Substance of the Plea, and to reduce the Place to a more particular Certainty. *2 Lutw. 1489. Pell versus Garlick. See Trespafs. (K) 57. S. C.*

(K)

Of another Action depending for a former Recovery for the same Cause, not good, and eontra. See Bonds. (N) 14. Privilege. (B) 21. Trover. (F) 8.

1. **L**ease for Years, and afterwards the Lessor made another Lease of the same Lands to the Plaintiff for his Life, who being turned out of the Possession by the Lessee for Years, brought an Action of Covenant against the Lessor upon the Words *Dedi & concessi*, which were only a Warranty in Law; the Defendant pleaded, that before this Action brought the Plaintiff had brought a *Warrantia Chartæ* against him in the Court of C. B. which Action was still depending; and upon Demurrer to this Plea in Bar, the Plaintiff had Judgment, because these Actions are of several Natures; for the *Warrantia Chartæ* is a Real Action, and shall bind the Lands, and the Action of Covenant is Personal, in which Damages only are to be recovered. *Yelv. 139. Pincomb versus Rudge.*

2. In a *Quare Impedit*, the Bishop and Incumbent plead, that there is another Writ depending against the same Bishop, for the same Cause, and that the Disturbance in the Declaration, for which the Plaintiff now complained, and the Disturbance in the other Declaration, are one and the same; the Plaintiff replied, that the first Writ was brought for *another Disturbance*, and traversed, that it *was one and the same*; and upon a Demurrer to this Replication, it was held ill, for tho' the Presentation and Disturbance are both in Question; yet the Presentation is the Chief Thing, the Disturbance is only Accessary. *Tim. 14 Jac. Earl of Bedford versus Bishop of Excester.* 1 *Brownl.* 162.

3. Debt upon a Bond, in which the Defendant and another were severally and jointly bound; the Defendant pleaded, that the same Plaintiff had obtained a Judgment against the other Obligor, for the same Debt, and had Execution for it; and upon a Demurrer to this Plea, it was held good, tho' the Defendant did not shew by what Process, or in what County the Execution was made; for it being a Record shall be tried by Record. *Moor* 29, 30.

Cafe for Words, the Defendant was found Not guilty, yet if no Judgment is entered, the Verdict shall not be any Bar to another Action brought for the same Words. 1 *Brownl.* 11. 2 *Brownl.* 122. *Jacob versus Sowgate.*

4. The Plaintiff obtained Judgment in King's Bench in an Action on the Cafe for slanderous Words, and likewise Judgment in the Common Pleas for the same Words; thereupon he brought a Writ of Error in the King's Bench to set aside that Judgment in the Common Pleas; but the Court would neither reverse or affirm it, but only granted, that Execution might be made on the Judgment in the Common Pleas, but not on the other Judgment. *Moor* 418. *Matthew versus Wood.*

5. Upon a Writ of Error to reverse a Judgment in the Common Pleas, in an Action on the Cafe; the Plaintiff declared that whereas on the 16th Day of December, he at the Request of the Defendant had delivered to him (the Defendant) 100 l. to the Use of his Father, he (the Defendant) promised to repay it to the Plaintiff, at or before May Day following, which he had not done; the Defendant pleaded in Bar, that the Plaintiff had brought an Action of Account against him for the same Money, and had declared, that it was delivered to him (the Defendant) on the 10th Day of December, &c. and averred, that this Action was for the same Money, and still depending; adjudged no good Plea, for these are different Actions, because Damages are to be recovered in an Action on the Cafe, but not in an Action of Account. *Moor* 458. *Barkley versus Foster.*

6. In Account, &c. for Malt; the Defendant pleaded, that the Plaintiff had brought an Action of Trover and Conversion against him (the Defendant) for the same, and for other Malt, and that he was guilty of the Conversion of some Part, and not guilty as to the Rest, and Damages assessed, &c. adjudged this was no good Plea to the Action of Account, because he might convert the Malt to his own Use, as 'tis supposed in the Action of Trover, and yet he ought to account for it, as is supposed in this Action. *Moor* 463. *Mortimer versus Wingate.*

4 Leon. 77. Spring v. Lawton. S. P. 7. Ejectment, &c. adjudged, that 'tis a good Plea in Abatement of the Action to plead, that another Ejectment is depending for the same Lands in C. B. and brought by the same Plaintiff. *Moor* 539. *Digby versus Vernon.*

2 Cro. 73. 2 Cro. 65. 67. 8. In Trover the Defendant pleaded, that the Plaintiff had brought another Action of Trover against one W. R. for the same Goods, and had Judgment and Execution, &c. and upon Demurrer this was adjudged a good Plea in this Action; but 'tis not so in an Action of Debt, because there the Sum in Demand is certain. *Moor* 762. *Brown versus Wotton.*

9. Cafe, in which the Plaintiff declared upon a Promise of the Defendant to pay 40^s l. for such a Thing, and 40 s. for a Mare upon Request; the Defendant pleaded, that the Plaintiff had brought another Action against him, in which he declared, upon a Promise to pay the Money on several Days; and upon Non Assumpsit pleaded, the Defendant had a Verdict and Judgment, which he now pleaded in Bar to this Action; and upon Demurrer to this Plea, it was adjudged no Bar to the Action, because in the first Action the Plaintiff had mistaken the Promise, which was to pay Money at several Days, and that was the Reason that it was found against him; but now he had laid his Action Right, which was, to pay upon Request; and both these Promises can never be the same Contract; so the Plaintiff had Judgment. 1 *Roll. Rep.* 391. *Paine versus Sell.*

10. Cafe for undermining the Plaintiff's House, so that great Part of it fell down: Upon Not guilty pleaded, the Plaintiff had a Verdict and Damages; but not being satisfied with the Damages, he would not enter upon the Judgment, but brought another Action, whereupon the Defendant moved, that he might have Leave to enter it, that he might plead it in Bar to the Action; and it was granted accordingly. *Hudr.* 219. *Andrew's Cafe.*

11. Information for Usury, thus; *Memorandum quod Termino Sancti Michaelis, &c.* and so setting forth the Usury; the Defendant pleaded, that before the Exhibiting the Information, scilicet *Termino Michaelis* (being the same Term) T. S. exhibited an Information against him for the same Usury, and had Judgment; and upon a Demurrer to this Plea, it was adjudged ill, because both Informations refer * to the first Day of the same Term, he should have pleaded, that this Information was exhibited against him on such a Day in the Term, and that at another Day before, in the same Term, T. S. exhibited another against him, and had Judgment thereon, &c. 2 *Lew.* 141. *Hutchinson versus Thomas.*

* Hob. 128, 171 Moor 864. Pie v. Cook.

12. *Replevin* for two Geldings taken 28 July 33 Car. in two Acres, &c. naming them; the Defendant pleaded, that in *Easter-Term*, 33 Car. the Plaintiff brought another Action of Trespass against him (the Defendant) for breaking his Close, and taking *duos equos* of the Plaintiff, &c. and for spoiling his Grass and Corn, and recovered 40 s. Damages, and 14 l. Costs, and averred the Geldings in this Declaration, and the Horses in the former Action, to be the same, and the Taking to be the same; and upon Demurrer it was adjudged, that this Averment was good, because *Equus* is a general Term for all Horses; and it being objected, that a Recovery in Trespass shall not be in Bar in Replevin, because this is brought for the very Cattle; but the other is brought for Damages, which might be given for the Taking the Horses, and not for the Value, because 40 s. can never be the Value of two Horses; and for this Reason the Judgment was given for the Plaintiff. 3 Lev. 124. *Field versus Jellius*.

13. Case, &c. in which the Plaintiff declared, that the Defendant digged in *tantum & tam prope* the Foundation of his (the Plaintiff's) House that great Part of it fell down, and the rest was spoiled, whereby the Plaintiff was compelled to leave it for eleven Months, &c. and lost the Use of his Trade during the said eleven Months *ad damnum*, &c. the Defendant pleaded, that in *Michaelmas-Term* last past, the Plaintiff and one Susan Barwell prosecuted a former Action against him for digging in the Plaintiff's Soil, under the Foundation of their House, by which digging great Part of the House fell, and the rest was spoiled, whereby the Plaintiff lost the Profit and Advantage of the said House from the 24th of April, till the Suing out of this Writ, (which was about six Months) and also divers of the Plaintiff's Goods, mentioning them in particular, and belonging to the Trade of a Sadler, to the Damage of 500 l. and that thereupon the Plaintiffs had a Verdict and Judgment for 140 l. and Satisfaction acknowledged thereon; and they aver, that the House, the Digging, the Fall, the Spoil, &c. in the former Action, and in this Action, are the same, and that the now Plaintiff is one of the Plaintiffs in the former Action, and that the Defendants in this and the former Action are the same, and that the Damages in the former Action were given in full Satisfaction of all the Damages in this Action; and upon Demurrer to this Plea, it was objected, that notwithstanding this Averment the Actions are not the same; for in the first Action the Digging is laid to be under the Foundation of the House; but in this 'tis said to be so near the Foundation, &c. besides, the first Action was brought by two Plaintiffs, for throwing down their House, and spoiling their Goods, and this is brought by one Plaintiff, but not for the spoiling his Goods, but for the Loss of his Trade for eleven Months; and in the other 'tis only for six Months; but adjudged, that the Actions are the same; for Digging so much of the Foundation, and so near, are but several Ways of expressing the same Thing; and tho' in the first Action the Plaintiffs called the House, their Messuage, and in this 'tis called his Messuage, yet 'tis but one and the same House, and so 'tis averred to be; and it shall be intended they were Jointenants, and that the Goods were in Partnership in Trade, and that the Trade was joint. 3 Lev. 179. *Barewell versus Kensey*. See *Palmer versus Lawson*.

14. Case, &c. for these Words spoken of the plaintiff, an Alderman of Norwich, and a Justice of Peace, *he is a rascally factious Alderman, a Lampooner*, and avers, that a Lampooner is there understood to be a Libeller; the Defendant pleaded in Bar a former Action brought by the same Plaintiff for the same Words, only that in that Action the Word *Lampooner* was not interpreted, in which Action the Plaintiff was barred; and upon a Demurrer to this Plea, it was objected, that it was ill, by Reason of the Interpretation of the Word *Lampooner*, which made the former a different Action from this; but adjudged, that the Plaintiff having been once barred for the same Words, he shall not entitle himself to a new Action by an Interpretation of a Word, which was not interpreted in the former Action. 3 Lev. 248. *Gardiner versus Helvis*.

15. *Indebitatus Assumpsit* for Goods sold and delivered, the Defendant pleaded *quod ipse ad narrationem prædictæ respondere non debet*, because there is another Action now depending, *ex eadem causa* in C. B. adjudged, this is a Plea in Abatement, and not a Demurrer to the Declaration, or a Plea in Bar, and a *Respondeas Ouster* was awarded. *Mod. Cases* 157. *Rowston versus Combate*.

See 6 Rep. 7.
5 Rep. 7.
b. 32. b.
4 Rep. 39.
40.
Cro. Eliz. 668.
41, 42.

Hob. 138, 139. Latch 193. Moor 459. 2 Vent. 168. 3 Mod. 3. 1 Lutw.

16. In an Account for Sugar and other Wares, &c. the Defendant pleaded, that the Plaintiff brought an *Indebitatus assumpsit*, & *insimul computasset* against him for 100 l. due to him for Wares, &c. and upon *Non assumpsit* pleaded, the Defendant had a Verdict, and avers, that the Wares mentioned in that Action are the same as in this Action; and upon a Demurrer adjudged, that this Plea was ill, because where a Plaintiff misconceives his Action, tho' there is a Verdict against him, that Verdict shall not be a Bar to a new Action; now in this Case the Plaintiff had misconceived his first Action; for he brought an *insimul computasset* before there was any Account stated; and now he hath a proper Action of Account, to which the Verdict in the other Action, shall be no Bar, for the Reason before mentioned. 2 Mod. 294. *Rose versus Standen*.

17. In Trover for a Ship, the Defendant pleaded, that at the Time of the Conversion he was Captain of a Man of War, called the *Phoenix*, and that he seized the said Ship for the Use of the *East-India Company*, she going in a Trading Voyage to the *East-Indies*, contrary to the King's Prohibition, and that the Ship was afterwards condemned in the Court of Admiralty, and

* See Putt v. Rawston.

a Sentence given for the Company, which is the same Conversion, and upon Demurrer to this Plea, the better Opinion was, that it was good, because the Defendant having entitled the Court of Admiralty to a Jurisdiction, and it appearing that Sentence was given there, it shall not afterwards be controverted in an Action of Trover. 3 Mod. 194. *Beak versus Tyrwhite*.

18. Case, &c. for erecting a Nuisance 2 Feb. the Defendant pleaded a prior Action brought for erecting a Nuisance 20 Martii, and that the Plaintiff had recovered in that Action; and avers it to be the same Nuisance and Erection; and upon a Demurrer to this Plea, the Judgment was against the Plaintiff, because tho' he might have an Action for the Continuance of the Nuisance; yet he can never have a new Action for the same Erection, tho' it was laid in a different Time from the first. 1 Salk. 10. *Johnson versus Long*. See 2 Salk. 714. *The Pleadings*.

19. In Assault, Battery and Maim, the Plaintiff declared, that the Defendant beat his (the Plaintiff's) Head against the Ground, and that he brought an Action of *Assault and Battery* for it, and had Judgment; and since that Recovery a Piece of his Skull fell out by Reason of the same Battery, &c. the Defendant pleaded in Bar the same Recovery mentioned in the Declaration, and averred it to be the same *Assault and Battery*; and upon Demurrer the Defendant had Judgment, because this was not a new Battery, the Consequence whereof is not the Ground of the Action, but the Measure of the Damages, and the Jury shall be supposed to have Consideration thereof at the Trial. 1 Salk. 11. *Fetter versus Beale*.

20. Case against *Besaliell Knight* an Attorney; the Defendant pleaded a Misnomer in Abatement; thereupon the Plaintiff, without any farther Proceeding in that Action, brought a new Action against him by his Right Name; to which he pleaded another Action depending for the same Cause; adjudged, that the Plaintiff should have discontinued the first Action, and 'tis too late now, because the Discontinuance will relate only to the Time of its being entered on Record; so that upon *Nul tiel Record* replied, it will be against the Plaintiff, because it was a Record at the Time of the Plea pleaded. 1 Salk. 329. *Knight's Case*.

(L)

De injuria sua propria, **where good, and not good.** See *Traverse*. (M)
per totum.

1. **I**N *False Imprisonment*, if the Defendant justified by Virtue of a *Capias* directed to the Sheriff, and a Warrant from him, there the Plaintiff cannot reply *de injuria sua propria*, for that would be to put the *Record* in Issue; for the *Capias*, which is on Record, is Part of the Cause; but in such Case he may reply *de injuria sua propria*, and traverse the Warrant, which is Matter of Fact; so where the Defendant justifies by Virtue of any Process out of an * inferior, or out of any Court, which is not a Court of Record, there *de injuria sua propria* generally, is a good Replication; for all is Matter of Fact, and makes but one Cause. 8 Rep. 67. In *Crogate's Case*. See *Peters versus Stafford*.

* Hardr.
6. Webb
6. Beale.
S. P.

2. That Case was as follows: In Trespas the Defendant pleaded, that such a House in *B.* was Copyhold, and *Parcel of the Manor of T.* and that the Bishop of *Norwich* was seised thereof, &c. and so prescribes to have Right of Common for him and his Copyhold Tenants of the said House, in such a Place, and that the Bishop granted the said House to *W. M.* that the Plaintiff put in his Cattle, and that the Defendant, as Servant to the said *W. M.* and by his Command, *molliter* drove them out of the Common; the Plaintiff replied, *de injuria sua propria absque tali causa*; and upon Demurrer, it was adjudged, that these Words *Absque tali causa* shall not relate only to the Command, but to the whole Plea, in which there were several Affirmatives; as that the House was Parcel of the Manor; that it was Copyhold, and that the Defendant had a Right of Common by Prescription; all which would be put in Issue, if this Replication was good, when the Issue ought to be upon a single Point, and the rest should be traversed; 'tis true, *de injuria sua propria*, without the Addition of *Absque tali causa*, is a good Plea, where it comes in Excuse to an Injury alledged to be done to the Person of the Plaintiff; or where a Defendant justifieth in Defence of his Possession, if the Title doth not come in Question. 8 Rep. 66. *Crogate's Case*.

3. Trespas, &c. for Beating and Imprisoning his Wife; the Defendant justified under a Warrant from the Sheriff; the Plaintiff replied *de injuria sua propria absque tali causa*, upon which they were at Issue, and the Plaintiff had a Verdict; and it was moved for a Repleader, because *de injuria sua propria*, is not a good Plea to a Record, for the Plaintiff ought to have traversed the Warrant; but adjudged good after a Verdict. *Raym.* 50. *Collens versus Walker*. See *Peters versus Stafford*. S. P. See 2 Leon. 81. *Moor versus Savage*. S. P.

4. In Trespas, the Defendant justified under a Judgment in Ejectment, and an *habere facias possessionem*, and a Warrant thereon, by which he was commanded to put the Plaintiff in Ejectment in Possession, by Virtue whereof he entered into the House, &c. and took the Goods, and put them in the Highway, and desired the Plaintiff to go out, which she refused; and thereupon *molliter manus imposuit* to turn her out, and that she *de injuria sua propria* assaulted him,

him, &c. the Plaintiff replied *de injuria sua propria*, without traversing any Matter alledged in the Plea in particular, or without the general Traverse *Absque tali causa*; and upon Demurrer this Replication was held ill, because *de injuria sua propria* is no good Issue here without the general Traverse *Absque tali causa*; but in this Case the Writ of Possession, or the Warrant upon it ought to be particularly traversed. 2 Lurr. 1381. *Rodoway versus Lowder*.

5. Trespass, &c. for Taking 200 Bushels of Salt; the Defendant justified under the Statute 10 Willi. for laying a Duty on Salt, and that it was shipped to be exported and not weighed, and that he was an Officer, &c. and seised it; the Plaintiff replied *de injuria sua propria absque tali causa*; and upon Demurrer to this Replication, it was held, that where a Defendant justifies by Authority at Common Law, as a Constable by Arrest for a Breach of the Peace, there *de injuria sua propria*, &c. is a good Replication; and so 'tis where the Defendant justifies by Authority of an Act of Parliament, because that being a general Law, can be no Part of the Issue, so that this Replication is good, but the Plea is ill, because the Defendant did not shew what Sort of Salt this was, whether Bay-Salt, Pit-Salt, white Salt, &c. for the Statute doth not extend to all. 2 Salk. 628. *Chance versus Weedon*.

(M)

**Pleas which go to the Disability of the Person, good, and not good;
and of Pleas which make the Trial impossible.**

1. **I**N Debt, the Defendant pleaded in Bar, that he was attainted of Felony, which Attainder was still in Force; adjudged no good Plea, but that he shall plead in Chief, and that he may be taken in Execution at the Suit of the Party, which shall not prejudice the King, for he may be hanged at any Time; and if a Man is outlawed, he shall not plead the Outlary in Disability, but shall be compelled to plead to any Action brought against him; but where an outlawed Man is Plaintiff, in such Case the Outlary may be pleaded in Disability to him. *Noy 1. Hytings versus Blake*.

2. Trespass was brought by a Widow; the Defendant pleaded, that she was married, (*viz.*) to one *John Wilmot*, who was then living at *Lisbon in Portugal*; this Plea was disallowed, because of the Impossibility of the Trial. *Moor 851. Eliz. Wilmot's Case*.

(N)

Of Pleas in Abatement and in Bar.

1. **A**SSISE of fresh Force against *B. and R.* his Wife and eleven others; the Defendants plead in Abatement, that there never was any such Person as *R.* the Wife of *B.* and upon Demurrer it was adjudged, that the Plea was good against all the Defendants but that only. *Pol-lard versus Jekyl. Plowd 9.*

2. In a *Quare Impedit*, the Bishop and Incumbent plead in Abatement, that there is another Writ depending against him the same Bishop only, and that the Disturbance in this and in the former Declaration, are one and the same Disturbance; adjudged, this is a good Plea without mentioning the Presentation. 1 Brownl. 163. *Earl of Bedford versus Bishop of Excester*.

3. In Debt on a Bond, the Defendant pleaded in Bar, that he and another were jointly bound, and that he was living and not named, and concluded in Bar, when this is a Plea only in Abatement; and therefore having pleaded and concluded in Bar, Judgment final was given for the Plaintiff. *Sid. 189. Burden versus Ferrars. See Chappels versus Vaughan*.

4. But where in Trespass the Defendant pleaded in Abatement, that he with another did the Trespass; and the Court being moved, that Judgment final might be given against him, because he had confessed the Trespass; but it was denied, because he pleaded it in Abatement; therefore the Rule was, that he should answer over, upon which an Issue might be taken and tried as soon as a Writ of Inquiry might be for Damages. *Sid. 190. Wright versus Bright*.

(O)

After Imparllance, not good. See Tender. (B) 14.

1. **I**N Ejectment, the Defendant imparled, and afterwards pleaded in Bar, that the Lands were *Palmer's* *antient Demesne*; and upon Demurrer to this Plea it was adjudged, that the Defendant could not plead *antient Demesne* after an Imparllance. *Hill. 22 Jac. Latch 83. Marshall versus Allen. Antea Antient Demesne. (D) 2. S. C. Hill. 24 Car. Style 197. Vincent versus Willis. S. P.*

2. In Replevin against Four, the Defendants confess the Taking, but plead in Bar, that the Plaintiff, 6 Feb. 1 Willi. had released Two of them, without saying, before the Writ brought or

pending the Writ, or after the last Continuance; the Plaintiff replied, that he had declared against them in *Michaelmas-Term*, 1 *Willi. modo & forma prædict'*, and that they *imparled* till *Hilary-Term* following, and so sets forth *Continuances* till *Easter* and *Trinity-Terms*, and demands Judgment, if the Defendants shall be admitted to plead this Release after an *Imparlance*; and upon Demurrer it was insisted for the Plaintiff, that by the *Imparlance* the Defendants had affirmed the Action; and that if they would have any Benefit of the Release, they should have pleaded, that it was made after the last *Continuance*, which they could not do, because it was made before; all which was admitted to be true, if it had been after *Issue* joined, for there is no Occasion of *Continuances* before; the Case was not adjudged, but it seems, that a Plea either to the Jurisdiction or *Misnomer*, or any other Plea in *Abatement*, cannot be pleaded after an *Imparlance*; but a Plea in *Bar* may be pleaded, because that goes to destroy the Action. 2 *Lutw.* 1174. *Rainbow versus Harrall*.

Raym.
182.

3. In *Trespas* for Taking his Cattle, the Defendant made a special Justification; the Plaintiff in his Replication avoided the Justification, and concluded *Et hoc paratus est verificare, unde petit judicium*, (omitting *& damna sua sibi adjudicari*) *si ab actione præcludi debet*; and by Reason of that Omission the Defendant demurred specially; the Plaintiff had Leave to amend upon Payment of Costs 1 *Lev.* 273. *The Lady Broughton versus Holt*.

(P)

Conuſance of Pleas and Privileges, good.

1. **A**ſſault brought againſt an Attorney, for Beating the Plaintiff in the City of *Wells*: The Biſhop of *Bath and Wells*, by his Attorney, demanded Conuſance of Pleas, and ſhewed the Charter granted by *Ed. 4.* of Conuſance of all Pleas of Lands and Tenements in *Wells*, and of all perſonal Pleas of Debt and *Treſpaſs*, &c. granted to the then Biſhop of *Bath and Wells*, and his Succeſſors, and alſo ſhewed Letters Patents of Queen *Elizabeth*, in Confirmation of the Grant of *Ed. 4.* and her cloſe Writ directed to the Juſtices to permit him to enjoy his Liberties, and thereupon the Conuſance was allowed. *Bendl.* 31.

2. If any Perſon hath Power by Act of Parliament to hold Conuſance of Pleas within his Manor, yet he ſhall not hold Plea of any Matter in which he himſelf is a Party. 8 *Rep.* 114. In *Dr. Bonham's Caſe*.

3. In Ejeſtment in *B. R.* &c. the Mayor and Commonalty of *Shrewsbury* demand Conuſance of Pleas by Virtue of a Grant of *Q. Elizabeth*, *tenere placita*, &c. and upon a Demurrer it was objected, that the Defendants did not ſhew any Allowance in *Eyre* or in *Quo Warranto*, or upon any Record; beſides, the Grant *Tenere placita* doth not take the Jurisdiction from other Courts without negative Words, to which it was answered, that if the Demand had been by Virtue of an old Grant Time out of Mind, then there muſt be an Allowance in *Eyre*, &c. but this was upon a new Grant in the Reign of the Queen; and 'tis true, that *Tenere placita* doth not take away the Jurisdiction of others in expreſs Words, but *ex Vi termini* it implies, that no other Court ſhall hold Plea of ſuch Matters; it was adjourned. *Palm.* 456. *Hampton verſus Phillips*.

4. The Biſhop of *Ely* having demanded Conuſance, and he being Party, it was moved, that he might make Entries on the Roll, both of the Time and Place when he would try the Caſe, for otherwiſe the Plaintiff might be delayed, the Biſhop having the Poſſeſſion; and it was ruled, that ſuch Entry ſhould be made. *Sid.* 282. *Grange verſus Simpson*.

5. *Treſpaſs Quare clauſum fregit* was removed into *B. R.* out of *Ely* by *Certiorari*, and Serjeant *Wright* came into Court and demanded Conuſance of Pleas for the Biſhop; and firſt, a Warrant under his Seal was read in *Latin*, and then the Record of the Plea, as it ſtood in the Court, and the Record went on thus: *Et modo ad hunc diem venit Episcopus Elyensis per T. S. attorn' suum & petit cognitionem*, &c. *quia dicit*, that the Place where the *Treſpaſs* is ſuppoſed to be done is within the Liberty of the Biſhop of *Ely*, and that *alias*, ſcilicet *termino Sancti Michaelis Anno 20 Ed. 3. B. R. Rot. 34.* in *Treſpaſs*, this Privilege was allowed, and ſets forth ſeveral other Records of Allowance, and ſo prays his Privilege *habendi cognitionem*; then he proceeds *& quaſitum eſt* (of the Defendant) *ſi quid dicere queat quare*, &c. *super quo allocatur*, and then Day is given on the Roll to the Parties at *Ely*, &c. *& dictum eſt Episcopo quod in ceteris fiat juſtitia*; adjudged, that this Privilege doth not lie in Preſcription but in Grant, and therefore the true Way of Pleading it is to ſhew an immemorial Uſage, which is an Argument of an antient Grant, and to ſhew one Allowance of it in *B. R.* or in *Eyre*, and rely upon it, for one is ſufficient, but without ſuch an Uſage Time out of Mind, the Law will not preſume a Grant; but 'tis not ſufficient to produce a Copy of the Record of Allowance, but it muſt be the Record it ſelf, for the Entry is *Inſpecto Recordo*. 1 *Sulk.* 183. *Foſter verſus Mitton*. See *Keltw.* 189, 190. *Sid.* 103. See *pl.* 6.

6. In Ejeſtment for Lands in *H.* in the *Iſle of Ely*; after Not guilty pleaded, a Suggeſſion was entered on the Roll, *Quod nullus juſtitarius vel Miniſter Domini Regis inſulam illam ingredi poſſet ad aliquam juratam extra*, &c. and ſo prays a *Venire facias* to *R.* the next Village in the County of *Cambridge*, which was granted; it was objected, that either a *Nil dicit* or the Confeſſion of the Defendant ought to be likewiſe entered, (*viz.*) *quia defenden' hoc non dedit*, *Ideo*, &c. but adjudged good either Way. 1 *Sulk.* 183. *Cotton verſus Johnſon*. See *pl.* 5.

(Q)

Conusance of Pleas and Privileges, not good.

1. **A**SSISE against the Mayor and *Burgesses* of the Borough of *Boston*, who appeared by their Attorney, and demanded Conusance of the Plea, and produced their Charter, which was, that no *Burgess* dwelling in the said Borough shall be impleaded of Lands, Tenements or Contracts, being within the said Borough, *elsewhere*; adjudged, that the *whole Body* of the Corporation being sued in this Action, could not have Conusance of this Plea. *Bendl. 16. Hunston versus Mayor and Burgesses of Boston.*

2. A Plaint was levied in the Court at *Yarmouth* against *T. S.* and he was committed; and upon an *Habeas Corpus cum causa*, the Plaintiff shewed a Charter granted to the Bailiffs of *Yarmouth*, that every Person of that Place should be impleaded there, and not elsewhere, and therefore prayed a *Procedendo*; but it was denied, because *B. R.* cannot be ousted of their Jurisdiction, without Matter of Discharge pleaded and recorded; and this *Habeas Corpus* being directed to the Bailiffs, &c. they might as well have returned this Charter as the Cause. *1 Roll. Rep. 232. Sterling's Case.*

3. Ejectment, &c. of a Messuage in *Oxford*; the Defendant pleaded, that he being a Scholar there, and a privileged Person, ought to be sued in the Vice-chancellor's Court, &c. and shewed a Charter granted to the University, *Anno 3 H. 2.* and *14 H. 8.* confirmed *Anno 33 Eliz.* by which Conusance of all Suits, Contracts, Covenants, Quarrels, excepting Freehold, was granted, and shewed an old Record *22 Ed. 1.* in an *Action of Covenant* brought in the Vice-chancellor's Court, for the quiet Enjoyment of an House in *Oxford* for a Year, in which Action the Court of Common Pleas granted a Prohibition; but upon producing this Charter, a Consultation was awarded; but in the principal Case it was adjudged, that no Consultation should be granted, but that the Vice-chancellors shall be prohibited, because they have no Jurisdiction in this Action, being an *Ejectment*, in which the Possession shall be recovered, and thereupon an *Habere facias possessionem*; so that a Man may be put out of his Freehold; and this Case is not like that old Record of *Ed. 1.* for that was an Action of Covenant where Damages only are to be recovered. *Cro. Car. 62. Halley's Case. See Privilege. (F) 3. S. C.*

4. Case for Words, &c. the Action was laid in *London*; after *Impar lance* the Bishop of *Ely*, by *1 Lev.* his Counsel, demanded Conusance, for that he had a County Palatine, and that the Words were *89. S. C.* spoken at *W.* within his Jurisdiction, and produced his Charters; but adjudged ill both as to the Matter and Form; for tho' the Parties lived within the *Isle of Ely*; yet in transitory Actions the Plaintiff hath Election to lay them where he will; that where a Privilege is claimed by Charters beyond Time of Memory, he ought to shew an Allowance before Justices in Eyre; besides, 'tis too late to demand Conusance after an *Impar lance*; and lastly, the Form of Demanding it is ill, because 'tis by an Attorney, without a Warrant in *Latin*, for a Warrant of Attorney in *English* is never allowed in such Cases; and this Warrant the Attorney must have in Court. *Sid. 103. The Bishop of Ely's Case. See Pleas. (P) 6. S. P. reported by Levinz, by the Name of Neale versus Huncton.*

(R)

Where Profert hic in Curia is necessary, where not. See *Deeds. (D) per totum. Recusancy. (A) 19.*

1. **T**HE Plaintiff, as Administrator, got Judgment on a *Scire facias*; and it was moved in Arrest of that Judgment, that the *Scire facias* was wrong, because it was not concluded with a *Profert hic in Curia literas testamentarias*, &c. but adjudged, that 'tis not the Course to set it forth in Writs which are founded on Records, as this was; but since this Judgment it hath been ruled, that the Plaintiff must conclude this Writ with a *Profert hic in Curia*, &c. *Cro. Eliz. 592. Shrewsbury Earl versus Lawson. Shore 60. Bosworth versus Ringale, contra.*

2. In Replevin, the Defendant avowed for Rent granted *Anno 12 Ed. 2.* and set forth a Devent to *W. R.* whose Heir he is, &c. and upon a general Demurrer it was held, that he ought to have set forth the Grant with *hic in Curia prolui*; for that is Matter of Substance, and not avoided by the Statute *27 Eliz. of Jeofails. Moor 885. Heard versus Baskervill.*

3. In Trespass, the Defendant justified, for that *W. R.* was seised in Fee, and died seised, and *W. Jones* &c. the Lands descended to his Daughters, and that he, by their Command, put in the Cattle, *577. &c.* the Plaintiff replied, and confessed that *W. R.* was seised in Fee, but that he *by Indenture* covenanted to stand seised to the Use of himself and the Heirs Males of his Body; and for Want of such Issue to the Use of *B. B.* for Life, Remainder to his eldest Son in Tail, Remainder to his own right Heirs, and that he died seised of such Estate without Issue Male; and that after his Death *B. B.* entered, and that the Plaintiff by his License put in the Cattle, *absque hoc, that W. R. died seised in Fee*; and upon Demurrer to this Replication it was objected, that it was ill, because the Plaintiff claimed by the Deed of Uses, and did not produce the same; but adjudged good,

good, for the Deed belonged to the *Covenantees*; besides, the Estate is executed by the Statute of Uses, and the Deed itself is but an Inducement to the Traverse. *Trin. 11 Car. Cro. Car. 301. Stockman versus Hampton. Cro. Car. 441. S. P. Dyer 277. S. P. Postea pl. 10. S. P.*

4. Debt against an *Administratrix*, who craved Oyer of the Writ, the *Teste* whereof was 19 Feb. &c. and then she pleaded in Abatement, that her Husband died Intestate 1 Feb. and that the Commissary of the Bishop of London, *legitime constitutus*, granted Administration to her on the twentieth of February, and not before, but did not conclude her Plea with a *Profert hic in Curia literas Administracionis, &c.* and upon Demurrer she was ruled to answer over. *Lutw. Abr. 3. Wulford versus Savil. Palm 173. Vulgar versus Higgins. S. P.*

5. Debt upon Bond to stand to an Award; the Defendant pleaded *Nil debet*; and upon Demurrer it was objected, that this Action was grounded on the Award, and therefore the Plaintiff ought to have concluded his Declaration with a *Profert hic in Curia Arbitrium, &c.* adjudged, that 'tis very true, where an Action of Debt is brought on a Bond, the Plaintiff must conclude his Declaration with a *Profert hic in Curia scriptum, &c.* and likewise in all other Cases where the Thing is demanded by Deed; but in this Case there is no Deed, for an Award, tho' under Hand and Seal, is no Deed, but a Judgment; besides, it may be made without any Writing. *Style 459. Dodd versus Horton.*

1 Saund.
68. S. C.

6. So where the Plaintiff declares on a Bond, it must be with a *Profert hic in Curia scriptum obligatorium*; the Reason is the same where a Defendant pleads an Indenture, under which he makes a Title, it must be with a *Profert hic in Curia Indenturam, &c.* *Sid. 308. Jevon versus Harridge*, but the Plaintiff shall not take Advantage of it upon a general Demurrer. *Sid. 308.*

7. The Testator had Judgment against the Defendant, and the Executor brought a *Scire facias* without a *Profert hic in Curia literas testamentarias*, to which the Defendant demurred generally; but it was adjudged against him, because this Omission is but *Matter of Form*, of which the Defendant cannot have Advantage upon a general Demurrer; but 'tis clear, that if the *Executor or Administrator* himself had obtained the Judgment and afterwards had brought a *Scire facias*, there a *Profert hic in Curia* is not necessary, because it appears in Judgment. *Sid. 249. Whiteman versus Miles. See 1 Bull. 200. 2 Salk. 499. S. P.*

8. Case upon a Policy of Assurance, in which the Plaintiff declared upon a Writing, omitting *hic in Curia prolat'*; it was moved for the Defendant, that he could not plead *Non assumpsit*, but his Case was such, that he must plead specially, grounded on the said Writing, of which he had no Counterpart, nor was it entered in the Office; and therefore he moved for a Rule, that the Plaintiff might produce it; the Court held, that where an Action on the Case is brought upon a Writing, that 'tis in their Discretion, whether it shall be with *hic in Curia prolat'*, or not; but they all agreed, that if the Plaintiff would strike the Word *Scriptum* out of his Declaration, they would discharge the perpetual Imparlane. *Sid. 386. Snifter versus Coel.*

Adjudged, that where a Grant of an Advowson was pleaded to one to the Use of another in Tail; in such Case the *Cestui que Use* need not in Pleading set forth the Grant with a *Profert hic in Curia*, because the Deed belongs to the Grantee, and therefore 'tis sufficient for him to alledge, that it was granted by him by Deed, &c. *Hill. 6 Jac. 1. In the Case of the Earl of Huntingdon versus Mildmay.*

9. Case against an *Executrix* for Goods sold to her Testator, who pleaded in Abatement, that her Husband died Intestate, but did not set forth *in what Diocese*, and that he had *Bona notabilia* in several Dioceses, but did not set forth *in which*, and that the Dean and Chapter of Canterbury, upon the Suspension of the Archbishop, granted Administration to her, so that she should be sued as Administratrix, and not as Executrix; and averred her Plea, with *hoc parata est verificare, unde petit judicium de Brevis, &c.* and upon a special Demurrer to this Plea, the Plaintiff shewed Cause, that the Defendant had pleaded an Administration granted to her without a *Profert hic in Curia*. 1 *Lutw. 27. Young versus Case.*

10. Debt upon Bond against the Executrix of *Edw. Crotch*, conditioned, that the said Edward should pay unto the Plaintiff, for the Use of his Daughter *Anne*, 5 *l.* at a certain Time limited in an Indenture, bearing Date with the Bond; the Defendant pleaded, that *by the said Indenture, the Plaintiff Robert did enfeoff H. T. &c. to the Use of the said Edward Crotch and his Heirs, who did therein covenant with the Plaintiff Robert to pay to him, for the Use of his Daughter Anne, the Sum of 5 l. within two Months after the Death of I. B. who was still living; upon a Demurrer to this Plea it was objected, that the Defendant should have pleaded this Indenture with a Profert hic in Curia, and that she must have done so, if the Bond had been for Performance of Covenants in the Indenture; now, in this Case it was to pay Money, which is the same Thing as if it had been to perform many Covenants, that if Edward himself had been living, he must have pleaded this Indenture with a Profert hic in Curia, and so must his Executrix, because both of them would have pleaded the Deed as an Excuse for Non-payment of the Money; if the Law should be otherwise, then the Defendant might fancy any Deed; and if 'tis never produced, the Court can never make any Judgment, whether 'tis real, or not; but adjudged, that in this Case the Defendant is not only a Stranger, and no Party to the Deed, but it belongs to the Feoffee, so that without his Consent 'tis impossible for her to produce it. 1 *Lutw. 481. Crotch versus Crotch. Antea pl. 3. S. P.**

11. In Trespass for Taking a Cow, the Defendant justified under a *Lease for Years* made to him of all *Estrays* happening in such a Manor, &c. and upon Demurrer it was objected to this Plea,

that the Defendant having made a Title to himself under a Lease, he ought to conclude his Plea with a *Profert hic in Curia*; which is very true, and would have been a good Exception upon a Special Demurrer, and shewing it for Cause; but not upon a General Demurrer, as in this Case. 2 Lutw. 1353. *Mellor versus Bocking*.

12. Adjudged, that upon a *Profert hic in Curia* the Deed remains as in Court all that Term, and no longer, unless 'tis controverted; but *Letters Testamentary* do not, because the Party may have Occasion to use them elsewhere: Where Letters Patents are recorded in the same Court where they are pleaded, the Defendant need not plead them with a *Profert*; but if recorded in another Court 'tis otherwise. 2 Salk 497. *Roberts versus Arthur*.

13. In Replevin, &c. the Defendant avowed for a Rent-Charge. and made Title under a Will, with a *Profert hic in Curia*; thereupon the Plaintiff insisted to have *Oyer* of the Will; but it was not granted, because a Will is not a Deed, and therefore the *Profert* in this Case was but Surplusage; he was not bound to plead it so, and therefore shall not be compelled to give *Oyer*. 2 Salk. 497. *Morris's Case*.

14. In Debt on a Bond in the *Grand Sessions in Wales*, the Plaintiff in his Declaration did not set forth a *Profert hic in Curia*; and after a * Verdict for him, and a Writ of Error brought by the Defendant, this Omission was assigned for Error; adjudged only Matter of Form. 2 Salk. 497. *Salisbury versus Williams*.

* In the Manuscript: after Judgment by Default.

15. In Debt upon Bond, the Defendant pleaded, *puis darreine Continuance*, Payment of Part, and an *Acquittance*, &c. and this was pleaded in Abatement; adjudged no good Plea upon a Demurrer to it, because the Acquittance is a * Deed, and therefore ought to be pleaded with a * 2 Mod. *Profert hic in Curia*. 2 Salk. 519. *Peirce versus Paxton*. Sid. 425. *Tapscott versus Wooldridge*. 64 S. P.

(S)

Where a Plea must be averred with *hoc paratus est verificare*, where not; and semper paratus, and of the Conclusion of Pleas to the Country. See *Averment*. (A) per totum. *Replication*. (B) 17. *Postea* (W) per totum.

i. **I**N Debt upon Bond, the Defendant pleaded, that he delivered it as an Escrow, & *hoc paratus est verificare*; adjudged, that this made the Plea ill, he should have said, & *sic non factum*. Plow. Com. 66. 2 Cro. 85. S. P. 1 Vent. 9. S. P.

2. In Covenant, &c. the Defendant pleaded an *Outlary in Bar*, *sub pede sigilli*, &c. if the Plaintiff reply *Nul tiel Record*, he ought not to conclude his Plea thus, (*viz.*) *dictum est prafut* (the Defendant) *quod habeat Recordum hic*, on such a Day, &c. *sub periculo*; nor *hoc paratus est verificare per Record' illud*; *Ideo petit quod Recordum illud videatur*; but if it be in the same Court, he must conclude, & *hoc parat' est verificare qualitercunque prout Curia considerabit, & quia Justitiar' hic se advisari volunt super inspectionem Recordi per prafut* (the Defendant) *superius allegat', dies dau' est partibus predict' hic usque*, &c. Dyer 227, 228. 2 Lutw. 1510. *Clerk versus Scroggs*.

3. In Trespafs, &c. which was alledged to be done 7 *Maii*, the Defendant justified on the 10th Day of *Mai*, and concluded his Plea thus, *Qua est eadem transgressio*; and upon Demurrer, this was held a good Plea by three Judges against *Yelverton*; for the precise Day need not be answered; 'tis sufficient, that the Justification be on another Day, so as there is an Averment, that 'tis *eadem transgressio*, because the Fact is to be answered, and not the Day on which it was done. 1 Bulst. 138. Cro. Car. 228. S. P. 2 Jones 146. S. P. See *Traverse*. (D) 21.

4. Debt upon Bond for Performance of Covenants; the Defendant pleaded Peformance; the Plaintiff replied, and assigned a Breach, &c. & *hoc*, &c. *unde petit judicium & damna sua sibi adjudicari*, omitting *debitum*; the Defendant demurred specially, *quia minus rite conclusit*; but adjudged, that tho' 'tis Form, 'tis but an unnecessary Form; for by the Words *petit judicium* all is included, because when the Court gives Judgment, 'tis always for the Debt and Damages. 2 Lev. 19. *Barnes versus Gludman*. See *Pitt versus Knight*. S. P.

5. In Trespafs for Battery and False Imprisonment, &c. the Defendant justified by a Writ out of B. R. in the County of *Middlesex*, directed to the Sheriff of *Devon*, and a Warrant and Arrest thereon at D. and traverses all other Places; the Plaintiff replied *de injuria sua propria absque tali causa*; and upon Demurrer it was adjudged, that the Replication was ill, for want of concluding & *hoc petit quod inquiratur per patriam*. 3 Lev. 65. In *Furfsden* and *Week's Case*.

6. Case, &c. upon an Agreement to deliver so much Corn, &c. the Defendant pleaded another Action depending for the same Thing, &c. the Plaintiff replied, that it was upon another Agreement, and traversed that it was brought for the same Cause; and upon a Special Demurrer, for that he ought to have concluded to the Countrey, the Defendant had Judgment; for where-ever there is an Affirmative, the next ought to be a Negative. 1 Mod. 72. *Human versus Tenam*. See 3 Cro. 755.

7. Debt upon Bond for Performance of Covenants; the Defendant pleaded Performance; the Plaintiff replied, that one Covenant was, that the Defendant should Account for what Money he had received, and that he had received 30 *l.* and refused to account for it; the Defendant in his Rejoinder, confessed the Receipt of the Money, and that he laid it up in the Plaintiff's Warehouse, from whence it was stolen by Persons unknown, &c. & *hoc paratus est verificare*; and upon Demurrer, it was objected, that he ought to have concluded to the Country, because the Plaintiff in his Replication alledged, that the Defendant did not account, and the Defendant in his Rejoinder, gave an Account, that he was robbed; so here was an Affirmative and a Negative; but adjudged, that where the Defendant in his Rejoinder sets forth new Matter, and shews, that he accounted, and in what special Manner he accounted, there the Plaintiff must have Liberty to answer that special Matter. 1 Vent. 121. Vere versus Smith.

8. Trespass *Quare clausum fregit & Bona asportavit*; the Defendant as to the Breaking pleads Not guilty, and as to the rest he justified at a Time different from that which the Plaintiff laid in his Declaration, and concluded, *quæ est eadem transgressio*; and upon Demurrer the Plea was held ill, because he did traverse the Time before and after. 184. Smith versus Butterfield.

9. Debt upon Bond, the Defendant pleaded, that he delivered it as an Escrow to *T. P.* & *hoc parat' est verificare*; and upon Demurrer it was held, that he ought to have concluded & *sic non est factum*, because the Matter amounts to a special *non est factum*, and the Plaintiff cannot reply to this Plea, that the Defendant delivered it as his Deed, and traverse, that he delivered it as an Escrow. 1 Vent. 210. Ward versus Froth.

10. In Replevin, the Defendant made Conusance as Bailiff to *T. P.* who demised the Place where, &c. under a certain Rent; the Plaintiff traversed the Demise, and concluded, & *hoc paratus est verificare*; and upon a General Demurrer, it was a Question, whether this ill Conclusion of the Plea was not helped by such a Demurrer; the better Opinion was, that the not concluding to the Country was but Matter of Form. 1 Vent. 240. Clue versus Bailly.

11. Debt upon Bond brought by the Husband, as Administrator to his Wife, to whom the Bond was given *dum sola* by the Name of *Elizabeth Perkins*; the Defendant pleaded, that he delivered the Bond to one *Elizabeth Perkins*, the Plaintiff's Sister, who died *sola & innupta*, and traversed that he delivered to *Eliz. Perkins*, the Plaintiff's Wife; to which Plea the Plaintiff demurred Specially; for if there be two of that Name, the Defendant should have pleaded *Non est factum*, or at least he ought to have induced his Plea, that there were two of the Name of *Elizabeth Perkins*; but this was intended to bring the Marriage in Question, which is not to be tried now: If the Issue be, whether *Eliz. Perkins* is the Wife of the Plaintiff, or not, that ought to be tried by the Countrey; but if it be *nunquam in legitimo matrimonio copulata*, that must be tried by the Certificate of the Bishop. Sid. 450. Gifford versus Perkins.

12. In Debt upon Bond conditioned, that if he paid all Sums expended about, &c. then, &c. the Defendant pleaded, that he had paid all Sums, &c. the Plaintiff replied, that he had not, &c. & *hoc paratus est verificare*; and upon a General Demurrer, the Defendant had Judgment, because here was a plain Issue; and therefore the Plaintiff ought to have concluded to the Country. Raym. 98. Charleton versus Finney. Dyer 121. a. S. P. 3 Leon. 90, 129 Bunny versus Bunny. S. P. 2 Roll. Rep. 63. Grey versus Grey. S. P. and Duncomb versus Lea, and Lane versus Alexander. Yelv. 137. S. P.

13. Judgment in Trespass against four Defendants; they bring a Writ of Error of a Judgment *coram vobis residen'*; and assign for Error, that one of the Defendants was an Infant, and appeared by Attorney, when he ought to appear by his Guardian, & *hoc parati sunt verificare prout Curia consideraverit*; the Defendant pleaded *in nullo & erratum*, and now shews, that there was no Error assigned, because they conclude & *hoc parati sunt verificare*, when it should be to the Countrey; so is Yelv. 58. King versus Gosper, and 1 Bulst. 37. Baker's Case. But per Hale, 'tis well enough, because *prout Curia consideraverit*, puts it upon the Court to direct, whether it shall be tried by the Court, or by Jury. Raym. 218. Welch versus Bell.

14. Debt upon Bond, for Performance of Covenants in Articles, reciting, &c. that whereas the Defendant had found out a Mystery in colouring Stuffs, and had entered into Partnership with the Plaintiff; he (the Defendant) covenanted not to procure any Person to obtain Letters Patents for seven Years, to exercise that Mystery alone; the Defendant pleads, that he did not procure any Person to obtain Letters Patents, &c. the Plaintiff replies, that he did procure Letters Patents for another, &c. & *hoc petit quod inquiratur per patriam*; and upon Demurrer to the Replication, it was objected, that it was ill, because the Plaintiff had replied both Matter of Fact and Matter of Record; the Procuring was the Fact, and the Letters Patents were the Record; therefore he should conclude *prout patet per Recordum: Sed per Curiam*, that had been very improper, because 'tis not the Record it self, but the Procuring it, to hinder the Plaintiff in the Partnership, upon which the Breach ariseth. 3 Mod. 80. Clerke versus Hoskins.

15. Husband and Wife as Administratrix of *T. S.* brought an Action on the Case against the Defendant for 25 *l.* being so much Money received by him for the Use of the Wife as Administratrix, &c. the Defendant pleaded the Statute of Limitations; the Plaintiffs replied, that Administration was granted *prout* in the Declaration; so that the Cause of Action did arise within six Years, and concluded to the Country; and upon a Demurrer to the Replication, it was adjudged ill, for they ought to have averred it; but by this Conclusion the Defendant had no Opportunity to make an Answer. 4 Mod. 376. Curry versus Stephenfon.

1 Vent.
77. S. C.

Sid. 422.
2 Lev. 73.

1 Salk.
421. S. C.

16. In Debt upon the Statute 23 H. 6. cap. 8 against the Defendant, who was an Attorney, for executing the Office of an Under-Sheriff two Years together; he pleaded in Abatement, that he was an Attorney of the Common Pleas, and ought not to be sued by Original, but by *Bill*; the Plaintiff demurred, and concurred thus, (*viz.*) *petit judicium & debitum pro Domino Rege & sibi adjudicari*, which is the Conclusion of a Demurrer to a *Plea in Bar*; the Defendant made the like Mistake in the Conclusion of his Joinder in Demurrer, (*viz.*) *petit judicium & quod præd'*, (the Plaintiff) *ab actione sua prædict' habenda præcludatur*, which is a Conclusion in Bar; but adjudged, this is not material, but that the Judgment shall be *quod respondeat Ouster*. *Lutw. Abr. 62. In Baker versus Duncalfe's Case. Postea Privilege. (B) 22. S. C.*

17. *Indebitatus Assumpsit, &c.* for Goods sold and delivered 1 *Maii*, the Defendant pleaded a Letter of *License* in Bar, which was given to him by the Plaintiff and the rest of his Creditors, for two Years, from the 29th of January 1699, by which he had Leave within that Time quietly to go about his Business, &c. and that if he should be arrested within that Time by the Plaintiff, &c. for any Debt, that in such Case the Deed should be an *absolute Release* of that Debt; then he sets forth, that within the said two Years the Plaintiff sued out a *Capias* against him, by Virtue whereof he was arrested for a Debt due on the Date of the Letter of License, and that he was thereby hindered in his Business; then he averred his Plea, & *petit judicium si prædict'* (the Plaintiff) *actionem suam præd' inde versus eum habere debeat*; the Plaintiff replied, and craved Oyer of the Deed, and then demurred; for that the Plea was not well concluded, for this Letter of License was a Release, and operates as such, and therefore it ought to be pleaded as a Release, thus; (*viz.*) *Unde petit judicium si præd'* (the Plaintiff) *actionem suam præd' contra præd' scriptum Relaxationis* (of the Plaintiff) *inde versus eum habere debeat*; but the Plaintiff dying, it was not adjudged. 1 *Lutw. 265. Trippet versus Nailour.*

18. Trespass for Breaking her Close on the 4th Day of Feb. and eating her Grass, and entring into her Barn and taking a Cow, with a *Continuando* as to the Eating the Grass from the said 4th Day of February, to the 4th Day of April following; the Defendant justified the Entry and Taking the Cow for an Heriot, *Quæ est eadem transgressio*; and upon Demurrer an Exception was taken to this Plea in Bar, for that the Defendant had justified the Entry into the Close on the 4th Day of February, but did not answer the Trespasses alledged in the Declaration under the *Continuando diversis diebus & vicibus*; but adjudged, that he having averred, that 'tis *eadem transgressio*, is as much as to say, *eadem causa actionis*. 2 *Lutw. 1309. Baldwin versus Noakes. Cro. Eliz. 705. S. P.*

19. In Assault, &c. the Defendant pleaded his Privilege, as Servant to Shem Bridges, Esq; one of the six Clerks in Chancery; and upon a Demurrer the Plaintiff had Judgment. because the Defendant had not concluded his Plea with *hoc paratus est verificare*; for every Privilege ought to be averred. 2 *Lutw. 1465. Adams versus Hatcher. Sid. 319. S. P. 2 Sid. 164. Foster versus Barrington. S. P.*

20. *Scire facias* upon a Judgment in an Assise; the Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy, & *hoc &c.* the Plaintiff replied, that he is a Subject born, (*viz.*) at such a Place in England, & *hoc paratus est verificare*; and upon a Demurrer to this Replication, it was held ill, for he should have concluded to the Countrey, because where Alien Enemy is pleaded in Abatement, it must be tried where the Writ is brought; but if it be pleaded in Bar, then this Replication would have been good. 1 *Salk. 2. West versus Sutton. See Scire facias. (H) 12. S. C.*

21. Trespass against two Defendants, one of them pleaded in Abatement, that the other was Tenant in Common with the Plaintiff; who replied, that he was sole seised, and traversed, that he was Tenant in Common with the Defendant, and concluded to the Country; and upon a Demurrer it was objected, that the Plaintiff ought not to have concluded his Traverse to the Country, but with an Averment, (*viz.*) & *hoc paratus est verificare*; but adjudged, that where a Traverse comprehends the whole Matter generally, as *Alsque tali causa*, it may conclude to the Country; but where a particular Thing is traversed, as *Alsque tali Warranto*, there it may be averred, and that in the Principal Case it was to maintain the Plaintiff's Writ, and therefore it was not such a particular Matter as ought to be averred. 1 *Salk. 4. Haywood versus Davis. See Dyer 333, 353, and 1 Brownl. and 1 Lev. 26. See Farr. 97. S. C. and Salk. 2 Part 703. The Pleadings.*

22. Debt upon Bond, with a Condition to make an Inventory, and to exhibit it to the Spiritual Court, *before such a Day*; adjudged, that 'tis not sufficient for the Defendant to plead, that there was no Court held that Day; but he must shew, that he was there ready at the Day, for that would be to shew, that he had done all on his Side towards a Performance. 1 *Salk. 172. Archbishop of Cantuar' versus Willis.*

23. *Assumpsit* against an Executor, who pleads in Abatement, that he is Administrator, & *petit judicium si ad Billam præd' respondere compelli debeat, &c.* and upon Demurrer it was objected, that the Conclusion of this Plea was to the Jurisdiction of the Court, and not to the Bill; that every Plea ought to have a proper Conclusion; and therefore it was adjudged, because the Defendant had not prayed, that the Writ or Bill might be abated, it could not be done. 1 *Salk. 297. In Fuller and Cook's Case.*

24. In Assault and Battery, the Defendant pleaded a Release of all Actions; the Plaintiff replied, that the Release was obtained by Durefs; the Defendant rejoined, that it was not obtained by Durefs,

but that it was voluntary ; the Plaintiff surjoined, that it was gotten by Durefs, and traversed that it was voluntary, & *hoc petit quod inquiretur per patriam*, upon which they were at Issue, and the Plaintiff had a Verdict, but the Judgment was set aside, because after a Traverse he ought not to conclude to the Country ; for a Traverse is a Negative of it self, and therefore the Defendant ought to have joined Issue in the Affirmative. 3 Mod. 203. *Anonymus*.

25. *Indebitatus Assumpsit* and *Quantum meruit*, &c. the Defendant pleaded *onerari non debet*, because he paid the Money after the Time, & *hoc paratus est verificare* ; and upon Demurrer, it was adjudged, that this Plea did not amount to the General Issue *Non assumpsit*, because it admits the Cause of Action ; but yet 'tis no good Plea, because *onerari non debet*, admits the Promise to be good, but avoids it by Matter *ex post facto*, therefore he should have pleaded it in Bar, *viz.* *actio non*, &c. besides this Plea was ill, for he ought to conclude to the Country. 2 *Silk.* 516. *Brown versus Cornish*.

1 Vent.
210.

26. Debt upon Bond, the Defendant pleaded it was delivered as an Escrow, to be his Deed upon the Plaintiff's Sealing and Delivering a General Release, which was not done, & *sic non est factum*, & *loc paratus est verificare* ; and upon Demurrer to this Plea it was adjudged, that the Defendant ought to have concluded to the Country. 1 *Silk.* 273. *Watts versus Rosewell*.

27. Case upon a *Mutuuus* for 20 s. the Plaintiff likewise declared upon two other Promises ; and the Defendant after an *Imparance* pleads *semper paratus*, &c. and upon Demurrer to this Plea it was adjudged, that where the Sum in Demand and the Day of Payment, are certain, there *semper paratus*, &c. is a good Plea ; but not after an *Imparance*, for that shews, that he was not *semper paratus* ; that in a *Quantum meruit*, and other Declarations, 'tis usual to plead *semper paratus*, &c. specially, (*viz.*) that the Plaintiff deserved so much, and that the Defendant *semper paratus* fuit to pay it. *Sid.* 364. *Ludlam versus Stacy*. See 2 *Mod.* 62.

28. An Agreement was made to assign Stock upon Request, and for Non-performance an Action was brought ; the Defendant pleaded *semper paratus*, after the Promise made ; and upon a Demurrer, *per Curiam*, this Plea is ill, because the Stock being assignable upon Request, the Time when the Plaintiff requires it, is the Time when the other is to perform it. 3 *Mod.* 295. *Harrison versus Hayward*.

(T)

Of Pleas which amount to a Confession of the Plaintiff's Demand, and to a Negative pregnant.

1. **A**mongst other Covenants this was one, that the Covenantor should not make any Grant of Lands without the Plaintiff's Assent ; the Defendant pleaded, that he did not grant the Lands without the Plaintiff's Assent ; this was held to be a Negative pregnant, and was one Cause why that Plea was adjudged ill. 2 *Cro.* 559. See Covenants. (K) 6. S. P.

2. Debt on Bond to perform Covenants in a Lease, in which the Defendant covenanted, that he would not deliver Possession to any Person but to the Lessor, or to such Person as should lawfully evict him ; the Defendant pleaded, that he did not deliver Possession to any but such who lawfully evicted him ; and upon Demurrer to this Plea, it was objected, that it was ill, because it was a Negative pregnant, he should have pleaded, that such a one did lawfully evict him ; but adjudged, that the Plea being pursuant to the Word of the Covenant, was good, and that the Plaintiff ought to have replied, and shewed a Breach, which he had not done, and therefore Judgment was given against him. 1 *Lew.* 83. *Pullin versus Nicholas*.

3. Account against the Defendant as Bailiff, &c. for 132 Bushels of Wheat to the Value of 20 l. the Defendant pleaded, that *Plene computavit de præd'* 132 Bushels ; the Plaintiff replied, that *non computavit*, upon which they were at Issue, and the Plaintiff had a Verdict and Judgment ; that the Defendant *computet*, and he appearing upon the *Capias ad computandum*, there were Auditors assigned, who afterwards delivered in the Account, (*viz.*) that the Defendant had confessed to them the receiving 120 Bushels of light Wheat *ad merchandizandum* ; but that he at the Request of the Plaintiff, had mingled ten Bushels with it, to make it fit for Sale, and craved Allowance of it, and of several other Particulars in *English* ; and upon Demurrer the Plaintiff had Judgment to recover for the 132 Bushels of Wheat, for which he had declared, and not *ad valorem* ; because by this Plea of *Plene computavit*, the Defendant confessed, he had received 132 Bushels, but that he had fully accounted for so much, when before the Auditors he had only accounted for 120 Bushels, which must be an imperfect Account ; and that is the same Thing, as if he had refused to account ; and in such Case, if the Judgment had been *ad valorem*, it had been wrong. 1 *Lutw.* 58. *Pierce versus Clerke*. See *Williams versus White*.

(V)

Of Pleas and Pleadings inter alia and separalia placita, and per nomen; and where they are not positive, but dilatory. Toll. (A) 17.

1. **I**N Trespass, the Defendant justified, &c. for that there was a Lease made by the Plaintiff, rendering Rent; and that in the said Lease *it was contained*, that if the Rent was behind; then the now Plaintiff covenanted, that the Lease should be void, &c. and upon Demurrer this was adjudged an ill Plea, because 'tis not *expressly* alledged, that the Plaintiff did covenant that the Lease should be void upon Non-payment of Rent, but only that it was *so contained* in the Indenture. *Plowd. Com. 143. a.*

2. 'Tis the usual Course to plead *inter alia*, where the Conveyance to be set forth contains more in it than what relates to the subject Matter of the Plea; and my Lord Coke commends this Way of Pleading, because 'tis to avoid Prolixity, and therefore where in Replevin the Defendant avowed for a Rent, and pleaded, that a Fine was levied *inter alia* of the Rent; it was objected, that it should be *per nomen* of the Rent; but Coke Ch. Just. held it good. 1 *Roll. Rep. 72, 73.*

3. The Pleading *per nomen*, &c. is no good Way of Pleading, for it never mends a Plea which is bad in the Beginning, but it often makes a Declaration ill; as for Instance, where the Declaration was of a Grant of forty Acres *per nomen* of twenty Acres more or less; these Words cannot possibly extend to so many Acres as forty. 1 *Roll. Rep. 422.* 1 *Brownl. 145.* S. C. *Fel. 166.* S. C.

4. In Covenant, the Plaintiff declared, that he bought a Coppice of the Defendant, &c. for which he paid so much, and that it was covenanted between them, that each of them should appoint a Measurer by such a Time, and if the Acres were more or less than 300, then so much Money should be paid to the Defendant for so many Acres as were above that Number, or if they were less, then so much to be repaid to the Plaintiff in Proportion for what he had already paid to the Defendant for the said Wood; that the Plaintiff appointed a Measurer, &c. and that it appeared upon the Measuring it, that it wanted seventy Acres of 300, which, at so much an Acre, amounted to so much, &c. the Plaintiff had Judgment; but it was reversed upon a Writ of Error, because the Plaintiff had not positively alledged, that it wanted seventy Acres in Measure, but only, that it appeared to him to want so much, which may be true, and yet the Defendant not obliged to repay so much, because it might not be measured Right. 2 *Cro. 390.* Sir Baptist Hick's Case.

5. In Trespass, &c. the Defendant pleaded, that he was possessed of an House which had an ancient Light, and that the Plaintiff's Servants *intendebant & conabantur* to stop it by Building another House and setting up Timber, which the Defendant pulled down, &c. and upon Demurrer this Plea was adjudged ill, because the *Intention* to build an House could not be put in Issue. 1 *Roll. Rep. 393.* *Cro. Eliz. 248.* S. P.

6. *Assumpsit*, &c. in which the Plaintiff declared, that the Defendant, in Consideration of a Marriage, &c. *inter alia*, promised to pay, &c. so much; after a Verdict for the Plaintiff, the Judgment was stayed, because the Promise is entire, and must be wholly set forth. *Allen 5.* *Powell versus Waterhouse.*

7. A Man became *Felo de se*, and W. S. being indebted to him on Bond, an Information was brought against the Obligor, suggesting, that he was indebted to the Deceased in 80 *l.* *prout patet per obligationem*; this was held to be no direct Charge, that he was bound in 80 *l.* because it refers to the Bond for Certainty. 1 *Saund. 275.* *The King versus Sutton.*

8. A Custom was alledged, that every Tenant of such a Manor *haberet a Way* over such a Close; this Plea was held ill, because it was no positive Allegation that they had a Way; it should have been *usi fuerunt habere viam*, &c. *Sid. 238.* Toll. (A) 18. S. P.

9. The Testator appointed his Executors to dispose his Goods according to a Schedule to his Will annexed: The Executors produced the Will to the Judge of the Spiritual Court, but not the Schedule, who would not grant Administration unless they would give Bond to dispose of the Surplus after Debts and Legacies paid, as the Court should decree; which Bond they gave, and afterwards the Court decreed them to pay 1500 *l.* to fifteen of the Testator's Kindred, and other Sums to other Persons: The Kindred brought the Action against the Executors, and declared *quod cum inter alia*, it was declared, without shewing what those Things were; and this being objected against the Declaration, it was adjudged, that the Plaintiffs having brought an Action on the Case, 'tis not requisite to declare specially, for 'tis not the special Performance, but the Non-performance, which is the Ground of the Action; and this be set forth *inter alia*, as a Feoffment upon Condition, &c. *Sid. 85.* *Chambers versus Roberts.*

10. *Sci. fa.* upon a Judgment against several Tertenants, who came in and pleaded several Pleas: The Plaintiff replied, *quoad separalia placita*, &c. and upon Demurrer it was objected, that this Replication ought to be several to each Plea, *viz. quoad plucitum* of one, &c. and so on *quoad plucitum* of another; but adjudged, that *quoad separalia placita* is well enough, and that it shall be construed *reddendo singula singulis.* *Sid. 39.* *Curtis versus Bateman.* See *Dyer 181.* B. 325. B.

11. The Death of the Party was assigned for Error in Fact; and upon an Affidavit made, that he was alive, it was moved, that this Plea might not be received; this being to delay the Plaintiff of his Execution, it was ruled, that the Attorney should appear and swear the Plea within seven Days, or else it should not be received. *Sid.* 172. *Beeston's Case*. See *Telv.* 58. 9 *Rep.* 30. B.

12. Debt for not performing an Award; the Defendant pleaded *nullum arbitrium*; the Plaintiff replied and set forth, that the Arbitrators, &c. *inter alia* awarded, &c. adjudged, that the Repliation is ill. 1 *Mod.* 36. *Rich versus Morris*. See 1 *Lev.* 292.

13. In Trespass, &c. the Defendant pleads, that *Alice Carmere* was seised in Fee, and devised the Lands to him and his Heirs, and died seised; the Plaintiff *Protestando*, that *Alice Carmere* did not die seised, replied, that before *Tho. Carmere* had any Title, *F. S.* was seised in Fee, who made a Lease of the Lands to *H. C.* for 1000 Years, and that the Residue of the said Term was assigned to one *W. M.* under whom the Plaintiff claimed *prout per Indenturam assignationis*, &c. *hic in Curia prolat' plenius apparet*; and upon Demurrer it was objected, that this was not a positive Affirmation, that the Term was assigned, because it refers to the Indenture of Assignment for its Certainty; he should have pleaded, that *A. C. concessit*; and for this Reason the Defendant had Judgment. 2 *Lutw.* 1337. *Meriton versus Ben*.

14. Trespass, &c. for Taking 1000 Spice-Cakes, &c. The Defendant justified under a Custom in London to chuse six Freemen of the Bakers Company every Year in the *Hulimote-Court* to inspect all spiced Cakes and Bread brought by Foreigners, and exposed to Sale in the Markets of London; and if they find any made of bad Wheat, or not full Weight, or deceitfully made or baked, then they used to seise and send them to the Prisoners; that the Defendant was chosen and sworn an Inspector; that the Plaintiff being a Foreigner, brought spiced Cakes half baked to *Stocks-Market*, &c. and that the Defendant, upon Inspection, found them not baked, and so seised them; and upon Demurrer it was held, that this Plea was ill, because to say, that he found the Cakes not baked, is no positive Allegation they were ill baked. 2 *Lutw.* 1374. *Palmer versus Barefoot*. 2 *Lutw.* 1402. *Cade versus Hillary*. S. P.

15. Trespass, &c. the Defendant pleaded in Bar, that the Mayor and Aldermen of *B.* were possessed of an Acre of Land called the *Key*, and that the Plaintiff's Horses being loaded with Sope-Ashes, his Servants *voluissent & conabantur* to unload them on the *Key* without the Leave of the Mayor, &c. and upon Demurrer this Plea was held ill, because there was no positive Allegation, that the Servants were on or near the *Key*, but only that *voluissent & conabantur* to unload on the *Key*. 2 *Lutw.* 1496. *Randle versus Dean*. See Justification. (D) 6. S. C.

(W)

Where more is demanded, and where less, than is due.

1. COVENANT upon a Charter-Party to pay 48 *l.* per Month, (*viz.*) when the Ship should arrive in *Guinea*, and afterwards so much when she should arrive in *England*; upon a Demurrer to the Declaration it was objected, that the Plaintiff demanded 30 *s.* more than was due upon the first Breach which he assigned, and 16 *s.* less than was due upon the last Breach; and tho' the first Breach may be cured by a Verdict, finding less, or by a Release of the Overplus, yet the Demand of less than is due is an incurable Fault; 'tis so in *Assumpsit*, for which see *Lastloe versus Thomlinson*, and 2 *Cro.* 247. *Adderton versus Dunton*. *Poph.* 209. *Latch* 175. and as to this Matter *Assumpsit* and *Covenant* cannot differ, because in both those Actions Damages are to be recovered; and 'tis certainly naught in an Action of Debt, for which see *Holmes versus Sanders*; but adjudged, that there is a Difference between an Action of Debt and *Covenant*; that a Verdict will cure this Matter, if the Jury find less, tho' it might be doubtful whether it would be good upon a general Demurrer; but upon a special Demurrer, and shewing it for Cause, 'tis clearly naught; Judgment was given for the Plaintiff. 2 *Lev.* 56. *Bolton versus Lee*. See Reservation. (E) 13.

2. In *Covenant*, the Plaintiff declared, that he covenanted to serve the Defendant five Years, and the Defendant covenanted to pay the Plaintiff 83 *l.* every Year quarterly, (*viz.*) 20 *l.* 15 *s.* at *Michaelmas*, and 20 *l.* 15 *s.* at *Lady-day*, &c. and assigns the Breach in Non-payment of the Whole: The Defendant demanded *Oyer* of the Indenture, which was, as the Plaintiff had set forth, but only under the (*viz.*) It was 20 *l.* at *Michaelmas*, and the Plaintiff had declared for 20 *l.* 15 *s.* Issue was taken, that the Plaintiff did not serve the Defendant; and the Plaintiff had a Verdict; and now Error was brought, and the Error assigned was the Variance between the Sums in the Declaration and in the Indenture; for the particular quarterly Payments in the one did amount to more than was in the Indenture by 15 *s.* but adjudged, that the Particulars shall be paid by equal Portions; and tho' 83 *l.* is not due by the Indenture, but less by 15 *s.* yet the Jury having given no more than what was really due, the Demand of more in the Declaration will not hurt, tho' in some Cases the Demand of less will. 2 *Lev.* 99. *Vanaston versus Mackarly*.

(X)

Of pleading Records.

1. **E**RROR of a Judgment in Debt in the Court at *Bristol*, upon a Bond of 600 *l.* the Defendant pleaded, that the Plaintiff had recovered upon the same Bond in *B. R.* the Plaintiff replied *Nul tiel Record, &c. & petit judicium & debitum*, omitting *damna*, the Defendant rejoined *quod habetur tale Recordum*, but did not aver it as he ought, *& hoc paratus est verificare per Recordum illud*, but says, *prout per Recordum inde residen' in B. R. apparet. Sed quia Recordum, &c. hic nunc judicialiter haberi vel proferri non potest, idem defenden' petit judicium si Curia nunc hic de & super præmissis ulterius procedere velit*; thereupon the Court at *Bristol* gave Judgment for the Defendant to bring in the Record; and upon Failure thereof, that the Plaintiff should recover *debitum & damna*, altho' he had not prayed any *Damages* in his Replication; and this was now assigned for Error; but adjudged, this was only Matter of Form, and aided by the Statute 27 *Eliz. cap. 5.* of general Demurrers; another Error assigned was, that the *Bristol* Court ought not to have given Judgment upon this foreign Plea of a Record in *B. R.* because they could not try in their Court whether there was any such Record, or not; but adjudged, that the Record in *B. R.* might be removed by a *Certiorari* out of the Chancery, and sent by *Mittimus* to the *Bristol* Court, and so the Issue of *Nul tiel Record* might be tried there. 1 *Saynd. 98. Pitt versus Knight.*

2. *Sci. fa.* against the Bail upon a Writ of Error, according to the Statute 3 *Jac.* The Defendant pleaded, that the Plaintiff in the Writ of Error did prosecute it with Effect, and that upon such Prosecution the Judgment was reversed, *& hoc paratus est verificare*; and upon Demurrer to this Plea it was adjudged ill, because the Defendant ought to have concluded *prout patet per Recordum.* *Raym. 50. May versus Spencer.*

3. Writ of Error was brought upon a Judgment in Debt in the Court of *C. B.* and the Defendant entered into a Recognisance before a Judge of that Court, that if the Plaintiff in Error should be nonsuit, or the Writ discontinued or the Judgment affirmed, then he would pay, *&c.* and now a *Scire facias* was brought upon this Recognisance, *&c.* and the Defendant craved Oyer, and pleaded, that the Plaintiff in Error did prosecute the Writ, and that he assigned Errors *Et quod placitum super breve de Error' præd' adhuc pendet indeterminatum*; the Plaintiff replied, that the Judgment was affirmed, that *placitum pendet indeterminatum*; and upon Demurrer to this Replication the Plaintiff had Judgment in *C. B.* and now the Defendant brought a Writ of Error; and adjudged, that the Defendant's Plea was only by Way of Excuse; and that it had been sufficient for him to have pleaded, that the Errors were assigned, and that *placitum inde pendet indeterminat'*; 'tis true, this Replication was in the Negative, and for that Reason the Plaintiff did not say, that *placitum non pendet indeterminatum, prout patet per Recordum*; but he ought to have said, that the Record was certified into *B. R.* in such a Term, and thereupon *taliter processum fuit, quod judicium affirmatum fuit prout patet per Recordum*; and if it was not so, then the Defendant might have rejoined *Nul tiel Record*, therefore this Replication was adjudged ill; besides the Traverse, that *placitum pendet indeterminatum*, puts the Matter of Record to be tried by the Country; the Judgment was reversed. 2 *Silk. 520. Fanbaw versus Morrison.*

4. Where the Foundation of the Action is a Record, it must be pleaded as such, but not where 'tis only an Inducement; as for Instance, in an Action of Debt for an *Escape*; the Plaintiff declared, that the Prisoner was committed and escaped; and upon a Demurrer to this Declaration, because he did not conclude *prout patet per Recordum*, the Plaintiff had Judgment; for the Commitment upon the Writ, which is a Record, was only an Inducement to the Action, the Foundation was the *Escape*; so in Debt upon a Judgment, where the Plaintiff declared *quod cum recuperasset, &c.* this is good, without saying * *prout patet per Recordum*; and the Defendant may plead to such a Declaration *Nul tiel Record.* 2 *Silk. 565. Waites versus Briggs.*

5. *Sci. fa.* against the Bail, the Defendant pleaded no *Capias* issued against the Principal; the Plaintiff replied, and set forth the *Capias*, *prout patet per Recordum*; the Defendant rejoins *Nul tiel Record*; the Plaintiff surrejoins, *quod habetur tale Recordum*, and prayed that the Court would inspect the Rolls; and upon Demurrer to this Surrejoinder the Plaintiff had Judgment, because by the Demurrer the Defendant denied, that the Court could inspect their own Records, which they may certainly do, for the Entry in such Case is, *Et quia justiciarii hic se advisare volum super inspectione ex examinatione Recordi, per præd' defend' superius allegati, dies dat' est partibus præd' hic usq; &c.* but if the Record pleaded is in another Court, then the Entry is *Et dictum est præfati defend' quod habeat hic Record'* (on such a Day) *periculo incumbente.* 2 *Silk. 566. Moor v. Garrett.*

6. In Ejectment, the Defendant refused to enter into a Rule to confess Lease, Entry and Ouster; but being served with the Rule, made Default, which was recorded, which the Plaintiff would afterwards have waived; but the Court denied it; for tho' 'tis true, that an Act of the Court done upon Record may be altered by the Court in the same Term; yet an Act of the Party, as a Default or Nonsuit, cannot, for that being once recorded, must not be altered, because it would be a Means of introducing Falsity of Facts in Records. 2 *Silk. 566. Turner versus Barnaby.*

Sid. 329.
Lev. 222.

Mod. Ca.
ses 157,
197.
See Da-
mages.

5 Mod. 8.

* Sci. fa.
(C) 24,
S. P.

Pluralities.

What shall be a good Qualification of a Chaplain, and what not. (A) | What shall be a Plurality. (B)
| What shall not be a Plurality. (C)

(A)

What shall be a good Qualification of a Chaplain, what not.

^{# In 4 Leon.} 247. *The Bishop of Exon. v. Sir Henry Wallop;* it was adjudged, that the Queen might give to any of her Chaplains as many Benefices as she would.

1. **T**HE * Queen retained a Chaplain by Word, without Writing, who, during his Life, was reputed to be her Chaplain, and exercised that Office as well in her Closet as elsewhere, and had all the Benefits of one of her Chaplains; and being dead above thirty Years, a Question was made, whether such a Retainer was good to have a Plurality by Virtue of the Statute; adjudged, that after so long a Time it shall be intended he was duly and lawfully retained. *Cro. Eliz.* 424. *Whetstone versus Wigford.*

2. A Parson was retained by a Baroness as her Chaplain, who had a Living with Cure, &c. and obtained a Dispensation to hold two Livings; afterwards the Baroness married, and then the Chaplain accepted another Benefice with Cure, and was inducted, &c. adjudged, that it was lawful for him so to do, for the Marriage was not a Countermand of the Retainer; and 'tis not requisite, that the Lady, who was a Widow at the Time she retained this Chaplain, should continue so at the Time when he accepted a second Benefice. 4 *Rep.* 117. *Atton's Case.* Moor 678. S. C. By the Name of *The Queen versus Bishop of Peterborough.*

^{1 And. 200. S. C. Q. Imp. (F) 9. S. C.} 3. In a *Quare Impedit* by the Queen to present to a Parsonage, which was void by the Incumbent's Taking another Benefice, not being qualified; the Defendant pleaded, that he was retained by *Sir James Crofts, sub sigillo suo*, who was Comptroller of the Household, and who by the Statute 21 H. 8. might have two Chaplains, and might qualify them to take two Benefices, &c. the Plaintiff replied, that the said *Sir James Crofts* had two other Chaplains which were qualified, who are still alive, so that the Defendant being the Third, he could not be qualified, &c. the Defendant rejoined, that one of those two Chaplains was removed and discharged by the said *Sir James Crofts*, to be his domestick Chaplain, so that he had but two Chaplains, of which the Defendant was one; and upon Demurrer it was adjudged, that a Retainer *sub sigillo* is not sufficient, for it must be *sub manu & sigillo*; and that after a Person hath retained his full Number, and they are certified to be his Chaplains, and qualified to have two Benefices, tho' he afterwards remove them for any Displeasure, or otherwise, yet during their Lives he can qualify no other, for they are still his Chaplains at large, tho' not his domestick Chaplains. *Godb.* 41. *The Queen versus Savacre.*

^{Moor 561. S. C.} 4. In a *Quare Impedit*, the Case was, A Countess being a Widow, retained two Chaplains, and afterwards retained a Third, who procured a Dispensation to hold two Livings, and was accordingly inducted into Two, the first being above the Value of 8 *l.* adjudged, that the two first Chaplains were only capable of a Dispensation within the Statute by Virtue of the Retainer; and the Retainer of the Third could not devest them of that Privilege, because by the Statute the Countess could qualify but Two and no more, and therefore the Retainer of the Third was void, and by Consequence the Dispensation which he had procured to hold two Livings, was likewise void. 4 *Rep.* 90. *Drury's Case.* 14 *Eliz.* Dyer 312. S. P.

5. In a *Quare Impedit*, the Case upon the Pleadings was, that the Defendant pleaded the Statute 21 H. 8. that if a Man hath a Benefice with Cure of the yearly Value of 8 *l.* and is inducted into another, &c. the first shall be void; the Plaintiff replied the Statute 25 H. 8. that a Chaplain to an Earl might have a Dispensation to hold two Livings; and the Question was, whether the Pope before that Statute could grant such Dispensations at Common Law; and it was the better Opinion that he might, for at first every Bishop had Power to grant Dispensations for Pluralities, till they by their Indiscretion lost that Power; and it was abrogated by a general Council, held Anno 1273. to which Council we sent two Bishops to assist; and this Constitution has been received since till the Statute before-mentioned. Moor 119. *Dolman versus Bishop of Sarum.*

6. Where a Parson is a qualified Chaplain to any Subject, and afterwards is made a Bishop, his Qualification is void, so that he cannot take Benefices *de novo* by Virtue of that Qualification; but if he had two Benefices before he was made a Bishop, he may have a Dispensation *retinere* those Benefices with his Bishoprick; but he cannot have a Dispensation *capere unum vel plura Beneficia de novo*, if he had his Number before. *Hob. 158. In Colt and Bishop of Coventry's Case.*

7. A Parson who had one Benefice, and being Chaplain to an Earl, got a Dispensation to hold another, *modo sit within ten Miles of the first*, and he accepted another, with Cure, &c. 394 S. C. but it was seventeen Miles distant from the first, and the Bishop supposing the first was void, and the Patron not presenting within six Months after the Acceptance of the second Benefice, collated to the first; and in Ejectment, the Question was, whether the Words *si modo* made it a conditional Dispensation, and the first Benefice void when he took the second; adjudged, that tho' these Words usually made a Condition, yet by the Civil Law they were only a Caution or Admonition, and therefore in this Case they shall not make a Condition, because of the great Inconveniency which might follow, to make a great many Benefices void by Lapse, which have been quietly enjoyed under such Dispensations. *Cro. Car. 475. Dodson versus Lynn.*

8. In a special Verdict in Trespass for taking his Tithes, the Case was, *Chaplain Extraordinary* to the King, and Incumbent on *Stockton*, and afterwards inducted to the Rectory of *Lakborow*, being above the yearly Value of 8 *l.* by Reason whereof *Stockton* was void, and so continued two Years, and then he was again presented to it by the King, as upon his Title of Lapse, and thereupon he was inducted again to *Stockton*, being likewise above Value; adjudged, that a Dispensation is not necessary for a Plurality, where the King presents his Chaplain to a second Benefice because such a presentation imports a Dispensation, which the King hath Power to grant as Supreme Ordinary; but if such a Chaplain be presented to a second Benefice by a Subject, he must have a Dispensation before he is instituted to it; that the King's *Chaplain extraordinary* is not a Chaplain within the Benefit of the Act, 21 H. 8. cap. 13 & 14. but only his *Chaplains in Ordinary*; for his Name is only entered in the Book of the King's Chaplains, whereas a Chaplain within that Statute ought to be retained under Seal. 1 Salk. 161. *Brown versus Mugg.*

(B)

What shall be a Plurality.

1. BY the Canon Law no Ecclesiastical Person could hold two Benefices with Cure, *simul & semel*, but that upon taking the second Benefice, the first was *ipso facto* void; the Pope by Usurpation did dispense with that Law, but the King may do it *de jure*, because that Canon is not repugnant to the Common Law; besides, by the Statute 21 H. 8. cap. 13. what the Pope did by Usurpation, is now vested in the King *de jure*; and therefore he may grant Dispensations to hold two Benefices with Cure, *simul & semel*.

2. In *Replevin*, &c. the Case upon the Pleadings was, That a Parson having a Benefice of the Value of 8 *l. per Ann.* took another with Cure, &c. but without any Dispensation; and the Defendant set forth, that it was of the yearly Value of 8 *l.* but did not aver, it was of that Value in the *Queen's Books*; and upon Demurrer it was adjudged, that it was sufficient to aver it to be of the yearly Value of 8 *l.* without saying, in the *Queen's Books*, because the Court took Cognisance only of the true Value, there having been two Valuations made of Ecclesiastical Livings, one in the Reign of *Ed. 1* the other by the Statute 26 H. 8. but the Court took not any Notice of those Valuations. *Cro. Eliz. 853. Bond versus Trickett.*

3. In Ejectment, there was a Special Verdict, in which the Point was, whether a Parson who hath one Living with Cure, above the Value of 8 *l. per Ann.* and accepts another with Cure, and above Value, and is admitted and instituted into the second, and before Induction gets a Dispensation to hold the second, whether in such Case the first was void; and adjudged, that it was, because the Church was full by Institution against all Persons but the King; and therefore the Dispensation came to late. *Goldf. 162. Robbins versus Prince.*

4. The Case before-mentioned has been doubted, for in a *Quare Impedit* brought by the King against the Bishop of *B.* and *H.* the Incumbent, for disturbing him to present to the Church of *C.* &c. which came to him by Lapse; the Plaintiff set forth the Statute 21 H. 8. and that *H.* the Defendant, was Parson of *C.* being a Benefice with Cure, of the Value of 8 *l. viz.* of the Value of 30 *l. per Ann.* and that he took another Benefice with Cure, (*viz.*) *M.* by which the first became void, and so continued for two Years, so that the Plaintiff ought to present; the Defendant by Protestation said, that the Church of *C.* was but of the Value of 7 *l. 14 s. per Annum*, at the Time of the Making the Statute, and then he pleaded the Stat. 26 H. 8. by which the Lord Chancellor had Power to enquire of the Values of all Benefices, and to certify the same into the Exchequer; and that upon a Commission for that Purpose awarded, it was returned into the Exchequer, that the Church of *C.* was but of the Value of 7 *l. 14 s.* and that he was inducted into the said Church; but because it was of so small a Value, he obtained a Dispensation to take another, &c. and thereupon he was inducted into the said Benefice of *M.* being of the Value of 8 *l. per Annum*; and upon Demurrer to this Plea, the Court was divided, whether the Value should be taken, as it was in the King's Books, or according to the true Value of the Living. *The King versus Bishop of B. and Henley. Pasch. 18 Jac.*

5. In a *Quare Impedit* to present to the Church of *Grinstead in Essex*, being of the Value of 5 *l.* the Plaintiff declared, that the King was seised of the Advowson in Fee, and presented *T. S.* who was admitted, instituted and inducted, who afterwards was inducted into the Church of *Stoneham*, by Reason whereof *Grinstead* was void, &c. The Bishop claimed nothing, but as Ordinary, &c. *T. S.* pleaded, and confessed the King's Title; but that before the Action brought, and after his Induction to *Stoneham*, the Archbishop granted him a Dispensation *retinere* the said two Benefices, &c. to this Plea the Attorney General demurred, and Judgment was given for the King in *C. B.* and upon a Writ of Error in *B. R.* the Judgment was affirmed; for tho' this was not Avoidance of the first Benefice by the Statute 21 *H. 8.* because it was under the Value of 8 *l.* yet it was an Avoidance by the Canon Law, without any Sentence of Deprivation; so that the Patron might present: The Difference is thus; *Jf.* where the Church is above that Value, the Patron is bound to take Notice of the Avoidance at his Peril, because 'tis by Virtue of an Act of Parliament, and therefore, if he doth not present within six Months, to the first, after the Induction to the second Benefice, 'tis lapsed to the Bishop; but if the Church is under Value (as in the principal Case) then there can be no Lapse, unless the Patron hath * Notice given of the Avoidance; 'tis true, he may take Notice himself if he will, and present immediately, and a *Quare Impedit* lies against the Bishop, if he refuse to admit the Clerk: But as to the Dispensation in this Case, it came too late, because the first Living was void by the Induction into the second, and a Dispensation *retinere* a void Living, must be ineffectual both in Law and Reason. *W. Jones* 404 *The King versus Bishop of London and Baldock.*

* By the Bishop.

6. In a Special Verdict in *Trespass*, &c. the Case was, that the Plaintiff *Sharp* was Rector of *Seburrow*, which is a Rectory with Cure, &c. and under the yearly Value of 8 *l.* in the *First-Fruits Book*, but now of the real Value of 50 *l. per Ann.* that he accepted another Benefice with Cure, &c. and was lawfully inducted to the same for six Years last past; that *Richard Thorpe*, before and after the Acceptance of the second Benefice, was the Patron of the Church of *Seburrow*, but had no Notice of such Acceptance; that *King Charles the 2d.* presented the Defendant by Lapse, who was thereupon instituted and inducted, and entered into the Parsonage-House, and the Plaintiff brought an Action of *Trespass*; the Question was, whether the Church was void within the Words of the Statute 21 *H. 8.* (*viz.*) *If any Person having one Benefice with Cure, of the yearly Value of 8 l. or above, accept another with Cure, and be inducted, that then the first shall be void.* Another Question was, That if the Church was not void within the Words of the Statute, then, whether it was void by the Canon Law, which is, *that he who takes a Benefice with Cure, &c. if he had another before, he is ipso facto deprived of the first*; and it was held, that this was not a Plurality within the Statute, because it did not appear, that the first Benefice was of the yearly Value of 8 *l.* in the King's Books, at the Time when he accepted the second, which ought to be precisely proved, because 'tis in the Case of a Penal Statute made against the Common Law, by which the first Benefice was never made void, be it of what Value it will, upon the Acceptance of a second: 'Tis true, the Jury found, that it was now of the Value of 50 *l. per Ann.* which may be very true; for the Word *Now* must relate to the Time of the Verdict given, and yet it may not be of the yearly Value of 8 *l.* at the Time of the Acceptance of the second Benefice, which might be many Years since; for 'tis not found when he accepted it; besides, the Finding the first Benefice to be now of the yearly Value of 50 *l.* cannot be material, because the Value must be taken, as 'tis in the King's Books in the *First-Fruits Office*; as to the second Question, 'tis plain, that the Church is void by the Canon Law, but where the Avoidance is by that Law, Notice ought to be given to the Patron; and if he had no Notice, no Lapse incurs on him; and the Jury found, that he had no Notice. 2 *Lutw. Rep.* 1301. *Sharpe versus French.*

(C)

What shall not be a Plurality. See (B) pl. 6.

1. A Parson who had one Benefice, obtained a Dispensation for another, and accordingly was inducted into a second Benefice, and afterwards he accepted the *Archdeaconry* of *Gloucester*; now, tho' by the Civil Law the first Benefice was void by this Means, yet by our Law 'tis not, because of a Proviso in the Statute 21 *H. 8.* by which no Deanery or Archdeaconry, shall be taken to be a Benefice with Cure, &c. 1 *Leon.* 316. *Underhill versus Savage.*

2. A Man was Parson of a Church, with a *Vicarage* endowed; the Parson accepted a Presentation to the *Vicarage*, without any Dispensation; adjudged by *Hobart Ch. Just.* that tho' these were several Advowsons, and several *Quare Impedit*s might be brought for them; yet this was no Plurality, because the Parsonage and the Vicarage are both but one Cure; the Vicarage being endowed out of the Parsonage; and also there being a Proviso in the Statute 21 *H. 8. cap.* 13. that a Parsonage which hath a Vicarage endowed, shall not be taken to be a Benefice with Cure of Souls within that Statute, to make a Plurality. 2 *Cro.* 691. *Woodley versus Manwaring.*

Policy of Insurance.

(A)

1. **A** *Sumpsit* on a Policy of Insurance ; upon *Non assumpsit* pleaded, the Jury found the Policy, by which the Insurers undertook from *London* to *Venice*, and the Words were *Warranted to depart with Convoy* ; it was held, that these Words mean, that he will sail out of the Port with Convoy, without any wilful Default of the Master ; therefore, if after such Departure out of the Port, the Ship is separated by Tempest, and taken, the Insurers are not liable : In another Case, it was held, that these Words mean, to depart with Convoy, (*i. e.*) from such Place where Convoys are to be had, as the *Downs*, &c. but *Holt*, Ch. Just. held, that *B. R.* takes Notice of the Laws of Merchants, which are general, but not of particular Usages ; as of taking Convoys in the *Downs*, for that is no Part of the Law of Merchants. 2 *Salk.* 443. *Jefferies* versus *Legendra*, and *Lethulier's* Case. See *Yelv.* 136. The Plaintiff had Judgment. 3 *Lev.*
320.
4 *Mod.*
58.

2. Policy of Insurance is discharged only from the Time of Deviation ; therefore, if any Damage happens in the Voyage before that Time, the assured shall recover for so much. 2 *Sal.* 444. *Green* versus *Young*.

3. Policy of Insurance, upon *Non assumpsit* pleaded, the Case was thus ; One *Crisp* being in the *West-Indies*, sent a Letter to *Bates* in *London*, to insure Goods upon the *Mary Galley*, Captain *Hill* Commander ; *Bates* carried the Letter to one *Stubbs*, who writ Policies, and he by Mistake made the Insurance on the *Mary*, Captain *Hastewood* Commander, and the Policy thus made was subscribed by the Defendant ; afterwards the *Mary Galley* was lost ; then *Stubbs* applies to the Insurers to consent that the Policy might be altered, to which they agreed, and the Mistake was amended ; and tho' it was objected at the Trial, that the *Mary* was a stouter Ship, and that the Insurers ought to have a greater *Premium* for the *Mary Galley* ; yet it was held, that this Action would lie, the Mistake being rectified by Consent, after the Policy under-written. 2 *Salk.* 444. *Bates* versus *Grabbam*.

4. Case, &c. upon a Policy to insure the *William Galley* from *Bremen* to *London*, warranted to depart with Convoy ; this Galley sail'd from *Bremen* with a *Dutch* Convoy to the *Elb*, where they were joined with several *Dutch* and *English*, and from thence sailed with them to the *Texel*, where they staid about nine Weeks, and from thence they all sailed, and the Galley was separated in a Storm, and taken by a *French Privateer*, and retaken by a *Dutch Privateer*, and paid 80 *l.* to him as Salvage-Money ; ruled *per Holt* Ch. Just. that the Voyage ought to be according to Usage, and that tho' Going to the *Elb* was in Fact out of the Way, yet it was no Deviation, because till after the Year, 1703, there was no Convoy for Ships directly from *Bremen* to *London* ; the Plaintiff had a Verdict. 2 *Salk.* 445. *Bond* versus *Gonsales*.

Poor Prisoners. See Statutes. (F) 3.

Poor Rates. See Taxes for the Poor.

Possession. See Bargain and Sale. (A) 1.

Possibility.

What Acts extend to a Possibility, what | barred, and by what not. (A)
not; and by what Acts it shall be | Of a Devise of a Possibility. (B)

(A)

What Acts extend to a Possibility, what not; and by what Acts it shall be barred, and by what not.

* Hardr;
417.

1. **P**ossibility, in a legal Sense, is that which may or may not be, and 'tis either near or remote; as for Instance, where an Estate is limited to one *after the Death of another*, this is a * *near Possibility*; but the Law doth not regard a Possibility which is remote; as where there is a Tenant in Tail in Possession, Remainder in Tail to B. B. who grants all his Estate to C. C. for the Life of the Tenant in Tail in Possession; this is a void Grant, because 'tis a remote Possibility, and indeed 'tis impossible, that it should ever take Effect; for 'tis a very remote Possibility, to suppose that the Tenant in Tail in Possession *may enter into Religion, and become profest*, and that thereupon the Grantee may enter and enjoy the Estate during his Life. 2 Rep. 50. In *Sir Hugh Cholmly's Case*.

2. Lessee for thirty Years devised the Profits to a Woman during her Widowhood, and afterwards devised the Term it self to B. B. and died; the Widow by the Assent of the Executors entered, and afterwards purchased the Inheritance of him in Reversion, who covenanted, that it was Free from Incumbrances, and entered into a Bond for Performance of Covenants; in an Action of Debt brought on this Bond, the Breach assigned was, that there was Incumbrance on the Lands; for there was a Term of Years in it, devised to B. B. and for the Defendant it was insisted, that he having a remote Possibility to enjoy the Term after the Death of the Widow, this Covenant did not extend to it; but adjudged, that it did. 10 Rep. *Hammington versus Rudyard*, vouched in *Lampett's Case*.

3. The Testator, being seised in Fee, devised the Lands to his Wife for Life, Remainder in Fee to his Son John, when he shall be 25 Years old; John, after the Age of 21, and before 25, levied a Fine to B. B. and lived till after 25 Years, and then died; adjudged, that his Heir was barred by this Fine, tho' when it was levied, his Father had only a Possibility to have the Fee-simple; this is cited in 10 Rep. 46, 50 a. In *Lampett's Case*. viz. *Johnson versus Gabriell*.

4. But where the Testator was possessed of a Lease for Years, and devised the Profits thereof to W. R. for Life, Remainder to another; and afterwards the Devisee for Life entered with the Assent of the Executor, and then he in Remainder for Life assigned all his Interest to another, and then the Devisee for Life died; it was adjudged, that this Assignment was void, because whilst the Devisee for Life was living, he in Remainder had only a Possibility to have the Term; for the Devisee for Life had an Interest in it *sub modo*, because he might have survived the whole Term. 4 Rep. 64. B. cited in *Fullwood's Case*. See *Sparks versus Sparke*. S. P.

5. A Lease was made to Husband and Wife of a Term for Years, for their Lives, Remainder to the Executors of the Survivor; the Husband granted the Term; adjudged, that it should not bar the Wife, because he had only a Possibility to it, if he had survived his Wife, and no Interest till then. *Hill. 17 Eliz. Popham*.

6. Husband and Wife were Tenants in Tail, Remainder to the Right Heirs of the Husband, who had Issue a Son; afterwards the Father levied a Fine to the King, who granted the Lands to the Earl of Huntingdon and his Heirs; the Husband died, and the Widow entered, and was possessed, and then the Reversion in Fee descending on the Son of the Earl, he and the Widow joined in a Deed, by which he confirmed all the Estate to her, and to the Heirs of her Body, by her Husband begotten; the Widow died; it was insisted, that the Estate-Tail of the Husband was barred by the Fine, and that nothing passed to the Wife by the Confirmation made to her by him who had the Reversion; because he had only a Possibility to it after the Death of the Husband without Issue; and a Possibility cannot be transferred; but it was the better Opinion, that it might, either by Confirmation or Release. *Cro. Car. 342. Baker versus Willis*.

7. Devise of all his Lands to his Wife for her Life, Remainder of a Moiety thereof to his eldest Son in Fee, Remainder of the other Moiety to his youngest Son in Fee: Proviso, that his Wife shall pay his Debts and Legacies; and if she die before Payment, &c. then his two Sons shall pay them; and if either of his Sons die before Payment, then the Survivor shall have the whole in Fee; the eldest Son (in the Life-time of his Mother) released to the youngest, all his Right, &c. to the Reversion and Remainder devised to him by his Father; it was objected, that this Release could be no Bar to his Right, because he had only a remote Possibility to the Remainder, for his Mother must be dead, and the Debts and Legacies must be paid before he can have any Title; but adjudged, that his Right was extinguished by this Release, for the Possibility was not remote. *Winch 54. Hoe's Case.*

8. Lease of an House for forty Years; in which the Lessee covenanted to repair; and at the End of the said forty Years, if upon View of the Lessor the House should be sufficiently repaired, then the Lessee, &c. should have it for forty Years longer; afterwards the Lessee assigned all the Interest and Term of Years which he had in the Premises; then the Assignee made his Wife Executrix and died, and she assigned her Interest to the Defendant; then the forty Years expired, and the House being in good Repair, the Defendant continued in Possession claiming another forty Years by Virtue of the original Lease made to the Lessee; but adjudged, that this Possibility of increasing the Estate in the House for forty Years longer, it being in good Repair, shall not go to the Assignee of the first 40 Years, but was determined by that Assignment which was made to him by the Lessee, for such Possibility could not pass by that Assignment, because the Lessee assigned all the Interest only of that Term of Years which he then had in the House, tho' one Judge was of Opinion, that this Possibility was inherent and depending on the first Term for forty Years. *Moor 27. Skerne's Case.*

9. The Testator being possessed of a Term for Years, devised it to his Wife for so long Time as she should live, and afterwards to his Son, and died; the Widow purchased the Inheritance, and sold it to one W. R. and covenanted with the Purchaser, that it was free from Incumbrances, and entered into a Bond for Performance of Covenants, and died, and then the Son claimed the Residue of the Term by Virtue of the Devise; but in an Action of Debt brought against him upon this Bond, it was held ill, because the Possibility that he might survive his Mother was an Incumbrance by which the Bond was forfeited. *Moor 249.*

10. The Earl of Oxford made a Lease to his Brother Robert Vere for Life, of the Manor of Shotscrook in Berks, and that if he marry, and his Wife should survive, then she should have it for Life; Robert, before he married, made a Feoffment of the Manor to T. Nook; and afterwards the Earl of Oxford levied a Fine to the said Nook; then Robert married and died, and his Wife survived; adjudged, that the Remainder to the Wife for Life was destroyed by this Feoffment, and that this Possibility of her having it was included in the Fine, which is likewise barred. *Moor 554. Powle versus Veer.*

(B)

Devise of Possibilities. See *Executory Devise.*

1. **W**Here the Testator hath only a Possibility and no Interest, that is the Reason why his Executors shall not have the Term, as where the Testator devised, &c. to his Wife for Life, and if she live till his Son was twenty-four Years of Age, then to him; and if she die before that Time, then to B. B. until his Son should arrive to that Age; B. B. died before the Wife, then she died before the Son was twenty-four Years old; adjudged, that the Executor of B. B. shall not have the Estate till the Son is twenty-four Years old, because nothing was vested in his Testator, but only a meer Possibility of an Interest. *Goldf. 64.*

2. There is a Difference between a Possibility founded on a Trust and a meer Possibility, for the first may be devised, but the other cannot, either by the Common Law or by Equity; as for Instance, the Testator devised a Term for Years to James Moor, for his Life; and if he should happen to die before the Expiration of the Term, then he devised the Remainder of the said Term to Philip Cole, who having only a Possibility to have it, if he survived James Moor, devised all his Interest to Richard Cole, he the said James Moor being then living; afterwards Richard Cole granted the Term to some Friend in Trust for himself; adjudged, that this Possibility being founded on a Trust in Philip Cole to preserve the Lease, he may declare his Will thereof. *Moor 808. Cole versus Moor.*

3. Devise of Lands to a Man and his Heirs, upon Trust, to pay 300*l.* per Annum to his Daughter Mary for her Life; and if she have Children, then to pay the same to them successively, and for Want of such Issue, then to Anthony, who had Issue John, and died; John, in the Life-time of Mary, devised the Lands to the Plaintiff Bishop, and then died without Issue; adjudged, that this Devise to Bishop was void, because John the Devisor had only a Possibility to have the Estate, if he survived Mary, dying without Issue, which was too remote a Possibility to vest any Interest in him. 3 *Lev. 427. Bishop versus Fountaine.*

Postulation. See *Ordinary.* (A) 10.

Powers. See *Authority.* (B)

Premunire.

(A)

1. **T**HE Statutes of *Premunire* are 27 *Ed.* 3. 16 *R.* 2. both which were made when the Pope usurped Ecclesiastical Jurisdiction here; and the Writ being *contra coronam & dignitatem Regis*, it hath been an Opinion, that no *Premunire* will lie now against an Ecclesiastical Person, because all Ecclesiastical Power is settled in the Crown; but it was resolved by all the Judges, that these Statutes are in Force, and that when an Ecclesiastical Judge doth usurp upon the temporal Laws, which are the Birth-right of the Subject, he draws him *ad aliud examen*, and therein he offends *contra coronam & dignitatem Regis*. 12 *Rep.* 50.

2. The Attorney General prosecuted a *Premunire* for the Queen and *R. B.* against the Dean of *Christ-Church* in *Oxford*, and others, and afterwards withdrew his Suit; and it was adjudged, that by this Means the Party grieved could not proceed, because the principal Matter of the *Premunire* was the putting him out of the Queen's Protection, and the Damages to the Party are but accessary, so that the Principal being released, the Damages are so likewise. 1 *Leon.* 290. *Queen, Parrot, and Dean of Christ-Church.*

W. Jones
217. S. C. 3. The Defendant being seised in Fee, was indicted for a *Premunire*, upon the *Stat.* 13 *Eliz.* but before Conviction he made an Entail of his Lands; it was adjudged, that the Attainder shall relate to the Time of the Offence, and that was before he entailed his Lands, and not to the Time of the Judgment, which was afterwards; and therefore the Freehold being in him at the Time of the Attainder, shall not be devested without an Inquisition under the Great Seal. *Cro. Car.* 123, 172. *Grosse versus Gayer.* See Exchequer Seal. (B) 5.

4. Tenant in Tail was attainted in a *Premunire*, he shall forfeit his Lands only during Life, and afterwards the Issue in Tail shall Inherit. *Trudgeon's Case* vouched in *Dr. Foster's Case*. 11 *Rep.* 56 and 63.

5. In a *Prohibition* by the King brought against a Prior, for that the King having recovered against him in a *Quare Impedit*, he sent his Brother with an Appeal to *Rome*, and sued there to avoid the Judgment; upon Not guilty pleaded, it was found against the Defendant, and thereupon the King prayed Judgment upon the Statute 27 *Ed.* 3. as in Case of a *Premunire*; but it was adjudged, that he should not have such Judgment, because the Suit was not brought according to the Statute, but by a Writ of Prohibition at Common Law. 9 *Rep.* 71. In *Dr. Hussey's Case*.

6. *Green* and others were indicted at the *Old Bailey*, for refusing the Oath of Allegiance in the Statute 3 *Jac.* cap. 4. and being convicted, had Judgment of *Premunire*; and upon a Writ of Error brought, it was assigned for Error, that this Oath is not in Force, but expired with the King, for the Words are, *That King James is lawful King, &c.* and doth not say his *Heirs, &c.* and the Words *King James* shall not include his Successors; besides, the Statute is, that *they shall take the Oath*, and the Indictment is for refusing the Oath *in his Anglicanis verbis*, and then it sets forth the Oath *verbatim, &c.* that *King James is rightful King*, which Oath is now gone by his Death; and this Statute is not like that of 7 *Jac.* cap. 4. by which 'tis enacted, that the Tenor of the Oath shall be taken; but adjudged, that the Name of the King shews what Person was intended, and it shall extend to his Successors: And *per Hale*, the Tenor is as much as if it was *verbatim.* *Raym.* 212. *Green's Case.*

7. Error to reverse a Judgment in *Premunire*, given at the *Assises* in *Somerset* against the Defendant *Perin*, for refusing the Oath of Allegiance mentioned in the Statute 3 *Jac.* cap. 4. which is, that *he shall be out of the King's Protection, that his Lands and Tenements, Goods and Chattels shall be forfeited to the King, and that his Body shall be imprisoned at the Will of the King there to remain*; he was indicted for this Offence; and upon Not guilty pleaded, the Issue was joined between him and the Clerk of the *Assises*: The Award of the *Venire facias* was certified thus, *Super quo preceptum fuit vic' Somerset prad' quod venire faciat*, when it should be *preceptum est*; but being in the preterperfect Tense, 'tis more like a History of something which was done before the Issue joined, than the Record of what the Court did at that Time; and for this Reason the Judgment was reversed. 2 *Saund.* 393. *The King versus Perin.*

8. By the Statute 3 *Jac.* cap. 4. 'tis enacted, that *he who shall refuse to take the Oath of Allegiance (therein prescribed) being tendered to him by the Justices of Peace in their Quarter-Sessions, they shall commit him to the Common Gaol, there to remain without Bail till the next Assises, where the said Oath shall be again in the said open Assises required of him by the said Justices of Assise and Gaol-Delivery, and the Person refusing shall incur a Premunire*: The Indictment against the Defendant upon this Statute, sets forth, that at the *Assises* held before *Sir Robert Atkins, &c.* it was presented, that at the general Quarter-Sessions for the County of *Hereford*, 14 *January*, An-

no 30 Car. 2. The Justices of Peace did tender the Oath to the Defendant, and he refused, and that afterwards, at the Assises held for the said County, 31 Martii, 31 Car. 2. before Sir Robert Atkins un' justiciar' Domini Regis de Banco, Ad Assisas in Com' Hereford præd' capiend' assign'; the said Justice Atkins again tendered the Oath, and he refused the same; upon Not guilty pleaded to this Indictment, the Defendant afterwards *relicta verificatione* confessed it, and Judgment of *Præmunire* was given against him; and now a Writ of Error was brought, and the Error assigned was, that the second Tender of the Oath was by a *Justice of Assise only*, when the Statute requires it should be a *Justice of Assise and Gaol-Delivery*; and the Defendant being committed by the Justices in their Sessions, none can deliver him but they who have Power to deliver the Gaol; this was held by one Judge a material Exception; but the Judgment was reversed for a Fault incurable, and that was in misreciting the Oath in this Indictment, which by the Statute is in these Words, *And him and them will defend, &c. against all Conspiracy and Attempts whatsoever*; and the Words in the Indictment are *Against all Conspiracies and Contempts whatsoever*. Raym. 374. *The King versus Munson*.

9. Judgment in *B. R.* in Debt against one *Standish*, who afterwards preferred a Bill in Chancery against the Plaintiff in the Action, to be relieved against this Judgment, and obtained a Decree, that he (the Plaintiff) should acknowledge Satisfaction, and pay to *Standish* forty Marks Coins and thereupon the Plaintiff in the Action brought a *Præmunire* against *Standish*, upon the Statute 27 Ed. 3. cap. 1. and upon a Demurrer two Judges were of Opinion, that *Standish* was guilty of a *Præmunire*. Sid. 463. *King versus Standish*. See 1 Bulst. 183. 3 Inst. 119. Hale Ch. Just. of another Opinion. See *Courtney versus Granvill*, and *Heath versus Ridley*. 1 Lev. 211. Mod. 59. Raym. 227. Hardr. 120. S. C.

Prescription.

Who may prescribe, for what; and where a Prescription is good. (A)	Who, and for what a Man cannot prescribe; and of Prescriptions which are void. (B)
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(A)

Who may prescribe, for what; and where a Prescription is good. See *Que Estate per totum*.

1. **T**HERE is a Difference between a Prescription, Custom, and Usage; Prescription hath respect to a *certain Person*, who, by Intendment, may have a Continuance for ever; as for Instance, he, and all those whose Estate he hath in such a Thing, this is a Prescription; but Custom is always applied to a *certain Place*, as Time out of Mind there has been such a Custom in such a Place, &c. Usage differs from both, for that may be either to Persons or Places, as to Inhabitants of a Town to have a Way, or to such a Hundred in such a County: Thus Tenant *for Life* cannot prescribe, but he shall have the Benefit of an Usage.

2. It was a Question, whether a Park-keeper *for Life* might prescribe in himself and Predecessors to have such Profits as incident to his Office; and it was the better Opinion he could not, because he hath not any Interest in the Office in Perpetuity, neither is there any Inheritance in it; and a Man cannot prescribe to the Incidents, unless he can prescribe to the principal Thing. *Dyer* 70. *Isham's Case*.

3. *Case, &c.* for disturbing him in his Common, wherein the Plaintiff declared, that *A.* was seised of certain Lands *for Life*, Remainder in Tail to *B.* and that they and all those whose Estate they had in the said Lands, had Common appendant to the same, and that they leased the Lands to the Plaintiff for Years; it was objected against this Declaration, that *Lessee for Life* and he in Remainder cannot prescribe together; but it was answered, that all was but one Estate. *Quære* 1 Leon. 177. *Hawkswood versus Husbonds*.

4. *Case, &c.* the Plaintiff declared, that *A.* was seised of the Manor of *B.* and that he and all those whose Estate he had in the said Manor, had the Liberty of Foldage in the Town of *D.* and that the Inhabitants thereof let their Lands lie fallow every second Year, and prescribed, that they,

&c.

&c. might set up Hurdles on their Lands with the Leave of the Lord of the Manor, but not otherwise; and that the said Lord demised the Manor to the Plaintiff, and the Defendant set up Hurdles on his Land *without License*, so that he was impaired in the Profits of his Foldage; it was objected, that this Prescription was not good, because it was against Law to abridge the Subject of the Profits of his Lands; but adjudged, that the Prescription was good, for it did not extend to deprive the Subject of the whole Interest and Profits of his Lands, but only restrained him to set up Hurdles; &c. 1 Leon. 14. *Punfany versus Leader*.

5. Case, &c. wherein the Plaintiff declared, that he was seised of an antient Messuage in B. and prescribed, that he; and all those, &c. whose Estate he had in the said Messuage, had used Time out of Mind to set up Hurdles in *aperta platea* of B. near the said Messuage every *Market-Day*, to make Pens for Sheep, for which he received Money, and that the Defendant broke down the Hurdles, *per quod proficuum amisit*; it was objected, that this Prescription was too general, it being to set up Hurdles in *aperta platea*, not shewing whether on his own Lands or on the Lands of another; for tho' Fishermen may prescribe to set Stakes on other Mens Lands to dry their Nets, that is for the publick Good, but this is for a private Gain, which cannot be on the Lands of another: but adjudged, that the Prescription was good, for a Market is as well for the Benefit of the Publick as Fishing. 1 Leon. 108. *Ferrer's Case*.

Moor 359. S. C. 6. Trespass, &c. the Defendant justified as in his Freehold, &c. the Plaintiff replied, that the *Locus in quo*, &c. was Parcel of the Manor of B. grantable Time out of Mind, &c. by Copy of Court-Roll, either in Fee or in *Tail*, or for Lives, and that it was granted to the Plaintiff by Copy in Fee; this Prescription was traversed; and upon Issue taken upon the Traverse it was found, that the Lands had been Time out of Mind granted in Fee, but never in *Tail*; adjudged, that it was found for the Plaintiff, because the Granting it in Fee was the Effect and Substance of his Title, which was found for him; and the Allegation, that it was grantable in *Tail*, or for Lives, was but the Conveyance to his Title. Cro. Eliz. 431. *Doyle versus Wood*.

7. Replevin for Taking *unum Equum, unum Spadonem*, and two Cows, &c. the Defendant, in his Avowry, prescribed in the Place where, &c. for Common appendant *pro omnibus Equis*, &c. and upon Demurrer it was objected, that this Prescription did not answer the Declaration, because the Defendant prescribed to have Common for all his *Horses*, but said nothing as to the Geldings; but adjudged, that the Prescription was good, for *Equus* is a general Term, and compriseth both Horses and Geldings, but not Mares. Cro. Eliz. 798. *Morse versus Stapleton*.

2 Cro. 151. S. C. 8. *Inhabitants*, unless they are incorporated, cannot prescribe to Matters of Profit in *alieno solo*, but they may for Matters of *Easement*, as for a Way to Church, &c. or for Matters of Discharge, as for a *Modus Decimandi*, or to be discharged of Tithes or Toll. 6 Rep. 59. *Gatewood's Case*.

1 Bullf. 115. S. C. 9. One Prescription may be pleaded against another where one may stand with the other; as for Instance, where a *Copyholder of a Bishop* prescribed, that all *Copyholders* within the Manor had been discharged of Tithes; but not where one Prescription is against another, as where one prescribes to have Lights to his House, and the other prescribes to stop them up. Godb. 183. *Hughes versus Keimejb.*

10. Replevin, &c. for Taking his Cattle in *five Acres of Land*; the Defendant avowed as Bailiff of B. B. and laid a Prescription in him, &c. to have *Herbage and Pasturage* of the said five Acres when it was not sown; it was objected, that this Prescription was not good, it being not like a Prescription to have Common, for that was to take the Profits only by the Mouths of Cattle, but this Prescription is to have the Land it self, for by the Demise of the Herbage the Land passeth; but adjudged, that the Prescription was good, because it might have a good Beginning by Grant; and if it may be good by Grant, 'tis good by Prescription. Winch 6. *Sparkes Sir George's Case*, and 45. *Pitt versus Chirke*. S. P.

11. In a *Quo Warranto* why the Defendant claimed the Liberty of *free Warren* in B. he pleaded, that he was seised in Fee of the Manor of B. whereof the *Locus in quo*, &c. was Parcel, and so prescribes to have Liberty of free Warren within all the said Manor and the *Demefnes* thereof, and that none shall chase any Game, &c. in the said Manor and *Demefnes* thereof, without his Leave; and Issue being taken, that he had no free Warren, &c. it was found for the Defendant, and thereupon it was objected, that his Prescription was not good, it being to have free Warren in the Manor, and in the *Demefnes of the Manor*; for tho' he might prescribe to have it in his own *Demefnes*, he cannot prescribe to have it in the Lands of other Freeholders in the Manor; neither ought he to prescribe to have it as appertaining to his Manor; but adjudged, that the Prescription was good, as well in the Lands of other Freeholders as in his own; for it shall be intended, that this Liberty was before there were any Freeholders in the said Manor, and that their Estates were afterwards extracted out of the *Demefnes*. 2 Cro. 227. *Sherington's Case*.

12. Trespass, &c. for Entering his Close, and Taking and Carrying away thirty Loads of Thorns in a Place called the *Waste*; the Defendant pleaded, that he was seised in Fee of a Messuage and three Acres of Land, &c. and so prescribes to cut down and take all Thorns growing in the said Waste, to spend in the said House or about the said Lands; the Plaintiff replied, that B. B. was seised in Fee of the Manor of W. whereof the said Waste was Parcel, and gave him Leave to take the Thorns; adjudged, that this Prescription by the Defendant excludes the Lord, so that he can neither cut or license any other to cut these Thorns. 2 Cro. 256. *Duglasse versus Kendal*.

13. *Sir Randolph Crew*, and all those whose Estate he had in the Manor of *Crew*, Time out of Mind had Turf to burn in his House in *Crew-Hall*, which Turfs they had in a great Waste, called *Oakhanger-Moor*, and being interrupted, he preferred his Bill in the Star-Chamber, against *Sir Tho. Vernon*, and his Son *George*, who was a Barrister at Law, &c. who put in their Answer, and therein affirmed, that the Owners of *Crew-Hall* did take Turf, but that it was by License, and affirmed, that they had a Release of all Right they had by Prescription; which Release being read in Court at the Hearing of the Cause, it appeared to be a Grant from *Sir Tho. Vernon* to one *Fulchurch*, to take Turfs in the said Moor to burn in his House in *Crew*, for ever; it was objected, that this Prescription was destroyed by the new Grant; but adjudged, that it was not, and that the Grant should enure as a Confirmation of the Prescription. *Moor* 818. *Crew versus Vernon*.

14. Error in *B. R.* of a Judgment given in a Court of Pie-powders; for that it was alledged to be a Court held at *Rocheſter* by Prescription, and also by Grant or Charter; which cannot be, because the Prescription is destroyed by the Grant; but adjudged, that it was not, and that the Prescription continues, unless 'tis altered by the new Charter. *Moor* 830. *Goodson versus Duffield*. 2 Cro. 313. S. C. 2 Bullf. 21. S. C. *Postea* Trial. (D) 11. S. C.

15. Prescription to have Timber to repair an old House, or to build new Houses, is good, without any Manner of Consideration expressed. 2 Cro. 25.

16. Trespas for Breaking and Entering his Close, and cutting down and carrying away his Grass; the Defendant pleaded, that the *locus in quo*, &c. was a certain Piece of Land in the Parish of *B.* and so laid a Prescription in the Inhabitants of the said Parish to enter into the said Land, and cut Rushes to strew the Church on such a Day, &c. adjudged, that this Prescription was good, for it was in Nature of an Easement, and not a Profit appender in another Man's Soil. *Murch* 16. *Bond's Case*.

17. Case, &c. wherein the Plaintiff declared, that the Office of Post-Master was an antient Office, to which several Fees were belonging, for carrying Letters; but did not say, Time out of Mind; adjudged, that it being an antient Office, and the Plaintiff having alledged, that such Fees did belong to it, he need not prescribe in the same. *Latch* 87. *Stanhope versus Ecquesſter*. *Godb.* 47. *Parker versus Herold*. S. P. 2 Leon 114. S. C.

18. Case, &c. in which the Plaintiff declared, that he was seised of a Close called *Hayes*, next the River *O.* and that the Defendant was possessed of another Close, called *Grove-Mead-Close*, on the other Side of the said River; and that he, and all the Possessors of *Grove-Mead-Close*, Time out of Mind have used to make a Hedge on the Bank of the said River, next the Water, which the Defendant had not done, by Reason whereof the Cattle passed thro' the River on the Plaintiff's Land *ad damnum*, &c. after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Prescription is ill, because that ought to be either by Way of Custom in a particular Place, or in a Person by Reason of the Continuance of his Estate; but a Possessor or Occupier is no such Person, for that may be for an Hour or less; and for this Reason the Prescription was adjudged ill. *Palm*. 331. *Holbach versus Warner*. 2 Roll. Rep. 288. S. C. 2 Cro. 665. S. C. See (B) pl. 7.

19. The Lord of the Manor of *Milden-Hall* brought an Action against the Defendant, for a Trespas in a Close, called *Westrow-Hills*, who justified, that the Close was Parcel of the Manor, and that he is one of the Free Tenants of the said Manor, and seised in Fee of an antient Tenement there, and that there are other Freehold and Customary Tenements, Parcel of the said Manor, and that omnes tenentes of the said Tenements have had *solum & separalem pasturam*, for all their Cattle levant and couchant in the Close, called *Westrow-Hills* (except Hogs, Sheep, and Northern Steers) every Year, *omni tempore Anni*, (except from the Feast of *St. Edmund*, to the 25th Day of *Murch* next following) as appertaining to their several Tenements, and so brings his Case within the Prescription; to which the Plaintiff demurred, and the Question was, Whether this Prescription was good to exclude the Lord of the Manor; the *Ch. Just. Vaughan* and *Tyrrell* held, that it was not good, ff. 'Tis generally agreed for Law, that a Prescription to have *solum & separalem Communiam* in a certain Place, doth not exclude the Owner of the Soil; but why it doth not, is not so plain by that Book; there are two Notions of the Word *Communiam*; one is the Interest in the Common, which one Commoner hath against another, not to have his Common surcharged, for this is meerly between Commoners, and not for a Commoner against the Lord, or for him against them; and in this Sense there may be *solum & separalem Communiam*, because one may have a Right of Common, and no more; and one Part of the Tenants of a Manor may have a sole Right of Commoning in a certain Place, excluding the other Tenants, and may claim there *solum & separalem Communiam* * a ceteris Tenentibus Manerii: The other Notion of a Common is, where one or more hath a Right of Pasture, with the Owner of the Soil; and in this Sense 'tis not possible for him, or them, to have *solum & separalem Communiam*, because one alone cannot at the same Time have that which he is to have and enjoy with another; he may have *solum & separalem pasturam* in such a Close, and by this all other Persons are excluded to have Pasture in that Close; and in this Sense the Word *Solum* signifies *totam pasturam*; and where a Man grants *totam pasturam*, the Grantor reserves nothing for himself; but if afterwards he restrains those general Words, certainly the Restriction must be for his own Benefit, and not for the Benefit of the Grantee; therefore in the Principal Case, the Prescription being to have *solum & separalem pasturam* in such a Close, all the Pasture must pass; but the Restriction (except for Hogs, Sheep and Northern Steers) must be for the Benefit of the Lord of the Soil, and therefore this is not a good Prescription to exclude him; the Court was divided; but

1 Lev. 253. 1 Vent. 163, 251. S. C.

* 1 Inst. 122.

* 4 Rep. 31. Foyſton v. Cratchrode.

but the Court of B. R. held this Prescription to be good ; as 'tis reported by Just. *Levinz. Vaugh.* 251. *North versus Coe.*

20. In Replevin, &c. the Issue was upon a Prescription to have Common in such a Place for *one Cow and an half* ; and after a Verdict for the Plaintiff, it was objected, that a Man could not prescribe to have Common for a *Cow and an half* ; but adjudged, that it shall be intended, that two Men had but one Cow, and so each of them had half a Cow. *Sid.* 226. *Ellard versus Hill.*

21. In Trespafs for Breaking his Close ; the Defendant prescribed, that the *Inhabitants of H.* Time out of Mind, had used to dance there, *at all Times of the Year*, for their Recreation, and so justified to dance there ; Issue was taken upon this Prescription, and the Defendant had a Verdict ; it was objected against him, that a Prescription to dance in the Freehold of another, and spoil his Grass, was ill, especially as laid in the Plea, *viz. At all Times of the Year*, and not at seasonable Times ; and for *all the Inhabitants, &c.* who, tho' they may prescribe in Easements, which are necessary, as a Way to a Church, &c. yet not in Easements for Pleasure only, as to dance ; but adjudged, that the Prescription is good, and tho' it might have been ill on a Demurrer, yet Issue being taken upon it, and found for the Defendant, 'tis good. 1 *Lev.* 176. *Abbot versus Weekly.*

22. In Replevin, the Defendant avowed Damage-feasant in his Freehold ; the Plaintiff replied in Bar, that there is a Custom for the *Copyholders* of the Manor of *H.* to have *Jolam pasturam omni tempore anni*, and that he by *Licence* of *T. S.* a Copyholder, &c. put in his Cattle ; the Parties being at Issue upon this Custom, it was found for the Plaintiff, and objected in Arrest of Judgment, that this Custom was not good, because it excluded the Lord ; but adjudged, that it did not, but as to the Pasture only, for the Lord shall have the Mines, Coals, Timber and Trees, &c. then it was objected, that the Plaintiff did not aver, that the Cattle were *levant and couchant* on the Copyhold ; adjudged he need not, because this is not a Common, but Pasture ; for tho' Levancy and Couchancy is the Measure of the Common ; 'tis not so of Pasture ; and here the Copyholder is to have the whole Pasture ; it was objected, that Commoners ought to depasture their own Cattle, and not those of Strangers ; but adjudged, that this being a Right of Pasture, and not for Common, it may be taken by the Cattle of Strangers. Lastly, that this Licence is good *per Parol* without Deed *pro hac vice* ; 'tis true it would be otherwise, if it was for a certain Time, because that would amount to a Grant, and then it must be by Deed. 2 *Lev.* 2. *Hopkins versus Robinson.* See *Trigg versus Turner.*

23. In Trespafs, the Defendant justified, for that he had a *Drift of Common*, to see that it was not surcharged, and that the Beasts taken were a Surcharge, for which he detained them till 5 *l.* was paid, &c. and upon Demurrer, it was objected, that a Prescription for Drift of Common doth not warrant a Distress, he should have prescribed to distrain ; adjudged, that 'tis a Thing of Common Right, for the Preservation of the Common. 2 *Lev.* 87. *Bromfield versus Teigh.*

(B)

Who, and for what a Man cannot prescribe ; and where a Prescription is void, and not good. See *Warren.* (A) 2. *Action on the Case.* (I) 4.

1. Trespafs, &c. for Carrying away thirty Loads of Clay in *B. B.* digged there for the Use of the Plaintiff ; the Defendant pleaded, that he is an Inhabitant of *B. B.* whereof the Place where, &c. is Parcel ; and that there is a Custom there, for *every Inhabitant to dig* and carry away Clay in *B. R.* for his necessary Use ; and that the Plaintiff *not being an Inhabitant there*, had digged the Clay, &c. and that he, the said Defendant had carried it away for his necessary Use ; and upon Demurrer adjudged, that the Justification was not good, for the Defendant prescribed, that every Inhabitant might dig Clay, so that by this Prescription he shall have what he digs, either by himself or his Servant, but not that which is digged by a *Stranger*, as the Plaintiff in this Case was ; for by the Plea it appears he was no Inhabitant in *B. B.* and 'tis probable he might have Leave from the Lord of the Soil to dig Clay. *Cro. Eliz.* 434. *Stiles versus Butts.*

2. Replevin, &c. the Defendant avowed, for that he was seised in Fee of the Rent, and prescribed to *distrain* for it in that Land, &c. adjudged, that the Prescription was not good, because he prescribed in the *Distress*, and not in the Rent it self. *Cro. Eliz.* 673. *Stephens versus Lewis.*

3. A Prescription to have wild Swans, which are *feræ naturæ*, and not marked, *nidificantes & frequentantes* within such a River or Creek, is not good, for he cannot have any Right to them, but only as they are in such a Place ; but if the Prescription had been, that within such a River there had been Time out of Mind wild Swans, not marked, *nidificantes, &c.* and that such an Abbot and his Predecessors, have always used to have and take to their own Use some of the said wild Swans, &c. such a Prescription had been good. 7 *Rep.* 15. *Case of Swans.*

4. Prescription, &c. to take the Under-wood growing on the Lands of another Man, adjoining to my Land, to make the Hedges of the Land on which the Wood did grow, is not good, because it sounds in Charge, and is not for the Benefit of him who prescribes. 1 *Leon.* 313. *Leigh versus Okely.*

5. A Man cannot prescribe by a *Que Estate* to any Thing which lieth in *Grant*, and which cannot be aliened without Deed or Fine; but if he will prescribe for such Things, it must be in himself and his Ancestors, because in such Case he comes in by *Discent*, without any *Grant*; but when the Thing lieth in *Grant*, such *Grant* is but a Conveyance to that which is claimed by Prescription, and in such Case a *Que Estate* may be alledged; as for Instance, a *Hundred* lieth in *Grant*, and a *Leet* is derived out of it; now, if a Man claims a Title to the *Leet*, he may prescribe, that he and his Ancestors, and all those whose *Estate* he hath in the *Hundred*, Time out of Mind, had a *Leet*. 1 *Inst.* 121.

6. Prescription to have Pot-Water out of such a River, and the Jury found, that he ought to have it, paying six Pence every Year; adjudged, that he had failed in his Prescription. 5 *Rep.* 78. In *Grey's Case*.

7. Replevin, &c. the Defendant avowed for Damage-feasant; the Plaintiff replied, and set forth, that he had a Close adjoining to the Defendant's Close; and that the said Defendant, and all the Occupiers of the said Close, Time out of Mind, &c. had used to make the Fences between the said Closes, and for want of Fences his Beasts escaped, &c. Issue was taken upon the Prescription, and found for the Defendant; and it was moved in Arrest of Judgment, that the Prescription was not good; for to prescribe, that every Occupier of the Close was to make the Fences, is too general, for that Word extends to a Tenant at Will, Tenant at Sufferance, or even to a Disseisor, for he is an Occupier; and for this Reason it was adjudged ill; but such a Prescription, to pay so much Money in Discharge of Tithes by the Occupiers of Lands, is good, because it goes in Discharge, and is for the Benefit of the Land, and Tithes arise, by occupying the same. 3 *Cro.* 445. *Anstey versus Lewknor.* *Cro. Car.* 302. *Baker versus Berriman.* S. P.

* See (A) pl. 19.

8. Case, for not scouring a Ditch, wherein the Plaintiff prescribed, that the Inhabitants of the *Bell-Inn* in *Maidstone* & omnes alii tenuram illam prius habentes mundare debuere & consuever', &c. adjudged an ill Prescription; for it ought to have been quod ipsi & predecessores sui de tempore cujus contrarium, &c. or, that such a Person, and all those whose Estate he hath, &c. for 'tis a very uncertain Prescription, to alledge, that all the Tenants of the House ought to scour the Ditch, for that extends to Tenants in Fee, for Life, for Years or in Tail; and the Prescription being the Foundation of the Action ought to be certain. *Godb.* 54. *Joyce's Case.* *Antea* 27.

9. Prescription for a Turn or Hundred-Court, and doth not shew any, or what Estate he had therein, or before whom it was held; and for these Reasons it was adjudged ill; and a Prescription to a Hundred by a *Que Estate*, is not good, because a Hundred is not manurable, but lies in *Grant*: 'Tis true, if the Defendant had alledged, that the King, and all they who were seised of the Hundred, have had, and Time out of Mind have used to have a Court, &c. that had been good. 1 *Brownl.* 198. *Darney versus Hardington.*

10. Inhabitants, unless they are incorporated, cannot prescribe to any Thing of Profit in the Soil of another Man; but in Matters of Easement, as in a Way to a Church; or in Matters of Discharge, as in a *Modus decimandi*; or to be discharged of Tithes or Toll, they may prescribe. 6 *Rep.* 60. *Gatewood's Case.* *Dyer The Case of Istebrewers Park*, which was a Prescription for *Keepers for Life*, not good. 2 *Cro.* 152. S. C.

11. In Trespals, &c. for Taking Turf in the Waste of the Manor, &c. the Defendant justified, for that Time out of Mind, *usitatum fuit*, that every Tenant for Years of an ancient Messuage and Close, in the said Manor, had Common of *Turbary* in the Waste, &c. and that he was possessed of an ancient Messuage and Close, &c. which was leased to him for a certain Term of Years, with all Commons thereunto appertaining; adjudged, that tho' this Common was appertenant to the Messuage and Close, yet the Lessee cannot have it, because he being Lessee for Years, and having prescribed by an *usitatum fuit*, he can have no Right by such Prescription; for an *Usage* ought to be perpetual, which cannot be in this Case, because 'tis interrupted by every new Lease; besides, Lessee for Years can never have Right to a Common by Prescription, because there is a certain Commencement and Determination of his Estate; and an *Usage* annexed to such an Estate, cannot be good. 1 *Eulst.* 17. *Grimes versus Peacock.* *Postea* Unity of Possession. (A) 7. S. C.

12. In Debt for Rent, the Defendant confessed the Lease, and the Rent reserved on it, but pleaded a Prescription to Common in ten Acres in *E* for his Beasts levant and couchant on the Tenements every Year after the Corn was sowed, from the 7th of *August*, till the Corn was reaped, and carried away; and that before any Rent became due, the Plaintiff enclosed the said ten Acres, so that the Defendant could not use his Common; but because he did not set forth in his Plea, that the Land was then sowed with Corn, it was adjudged against him; for if it was not sowed, then by his Prescription he is not to have Common; besides, he did not alledge, that the Plaintiff kept those ten Acres enclosed; for it was lawful for the Defendant to break down the Inclosure, to take his Common. 2 *Cro.* 679. *Sanderfon versus Harrison.*

13. One Prescription cannot be pleaded against another, unless the first is answered or traversed; as for Instance, the Plaintiff prescribed for a Fold-Course for 300 Sheep, in seventy Acres of Land in *B*. every Year, from fourteen Days after the Corn was carried away, till *Lady-Day*.

W. Jones 375. S. C.

Day, when the Lands should be sowed again; the Defendant pleaded, that there is a Custom within the said Town of *B.* that any one may enclose any Part of his Lands lying in the Common Field, when it was not sown, &c. this Plea in Bar was adjudged not good, because it did not answer or traverse the Prescription in the Declaration. *Cro. Car.* 432. *Spooner* versus *Day*.

14. One prescribed, that all the Occupiers of *B.* *Habuerunt* and *habere consueverunt* Common in such a Town in *C. ratione Vicinagii*, without alledging, *Time out of Mind*; and for that Reason it was adjudged ill pleaded; tho' so much was implied, because the Prescription is the Foundation for this Common by Vicinage; but 'tis otherwise where a Man claims *Common appendant*; for in such Case the Plea would be double, if the Defendant prescribed to it. *Latch* 161. *Jenkin's* Case.

² Roll.
Rep. 309.

15. In Trespass, for Feeding on his Pasture-Ground; the Defendant prescribed, that he, and all those whose Estate he had in the Manor of *Hassop*, had Common for *all Sheep* levant and couchant on the said Manor; the Plaintiff took Issue upon this Prescription, and upon the Trial the Evidence was, that this Manor was purchased by the Plaintiff of Coparceners, and that he bought the Inheritance of one Moiety first, and at the same Time had a Lease of the other Moiety for a Term of Years, and purchased the Fee of that Moiety afterwards; another Part of the Evidence was, that the Plaintiff had Common only for *his own Sheep*; two Judges were of Opinion, that he had failed in his Prescription upon the first Part of the Evidence, because it was entire as the Common in the whole Manor, when he purchased it by Parcels; therefore, since it was severed by his own Act, and not by Act of Law, (as by Partition) tho' it was reunited again in him, yet he ought to make a special Prescription; but all of them agreed, that the Prescription was ill upon the second Part of the Evidence; for he had prescribed for Common for *all Sheep Levant and Couchant*, &c. and the Evidence was, that he had Common only for *his own Sheep*; besides, it did not appear, whether this Common was appendant or appertenant. *Palm.* 362. *The Earl of Devon* versus *Eyre*.

16. Case, &c. in which the Plaintiff declared, that he was seised of Lands, &c. and that he and all those whose Estate he had therein, *simul cum quibusdam aliis tenentibus* Tenants by Copy of Court-Roll of a Manor in *H.* have Time out of Mind had *solum pasturam* in such a Close, &c. and upon Demurrer to this Declaration, it was objected, that this Prescription is ill, because he prescribed in a *Que Estate* in himself, *simul cum aliis Tenentibus*, &c. of a Manor in *H.* which is uncertain both as to the Tenants, and as to the Manor; for 'tis not said of what Kind, or of what Number those Tenants are, nor what Manor; for 'tis only of a Manor in *H.* and there may be several Manors in one Vill, and every Manor hath a certain Name; and it was adjudged accordingly. 2 *Lev.* 178. *Underwood* versus *Sanders*.

17. Case, &c. wherein the Plaintiff declared, that he was seised in Fee of a Close, called *Langdales*, and so prescribed for a Way leading from the Highway thro' a Place called *Badley-Well-Lane*, to a Place called *Langdale-Lane*, and from thence to his said Close, called *Langdale*, and that the Defendant had spoiled *Badley-Well-Lane*, with his Carts and Carriages; that the Way was of no Use to the Plaintiff, &c. The Defendant pleaded in Bar, that *W. V.* was seised in Fee of a Close, called *Badley-Well-Close*, and then lays a Prescription in the said *W. V.* for a Way through *Badley-Well-Lane* to the said Close, and so back again, and justified the Going thither with his Carts, &c. The Plaintiff in his Replication confessed, that *W. V.* was seised, &c. and had a Way from the Lane to the Close; but that the Defendant, in using the said Way, did go beyond that Close to another Close, called *Warton Langdales*, and so back again; the Defendant rejoined, as before, in his Plea; and upon Demurrer to the Rejoinder the Plaintiff had Judgment, because the Defendant having prescribed to a Way to a Close, he cannot justify the going beyond it. *Lutw. Abr.* 40. 1 *Mod.* 190. *S. P. Langhton* versus *Ward*.

18. In Replevin, &c. the Defendant made Cognizance, for that he and several other Persons were seised and possessed of 217 Cattle-gates in *Middleham Moor*, and so justified the Taking the Plaintiff's Cattle Damage-feasant; and upon Demurrer the Plaintiff had Judgment, because the Defendant did not shew any Manner of Title to those Cattle-gates, either by Grant or Prescription. 2 *Lutw.* 1157. *Wood* versus *Atkinson*.

19. *Rescous*, &c. in which the Plaintiff declared, that he had distrained 300 Sheep, and would have impounded them for Damage-feasant, but that the Defendants rescued them, &c. The Defendants plead, that *Anthony*, late Bishop of *Norwich*, was seised in Fee of the Manor of *N.* and that the said nuper *Episcopus*, and his Predecessors, Time out of Mind, had Liberty of *Faldage* and a *Fould-Course*, for 300 Sheep in and upon the Plaintiff's Closes at certain Times of the Year, and so justifies the Putting in his Sheep under a Lease from the Bishop of the said *Faldage* and *Fould-Course*, and that they were *Depasturing* there, &c. the Plaintiff in his Replication made a Title to himself of the Closes, under a Grant from the Bishop before the Lease made to the Defendants, and traversed the Prescription, of the Liberty of *Faldage* and *Fould-Course*; the Defendants take Issue upon the Prescription, and had a Verdict; but the Judgment was stay'd, because the Prescription to have a *Faldage* and *Fould-Course* could never extend to the *Depasturing*, because *Faldage* is to have other Mens Sheep folded on my Lands; and 'tis inconsistent with a *Fold-Course*; therefore having confessed the Trespass, and not made a good Justification, they cannot have Judgment. 2 *Lutw.* 1249. *Sharpe* versus *Bachonow*.

20. Trespass, &c. for Breaking his Close; the Defendant pleaded, that *T. S.* was seised in Fee of a Water-mill and *Wear*, and so prescribed to come on the Plaintiff's Close to repair the *Wear*: The Plaintiff, in his Replication, confessed the Seisin, and the Custom to repair the Wear, but said, that *T. S.* had extended the Wear beyond the *antient* and usual Place, upon which they were at Issue; but nothing appears farther. 2 *Lutw.* 1515. *Morgan versus Evans.*

21. In Replevin, the Case upon the Pleading was, that several *Freeholders and Copyholders* of a Manor prescribed to have the *sole and several Feeding of 100 Acres of Pasture, &c.* for all their Beasts upon their several Freeholds and Copyholds every Year, at all Times in the Year, &c. and upon Demurrer the Court of Common Pleas was divided upon the Question, whether this Prescription was good, or not; and afterwards the Chief Justice *North* held it to be void, because several freeholders cannot join or be joined in a Prescription to claim an *Interest* in another Man's Soil, as annexed to their several Estates; and because the Claim of *sole and several Pasture*, is an *Interest* which cannot be claimed by *Prescription and Custom both together*, as 'tis in this Case by *Freeholders and Copyholders*; and another Reason is, because this *Prescription and Custom* wholly excludes the Owner of the Soil at all Times, which the Law will not allow. As to the first of these Reasons, 'tis true, a Prescription may be laid in several Persons, where it tends only to Matters of *Easement or Discharge*, but not where it goes to Matter of *Interest or Profit* * *in alieno solo*, for that is a Title, and the Title of one doth not concern the other; therefore several Men having several Estates, cannot join in making a Prescription; besides, *solu & separalis pastura* cannot be claimed to exclude the Owner of the Soil; he may be excluded for a certain Time; and so is *Pitt and Cheek's Case.* *Hutt.* 45. which Case is likewise reported in 6 *Rep.* by the Name of *Sparks's Case*, where 'tis held, that a Man may prescribe to have *solum vesturam* from such a Day to such a Day, and thereby the Owner of the Soil may be excluded; this is likewise said by my Lord *Coke.* 1 *Inst.* 122. *a.* and immediately afterwards he tells us, so a Man may prescribe to have *separalam pasturam*, (*i. e.*) in the same Manner as he may have *solum vesturam*; the Owner of the Soil may be likewise stinted as to the Quality and Number of the Cattle; and so is *Kendrick and Paragite's Case.* 2 *Brownl.* 64. he may be excluded as to some Kind of Profits; as for Instance, a Man may prescribe to have *unnes spinas* growing on his Waste; and so is *Duglasse and Kendal's Case*; but there is no Case in all the Books, of a *sole Pasture at all Times in the Year*, but in *Hutt.* 45. and there 'tis made a Profit *apprender*, and the most considerable Profits were still left in the Owner of the Soil. 1 *Vent.* 383. *Potter versus North*, that the Prescription is good. 2 *Lev.* 2. *S. P.* 2 *Saund.* 320, 324. *S. P.* 1 *Mod.* 74. *S. P.*

Vaugh.
251. S. C.
1 Saund.
347. S. C.
1 Lev.
253, 268.
S. C.

* 3 Mod.
250.
Fisher &
Wrenn.

22. In Trespass, &c. for Chasing, &c. sixty Sheep, &c. the Defendant justified, for that the Place where, &c. was the Freehold of *John Theed*; the Plaintiff prescribed for Common for sixty Sheep, *levant and couchant* upon his Tenement, &c. and avers, that he put in sixty Sheep, &c. to eat the Grass and Use the Common, &c. The Defendant rejoined, and traversed the Prescription, upon which they were at Issue, and the Plaintiff had a Verdict; and amongst other Exceptions which were made in Arrest of Judgment, this was one, (*viz.*) that the Plaintiff did not alledge that the sixty Sheep which he put in the Place, where, &c. were *levant and couchant* upon his Tenements; and if they were not, then the Defendant might lawfully distrain them Damage-feasant; but adjudged, that after a Verdict it shall be intended, that the Sheep of the Plaintiff were in the Place where he had prescribed to have Common; for otherwise the Defendant might have taken Advantage of it by a Demurrer in his Rejoinder; but when he rejoined and traversed the Prescription, and it was found against him, the Want of such Averment, and several other small Faults are aided by the Statute of *Jeofails*; and so it was adjudged in *Prance and Tringer's Case.* 2 *Cro.* 44. 1 *Saund.* 226. *Sennel versus Hegg.*

23. In Trespass for Breaking his Close at *Derby*, and Treading down his Grass, and feeding it with Cattle, &c. The Defendant, as to all the Trespass, except with two Horses and two Mares, pleads Not guilty; and as to them he pleads in Bar, that the Place where, &c. was twenty Acres of Land in *Derby*, and Time out of Mind Parcel of a common Field, called *Littlefield in Derby*, and that the *Borough of Derby* is an antient Borough, and that the Defendant *tempore quo & diu antea* was a Burgess of the said Borough; then he lays a Prescription in the Corporation for Common, (*viz.*) that the Mayor and Burgesses for themselves, and for every Burgess of the said Corporation, had Common in the Place where, being *Littlefield*, for all their commonable Cattle; and shews in what Manner, and brings himself within the Prescription, and that he put in the said Cattle to use his Common, *qua est eadem transgressio, &c.* and upon Demurrer it was objected, that this Plea was ill, because the Defendant had prescribed for Common in *gross sans nombre* when there is no such Common; for if it should, then the Corporation might surcharge the Common, there being no Restraint to the Number of their Cattle, insomuch that the Proprietor or Owner of the Soil would be wholly excluded; therefore he should have laid this Prescription for all Cattle *levant and couchant within the Vill*; to which it was answered, that *Littleton* in enumerating the several Sorts of Commons, mentions a *Common in gross sans nombre* to be one. *Co. Litt.* 122. *a.* and that he who hath Right to such Common, cannot surcharge it, for if he doth, the Lord or Owner of the Soil may distrain; 'tis true, if the Defendant had claimed this Common as *appendant or appurtenant*, there the Prescription must be for Cattle *levant and couchant*; but this was a Claim of a *Common in gross, &c.* and in such Case it had been improper to prescribe for Cattle *levant and couchant, &c.* now, if a natural Person had claimed it, the Prescription had been good to say, that he and all his Ancestors, whose Heir he is, Time out of Mind, had Common in the Place where, &c. *pro omnibus averiis suis*, without relating to any Estate, and

1 Mod. 6.
T. Jones.
115.

* See
Goodwin
v. Brooks.

without saying *levant and couchant*, because he had no Land upon which they might be *levant and couchant*; and a Corporation may prescribe for themselves and for every Burgess in the same Manner as a natural Person may; 'tis true, as before mentioned, if a natural Person had claimed Common *appendant or appurtenant*, he must have alledged a Seisin of Land for which he claimed it, and that he and all those whose * Estate he had in the said Land, had Time out of Mind, Common, &c. in the said Land, *pro averiis suis levant and couchant* on the said Land; but 'tis otherwise in a Prescription for Common in *gross*: But after all it was adjudged, that the Plea was ill, because the Defendant in his Prescription did not aver, that the Cattle were *levant and couchant within the Vill*, and that it had been good, if those Words had been put in; tho' Kelynge Ch. Just. positively affirmed, that there could not be any Common in *gross sans nombre*. 1 Saund. 344. Mellor versus Spateman.

24. Trespass, &c. by the same Plaintiff as in the last Case against the Defendant Walker, for Breaking his Close in Littlefield in Derby, &c. on the first Day of April, 21 Car. 2. The Defendant pleaded the like Plea as before, and justified the Putting in his Cattle on the first Day of August, 20 Car. 2. and averred, that they were his own Cattle, and *levant and couchant within the Vill of Derby* (all which was omitted in the Plea in the foregoing Case) *qua est eadem transgressio*, &c. and upon Demurrer it was objected to this Plea, that the Plaintiff had laid the Trespass to be done on the first Day of April, 21 Car. 2. and the Defendant justified on the first Day of August, 20 Car. which varies from the Time in which the Trespass was laid in the Declaration, wherea he ought to justify on that very Time; but adjudged, that the Plea was good in Substance, because the Defendant had averred *qua est eadem transgressio*, of which the Plaintiff complained; and the Plaintiff having demurred generally to it, this is but Matter of Form, and not Substance, of which no Advantage can be taken upon a general Demurrer. 2 Saund. 4. Mellor versus Walker.

1 Mod.
74.
1 Vent.
103.
2 Lev. 2.
5. C.

25. In Replevin, the Defendants made Conusance as Bailiffs to B. and T. for that the Place where contained 500 Acres of Land, &c. and Time out of Mind was Parcel of the Manor of Blisland in Cornwall, of which the said B. and T. were seised in their Demesne, as of Fee, and so justified the Taking, &c. *Damage-feasum*: The Plaintiff replied in Bar to the Conusance, that there were, Time out of Mind, within the said Manor, several Copyhold Tenements, Parcel thereof, demised and demisable by Copy of Court Roll of the said Manor, at the Will of the Lord, according to the Custom thereof; and that Time out of Mind there was a Custom, that all the customary Tenants of Copyhold Tenements of the said Manor, had and used to have *solam & separalem pasturam* in the Place where, &c. yearly, and every Year *per totum annum ad eorum libitum tanquam ad customaria sua tenementa predicta spectant*; and also, that the said Copyholders, before the Time of the Taking, &c. *dederunt licentiam* to the Plaintiff to put his Cattle into the Place where, by Reason whereof he put them in; and that the Defendant *de injuria sua propria* took them; the Defendants rejoin, that the Plaintiff *de injuria sua propria* put his Cattle in, and traverse the Custom alledged in the Replication, upon which they were at Issue; and the Plaintiff had a Verdict, that there was such a Custom; and in Arrest of Judgment, several Exceptions were taken to the Replication in Bar to the Conusance; first, for that the Plaintiff did not shew what Estate the Copyholders had in their Copyhold Tenements, for which they claimed to have *solam & separalem pasturam*; but adjudged, that they need not, because, let their Estates be either of Inheritance, or for Life or for Years, 'tis not material as to this Point, for they do not claim *solam & separalem pasturam* by Prescription but by Custom; and 'tis the Custom of the Manor which hath annexed it to their several Estates as a Profit *apprender*, or Prequisite for the Time being, &c. 'tis true, if Freeholders claim such a Perquisite, they must by a *Que Estate*, and prescribe in him; but 'tis otherwise in the Case of Copyholders who claim by Custom; then it was objected, that a Custom to exclude the Lord of the Soil could not have a reasonable Commencement, for every Custom supposes a Grant which is lost; and tho' the Lord might make such a Grant to Freeholders to exclude himself, yet he could not do it to Copyholders, by Reason of the Weakness of their Estates, which is only *ad voluntatem Domini*; but adjudged, that this Custom might have a reasonable Commencement between the Lord and his Copyhold Tenants, (*viz.*) that they should have the *sole Pasture* to induce them to hold and to improve their Estates, which at first were only at Will; and this by continual Usage was turned into a Custom; 'tis certain, that a Man may prescribe to have *solam pasturam*, because this may have a reasonable Commencement by a Grant; and if it be claimed by Prescription, the Reason is the same by Custom: Then it was objected, that the Plaintiff did not alledge that the Copyholders had *solam pasturam* for their Cattle *levant and couchant* upon their Tenements; for where a Man prescribes for Common *appurtenant*, 'tis ill, unless 'tis for Cattle *levant and couchant*, &c. and so is Noy 145. Jefferies and Boyes's Case; adjudged, this is very true, and the Reason is, because by such a Prescription the Party claims only some Part of the Pasture, and the *Quantum* is ascertained by the *Levancy and Couchancy*, the rest is left for the Owner of the Soil; and therefore if he who thus prescribes should put in more Cattle than are *levant and couchant* on his Tenement, he is a Trespasser; but in the principal Case, the Copyholders claim all the Pasture exclusive of the Lord, so that 'tis not material whether 'tis eaten by Cattle *levant and couchant*, or by any other Cattle; next it was objected, that a Custom to have *solam & separalem* is a Benefit for their own Cattle, (*i. e.*) for the Cattle of the Copyholders themselves, and therefore they cannot license other Men to put in their Cattle; but if they could, the Plaintiff in this Case did not shew that he had a good License, for 'tis only *dederunt licentiam*, &c. which is not good, unless it had been by Deed; but

adjudged, that he who hath an *Interest in the Soil* might *license* any one to use any Liberty there, and the Copyholders in this Case had an *Interest in the Herbage*, and such an Interest that they alone and none else could punish a Trespasser for Feeding his Cattle upon the Herbage, and therefore they may dispence with such a Trespass by giving a License without any Deed; 'tis true, 'tis otherwise in the Case of one who claims *Common*, for there the Owner of the Soil may bring an Action of Trespass for Feeding the Grass, and therefore a *Commoner's License* will not excuse the Trespass, unless 'tis by *Deed*, where he may grant his Interest over by *Deed*; but in this Case, tho' the License may not be good, without 'tis granted by *Deed*; yet after a Verdict which hath found the Custom, it shall be intended that it was a good License by *Deed*. 2 *Saund.* 324. *Hoskins* versus *Robins*. See *Cro. Eliz.* 458. *Corbyson* versus *Pearson*. S. P.

26. In Replevin for Taking a Sail of a Ship; the Defendant avowed, for that he was seised in Fee in the Manor of *Padstow*, where there is a *common Key* extending from such a Place, &c. for the unlading Salt, and that he and all those, &c. have used to *repair the said Key*, and have kept a Bushel for measuring Salt, and have used to take of every Ship arriving there, and loaded with Salt, one Bushel of Salt, and so brings his Case within the Prescription, and avows for the Taking the Sail: The Plaintiff pleads in Bar to the Avowry, that the River on which this Key is pretended is a great River, ten Miles in Breadth, and that the Key extends half a Mile, and no more; that the Ship arrived seven Miles distant from the Key, and traversed, that it arrived at the Key; and upon Demurrer it was insisted for the Avowant, that 'tis not material whether the Ship arrived at the Key, because it might come thither when the Mariners pleased; but adjudged no good Prescription, because here is no meritorious Consideration of providing Weights, Measures, and other Things; 'tis true, he alledges a Custom to repair, but that extends only to the Ships which arrive at the Key, which this did not; and the Avowant might as well prescribe to the Confines of *France* as to seven Miles distant from the Key. *Raym.* 232. *Prideaux* versus *Warne*. See *Toll.* (A) pl. 14. See *The Bellman of Leicester's Case*.

27. The Plaintiff declared, that he was seised of a *Tenement*, but did not say in Fee, and so prescribed to fetch Pot-water from the Defendant's Close; Issue was taken upon the Prescription, and found for the Plaintiff: But *per Curiam*, in Arrest of Judgment the Declaration is ill, because the Plaintiff did not set forth, that he was seised in Fee, and it shall not be so intended, unless set forth; and a Prescription cannot be annexed to any Thing but to an Estate in Fee, therefore this is a Defect in Substance, and not aided by a Verdict. 2 *Mod.* 318. *Scoble* versus *Skelton*.

28. Trespass against two Defendants for Breaking his Close and Killing his Fowl in his free *Warren*; the Defendants, as to all the Trespass besides Killing the Fowl, plead Not guilty, and as to that they say, that the Dean and Chapter of *Excester* are seised in Fee of the Manor of *Brampton*, of which the said Warren is Parcel, and so prescribes in a *Que Estate* for them, their Farmers and Tenants to fowl in the said Warren; and that they made a Lease, Parcel of the said Manor, to the Defendants for twenty one Years, reserving Rent, and so justify as Tenants, &c. The Plaintiff replied *de injuria sua propria*, upon which they were at Issue, and a Verdict for the Defendants; it was objected in Arrest of Judgment, that this Prescription was too large, it being for the Dean and Chapter, and their Tenants, and that 'tis unreasonable, that every Tenant should prescribe for an Interest; it hath been so ruled for a Common, without saying for his Cattle *levant and couchant*, because 'tis that which must ascertain the Number of them: *Sed per Curiam*, tho' this Prescription might have been ill upon a Demurrer, yet 'tis well enough after a Verdict; and in this Case 'tis not too general, so that it may be exclusive to the Lord, because 'tis for a *Profit appender in alieno solo*, and for such a Profit the Tenants of a Manor may prescribe by a *Que Estate* exclusive of the Lord. 3 *Mod.* 246. *Davis's Case*.

29. Trespass for Taking and Carrying away his Cheeses; the Defendant justified, for that he was seised in Fee of *Chipping Sudbury*, and of an antient Market there held every *Thursday*, and that he and all those whose Estates he had, &c. used to take a Penny for every Hundred of Cheese exposed to Sale in the Market, in the Name of the *Pitching Penny*; and upon Denial to distrain, &c. upon Demurrer it was objected, that the Defendant had not made out a sufficient Title, because he did not alledge an *Usage Time out of Mind*, but only by a *Que Estate*; and the Court was of that Opinion. *T. Jones* 227. *Goodwin* versus *Brooks*.

30. The Plaintiff prescribed for Toll of Goods bought within his Manor, (*viz.*) 2 d. *pro qualibet sarcina* of *Manchester* Goods bought in *Manchester*, &c. and the Question upon the Pleadings was, whether a Toll independent of all Markets and Fairs might be claimed by Prescription, without shewing that the Subject hath some Benefit; and it was argued, that it might, from the Authority of that Case in * *Dyer*, where the Lord Mayor of *London* brought an Action on the Case * *Dyer* grounded on a Custom, to have the 20th Part of the Salt of every Stranger who brought Salt to the Port of *London*, and no Reason was alledged why he should have that Part, yet the Mayor had Judgment: *Sed per Holt* Ch. Just. and *Curiam*, this Prescription cannot be good, because there was no Recompence for it; and every Prescription to charge the Subject with a Duty, must import some Benefit or Recompence to him who pays it, or else some Reason must be shewed why the Duty is claimed: That Case in *Dyer* seems to be very hard and unreasonable. 4 *Mod.* 319. *Warington* versus *Mosely*.

31. In Trespass for Breaking his Close and Fishing in his several Fishery; the Defendant pleaded, that the Earl of *Warwick* was seised in Fee of an Acre covered with Water, lying contiguous to the said Close, and so prescribes to have a *necessary Easement* to catch Fish in the said Water, and to enter into the said Close to spread Nets; that the Earl granted this Close to King *Ed. 6.* who granted

granted it to *T. Lucy* in Fee, with *all Ways, Emoluments, Commodities and Hereditaments, &c.* and so derives a Title to himself from the said *T. Lucy*, and justifies in his own Right to enter the Close, &c. and upon Demurrer it was objected, that this Plea was ill, because the Defendant had prescribed for a necessary *Easement*, but did not say, that it was necessary for catching Fish; it should have been, that he and all those, &c. *consequerunt habere quandam viam, or quoddam privilegium sine libertatem* to enter the Close; 'tis true, he pleaded, that *usi fuerunt & consequerunt intrare*, but that might be with Leave: *Per Curiam*, the Word *Easement* is known in Law; 'tis a Genus to several Species of Liberties which one may have in the Soil of another, without claiming any Interest in the Land it self; but here the Thing it self is set forth, (*viz.*) to catch Fish, and no Instance can be given of a Prescription for such a Liberty by the Word *Easement*; therefore a Rule was made to set the Prescription right, and to try the Merits. 4 *Mod.* 362. *Peers versus Lucy*.

Presentation.

Grants of the next Presentation, good. (A)	ties; and where Two have a Right to present. (E)
Of Presentation and Nomination, and of Presentations by the Crown. (B)	Who may present to a Benefice, and who not. (F)
Presentation of a common Person, good, and not good; and where two Patrons pretend a Title. (C)	By what Words the next Presentation shall pass, and what not. (G)
Of Revocations of Presentations. (D)	Grants of the next Presentation avoided. (I)
Of Presentations by Turns, and to Moie-	

(A)

Grants of the next Presentation, good.

1. **G**RANT of the next Presentation to the Church of C. the Grantee died, and then the Church became void; adjudged, that the Executor of the Grantee shall have the Presentation as a Chattel, and not his Heir at Law. *Glanvil, lib. 6. cap. 7.*

Gouldf. 78. S. C. 2. The Patron granted the next Presentation to Two, the Church became void, and during the Avoidance one released his Right to the other, who being disturbed, brought a *Qu. Impedit* alone; adjudged, that the Release being given after the Church was void, was of no Effect, and therefore both ought to have joined in the Action. *Leon. 167. Brooksby versus Wickham.*

3. A Grant of the next Presentation *quandocunq; Ecclesia vacare contigerit pro unica vice tantum*; he must present upon the very next Avoidance, which, if he neglects, he hath lost the Benefit of his Grant. 1 *Bullst.* 26. *Starkey versus Pool.*

4. An Incumbent on a Church purchased the Advowson in Fee, and devised, that his Executor should present to it after his Death; and then, by the same Will, he devised the Advowson in Fee to another; the Question was, whether this was a good Devise of the next Avoidance, because instantly, upon the Death of the Incumbent, when his Will should take Effect, the Church would be void; and so it being a Thing in Action, is not devisable; but adjudged, that 'tis good, according to the *Intention* of the Testator expressed in his Will. 2 *Cro.* 371. *Pinchion versus Harris.* See Advowson. (A) 15. S. C.

1 And. 2. Bendl. 24, 34. 4 Leon. 119. 5. Grant of the next Presentation to *Sir Godfrey Foliamb* and to four more, *& eorum cuilibet conjunctim & divisim, &c.* afterwards the Church became void, and *Sir Godfrey* presented one of the other four Grantees; and adjudged, that the Presentation by one alone was good. *Moor* 4. *Sir Godfrey Foliamb's Case.*

By the Name of *Sir William Hollis.*

6. Grant of the next Presentation to two Persons, and before the next Avoidance one of the Grantees gave a Release to the other; then the Incumbent died, and one of them presented alone; and being disturbed, brought a *Quare Impedit*, and had a Verdict; and upon a Writ of Error brought, because one of the Grantees had brought this *Quare Impedit* in his own Name alone, it was adjudged well enough, because the Release made to him was before the Church was void. *Moor* 467. *Lewes versus Bennet.*

(B)

Of Presentation and Nomination, and Presentations of the King. See *Vicar.*

1. **W**Here a Bishop hath a Title to present upon any Vacancy, and dies, and the Temporalities come to the King, he shall present, and not the Executors of the Bishop. 50 *Ed.* 3. 26.

2. The

2. The King may repeal a Presentation before his Clerk is inducted, and this he may do by granting a Presentation to another, which without any farther Signification of his Mind, is a Revocation of the first Presentation. 13 *Eliz. Dyer* 293. 22 *Eliz. Dyer* 360. *Mich. 8 Jac. Walter's Case. S. P.*

3. A Manor, to which an Advowson was appendant, came to Queen *Mary* by an Attainder of the Patron, who had only an Estate for Life in it, and she made a Lease thereof to *B. B.* for forty Years, if the Person attainted should so long live; the Church became void, and the Lessee presented, but the Manor being settled in Remainder in Fee to *H. 8. Queen Eliz.* as Heir to him, presented upon this Avoidance; but adjudged against her, because her Title is encountered with a Lease of her Ancestor. 1 *Leon. 54. The Queen versus Middleton.*

4. The Queen had a Title to present to a Vicarage by Lapse; the Ordinary collated a Clerk, and afterwards the Queen presented *B. B.* who brought a *Quare Impedit* against the Ordinary and the Clerk whom he had collated, pending which Suit the Collatee by Fraud procured a Presentation from the Queen, without mentioning her Pleasure to revoke the first Presentation to *B. B.* and for that Reason it was adjudged, that her second Presentation was void. 17 *Eliz. Dyer* 339.

5. The King had a Title to present by Lapse, and accordingly he presented, and his Clerk was admitted and instituted, but died before he was inducted; adjudged, that since the King might lawfully revoke his Presentation before Induction, therefore he may in this Case present again, for the Church was not full against him. 1 *Leon. 156. Wright versus Bishop of Norwich.*

6. Adjudged, that where the King hath a Title to present as lawful Patron, and he mistakes his Title, and presents *ratione Lapsus*, in such Case his Presentation is void; *a fortiori* where he hath no Manner of Title and yet presents *ratione Lapsus*, for that Presentation is absolutely void, and the Presentee is admitted, instituted and inducted; the Church is still void, and the true Patron shall not be put to a *Quare Impedit* to remove such Incumbent. 6 *Rep. 29. Green's Case. See Deprivation. (A) 6. S. C.*

7. The Patron brought a *Quare Impedit* against the Incumbent, &c. and had Judgment and a Writ to the Bishop; afterwards the Patron was outlawed in Debt, and then the Incumbent supposing the Queen was entitled to present, by Reason of the Forfeiture, resigned the Living, and was presented by the Queen, and inducted; then the Patron reversed the Outlary, and brought a *Scire facias* against the Incumbent, to have Execution of the Judgment recovered against him, who pleaded all the aforesaid Matter; adjudged, that by the Outlary the Queen was entitled to the Presentation, tho' it was but a Thing in Action, which being once vested in her, and she presenting, 'tis good; for by such Presentation she hath gained a Patronage till 'tis recovered again; for so long as the Incumbent keeps the Possession upon the Presentation, so long she is Patroness; but in this Case, upon the Reversal of the Outlary, the Patron shall be restored to his Presentation, and the rather, because the Incumbent procured a Presentation upon an apparent Practise *pendente lite*, for he resigned on purpose to be presented; which, if he had not done, the Church had been full of him, and by Consequence the Queen could not have presented. *Golsb. 103. Berkly versus Cornwall.*

8. If an Abbot had the Presentation, and another the Nomination, he who hath the Nomination is the true Patron; and when the Abbey was surrendered to the King, he who had the Nomination shall have the Presentation, because it doth not consist with Regal Power to nominate for another. *Poph. 158. Dickenson versus Greenhow. Hob. 156. S. C.*

9. An Advowson was appendant to a Manor, Parcel of the Dutchy, and the King presented under the Great Seal of *England*, and adjudged good; for a Presentation is only a Commendation of a Clerk to the Ordinary; so where the King presented to a Deanery, and misrecited the Name of the Foundation, it was held good for the same Reason. *The King and the Bishop of Lincoln's Case. 2 Cro. 247. and Cro. Car. 70. Stephens versus Potter. S. P.*

10. In a *Quare Impedit* against the Bishop of *London*, and *Dr. Birch*, for hindring him to present to the Parish Church of *St. James*; the Declaration set forth, that *St. Martin's* being a large Parish, by the Statute 1 *Jac. 2.* the Parish of *St. James's* was taken out of it, and made a Parish of it self, and *Dr. Tennison* first Rector, and appointed the Patronage after his Death to the Bishop of *London* and his Successors, and to the Lord *Jermyn* and his Heirs by Turns; that *Dr. Tennison* was made Bishop of *Lincoln*, so that it belonged to the King by his Prerogative, to present by Cession; to this Declaration the Bishop of *London* demurred, and *Dr. Birch* pleaded the Statute 25 *H. 8.* by Virtue whereof the Archbishop of *Canterbury* granted a Dispensation to *Dr. Tennison*, to hold this Church in *Commendam*, &c. which the the King confirmed; to this Plea the Attorney General demurred; it was admitted by the Court, that before the Reformation, and antiently, the Crown did not exercise this Prerogative, to present upon Cession, but that the Pope did it by Usurpation. *Owen 144. Moor 399. Cro. Eliz. 526. Winch 94. 2 Cro. 691. Dyer 228.* but that it was an Usurpation upon the King's Prerogative; and that notwithstanding a Statute 7 *H. 7. cap. 8.* was made against these Provisions, the Pope still presented upon the Promotion of an Incumbent, tho' it was the King's Prerogative so to do: Now admitting, that the King in this might present by Cession, his Turn is not served by confirming this *Commendam*, because the Dispensation it self to hold the Living in *Commendam*, was only to save the Avoidance, and therefore the Confirmation thereof only continued the Possession in the Incumbent, but transferred no new Right: As to the Objection, that no Body can say the King shall present, when the Act of Parliament says, the Bishop of *London* shall present upon the first Avoidance; it was adjudged, that

4 Mod.
190.
3 Lev.
382.
Cafes Adj.
364.

that this Act of Parliament did not interfere with the Prerogative, because a new Advowson created by Act of Parliament, must be subject to the same Rules of Law and Prerogative as an old one is; like an Estate-tail created by Act of Parliament; 'tis subject to such Bars as other Estates-tail, and the Wife shall be endowed of it: As to the Objection, that this new Church was a kind of Donative to Dr. *Tennison*, for he did not come in by Institution and Induction; and in Case of a Donative, the Promotion of the Incumbent doth not make a Cession; besides, by the very Words of the Statute, the presentable Right doth not commence till after his Death; but adjudged, that the Right of Presentation passes immediately upon the Making the Act, but in Point of Interest, not till the Avoidance. 2 *Salk.* 540. *The King versus Bishop of London, &c.*

(C)

Presentation of a Common Person, good and not good; and where two Patrons pretend to a Title. See Postea (E)

1. **T**Here was a Grant of the next Avoidance; afterwards the Parson, Patron and Ordinary joined in a Lease, before the Statute 13 *Eliz.* for 99 Years; the Parson, who was incumbent, died; the Grantee of the next Avoidance presented, and his Clerk was instituted and inducted, and enjoyed it against the Lease during his Life; then upon his Death the Patron, tho' he had joined in this Lease, presented, and his Clerk was admitted, &c. adjudged, that he shall hold it against the Lease, because that was utterly avoided by the Entry of the Clerk, who was his Predecessor, and who had presented by the Grantee of the next Avoidance; for when he was in Possession, the Lessee was evicted not only for the Life of the Incumbent, but for the whole Term. *Cro. Car.* 240. *Plowden versus Oldfield. Antea Extinguishment. (E)* 17.

2. Where a Church becomes void in the Life-Time of a Bishop, he cannot devise the next Presentation; but if the Bishop, or any Incumbent of a Church, hath the Advowson in Fee, and then either of them deviseth, that upon the next Avoidance, his Executor shall present; this is good, tho' they devise the Inheritance to another. *Dyer* 285.

2. The Lord of a Manor, to which an Advowson was appendant, presented his Clerk to the Church, who was admitted, instituted and inducted; afterwards he granted the next Avoidance to four Persons, & *eorum uni* jointly and severally, and then sold the Manor, &c. to another; the Church became void, by the Death of the Incumbent, and one of the said Grantees of the the next Avoidance, by himself alone, presented another of the said Grantees, who was admitted, instituted and inducted; adjudged, that this Presentation was good. *Bendl.* 54. *Sir Ralph Langford's Case.*

4. If the Patron present a Man who is unlearned, and the Bishop gives him Notice of it, as he ought, in such Case, if the Patron doth not present another within six Months after the last Avoidance, the Bishop may collate. 1 *And.* 30.

5. Tenant for Life, Remainder in Fee of an Advowson, the Tenant for Life presented his Clerk, who was admitted, instituted and inducted; but by the Statute 13 *Eliz.* the Benefice was void, for want of reading the 39 Articles; however he continued Incumbent during his Life; afterwards the Tenant for Life died, and then the Incumbent died; then the Queen reciting her Title to present by Lapse, presented her Clerk, who was admitted, instituted and inducted; and the Remainder-Man presented his Clerk, who was admitted, &c. adjudged, that the Queen's Presentation was void, and that the other was good. *Yelv.* 7. *Greendit versus Baker.*

6. The Father was Incumbent, and after his Death the Patron presented his Son, who was refused by the Bishop, because by the Canon Law *filius non potest succedere patri in eadem Ecclesia*, whereupon the Patron presented another; then the Son, who was first presented, obtained a Dispensation *non obstante* the Canon; but the Ordinary admitted the second Presentee, who was also instituted and inducted, thereupon the Son sued him and the Ordinary in the Spiritual Court, but a Prohibition was granted. *Litch* 191. *Stoke versus Sykes.*

7. Lessee of a Rectory, for 15 Years, to which the Advowson of a Vicarage was appendant, granted the next Presentation to the said Vicarage to *B. B.* and died; his Administrator surrendered the Term to another, who accepted it; the Question was, if this Surrender had made the Grant of the next Presentation void; and adjudged, that it had not, because the Grantor shall not derogate from his own Grant, and therefore the Term in some Respect shall be taken to continue for the Benefit of the Grantee; as if Lessee for Years grants a Rent-Charge, and afterwards surrenders his Term, it shall still continue for the Benefit of the Grantee, tho' 'tis actually determined. 8 *Rep.* 144 *Davenport's Case.*

8. The Way to stop a Presentation after a *Quare Impedit* brought, and *pendente lite*, is to serve the Bishop with the Writ *Ne admittas*, and then if he should admit a Clerk, and the Plaintiff should recover in the *Quare Impedit*, he may have the Writ *Quare incumbavit* against the Bishop, and thereby remove any Clerk who came in *pendente lite*, let his Title be what it will; but if he doth not bring a *Ne admittas*, then if another Incumbent should come in by good Title *pendente lite*, he shall hold it. *Mich* 3 *Jac.* 2 *Cro.* 93. *Lancaster versus Lowe.*

9. Two Sisters Coparceners of an Advowson, married; then the Clerk of the Husband of the eldest Sister was received upon the first Avoidance; and afterwards, and before the second Avoidance, the youngest Sister died; then the Church became void, and the said Husband of the youngest Sister

Sister brought a *Quare Impedit*, being disturbed to present, as Tenant by the Curtesy in *Torno secundo*, and had Judgment. *Moor* 224. *Beverley* versus *Archbishop of Canterbury*.

10. Two Patrons pretending a Title to present, one of them presented *W. R* but the Bishop refused Institution; whereupon he sued in the Court of *Audience*, and had an *Inhibition to that Bishop*, and upon that Suit he obtained an Institution by the Archbishop, upon which he was inducted; afterwards the Bishop, who was inhibited, granted Institution upon the Presentation of the other Patron, and his Clerk was likewise inducted; and thereupon *W. R.* who had been instituted and inducted before, upon a Motion obtained a Prohibition, because by the first Induction the Incumbency was determined; so that *quoad* the Incumbence the Prohibition was granted; but not *quoad* the Contempt of the Ordinary after he had been inhibited. *Moor* 499. *Middleton* versus *Lawte*.

(D)

Of Revocations of Presentations.

1. **T**HE Patron may revoke his Presentation before Institution, but not afterwards; for a Presentation is no more but a Power given to the Ordinary to admit the Clerk, and if the Patron die before Induction, his Presentation is determined. *Mich.* 8 *Jac.* *Calvert* versus *Kitchen*. See *Latch* 191. *S. P.* But this was in the Case of the King; but 'tis otherwise in the Case of a Common Person; for if he die after Institution, and before Induction, his Presentation is not determined by his Death. *Dyer* 348. *Wiston's* Case.

2. The Vicarage of *Yatton*, &c. came to the Queen by Lapse; the Bishop of the Diocese collated to it; and afterwards the Queen presented one to the Vicarage, who brought a *Quare Impedit* against the Bishop and his Collatee, pending which Suit, the Collatee by Fraud and Covin obtained a Presentation from the Queen, without mentioning her Pleasure to revoke the first Presentation; adjudged, that her second Presentation had been a Repeal of the first, if it had not been obtained by Covin. *Mich.* 4 *Jac.* *Bishop of Bangor* versus *Williams*. 19 *Eliz.* *Dyer* 339. *S. P.*

(E)

Of Presentation by Turns, and to Moieties; and where two have a Right to present. See Antea (C)

1. **W**HERE two or more have a Title to present by Turns, one of them presents, and his Clerk is admitted, instituted and inducted, and is afterwards deprived for some Crime, he shall not present again, but that Presentation shall serve his Turn; but where the Admission and Institution of his Clerk is void, there his Turn shall not be served; as for Instance, if after Induction he neglect to read the 39 Articles, his Institution is void by the Statute 13 *Eliz.* and the Patron may present again. 5 *Rep.* 102. *Windsor* versus *Archbishop of Canterbury*. *Cro. Eliz.* 686. *Loveday's* Case. *S. P.* *Moor* 558. *S. C.* by the Name of *Loveden* versus *Windsor*.

2. In a *Quare Impedit* the Plaintiff declared, that *L.* was seised in Fee de medietate *Ecclesie de W. & ad presentationem ad eandem Ecclesiam qualibet prima vice ut in grosso*, and that *B.* was seised of the other Moiety, and that *L.* presented his Clerk in his first Turn, who was admitted, instituted and inducted, and upon the Avoidance *B.* presented in his Turn, whose Clerk was likewise inducted, and afterwards deprived, and the Bishop thereupon collated, without giving Notice of the Deprivation; afterwards *L.* granted his Moiety to another; then the Collatee of the Bishop died, and *B.* supposing his Turn was not served, because his Clerk was deprived, presented again, and disturbed the Grantee of *L.* who brought the Action against *B.* and upon Demurrer adjudged, that when *L.* had Right to present, upon the Deprivation of the Clerk of *B.* it being by that Means come to his Turn again; for this Collation of the Bishop without Notice, &c. was not good against him, yet this was but a Thing in Action; and when he had granted the Advowson to another, the Grantee cannot have it, nor the Grantor, for he had destroyed it by his Grant; so that the Right of Presentation was come again to *B.* but he suffering the Collatee of the Bishop to die Incumbent, this was adjudged a Presentation in his Turn; because he being the Rightful Patron, might have removed the Collatee by a *Quare Impedit*, which he neglected to do, and therefore the Incumbency of the Collatee is a Plenarty against him, and a Serving his Turn. *Cro. Eliz.* 811. *Leak* versus *Bishop of Coventry and Babington*.

Owen
131. *S. C.*

3. The Case was, there was a Grant of the next Avoidance to two; afterwards the Church became void, and then one of them released all his Right and Title which he had in the Advowson and Presentation, to his Companion, who presented; but adjudged, that his Presentation was void, because after the Avoidance the Interest was attached in both, and both had a Power to present, which could no more be released by one to the other, than it could be granted in that Manner; for 'tis no more than a Right, and not a Chattel in Possession. 1 *And.* 223. *Brooksby* versus *Bishop of Lincoln*.

4. There were two Patrons of one Church, one presented his Clerk to one Moiety, and the other likewise presented his Clerk to the other Moiety; afterwards both these Moieties were ap-

propriated to the Hospital of *St. John* in *Warwick*, and held for an entire Rectory, and so certified into the First-Fruits Office; the Possessions of the Hospital came to *Ed. 6.* by Dissolution, and afterwards to Queen *Eliz.* who granted the Rectory of *Morton*, and all Tithes and Hereditaments thereunto belonging, to *Aub. Stoughton*, from whom the Plaintiff derived a Title by Descent; adjudged in an Action of Trespass, that there may be two Incumbents of several Moieties in one Church, and that after the Appropriation, it was an entire Rectory, and so reputed, and therefore the Grant thereof as one entire Rectory, is good. *W. Jones 446. Stoughton versus Palmer.*

5. Error of a Judgment in *C. B.* in a *Quare Impedit*, wherein the Plaintiff declared, that *A. R.* and *B. W.* were seised in Fee, as *Jointenants of the Advowson in Gross*, and by Indenture agreed from thenceforth to be seised thereof as *Tertenants in Common*, and that their respective Heirs should present by Turns, and shews several Presentations alternately, and that *A. R.* died, and his Moiety descended to *T. C.* from whom the Plaintiff made a Title of the Grant of the next Presentation, and that *T. C.* made a Will, and *D. M.* Executor, and died, and that the Church being void, it belonged to him to present, &c. the Bishop claimed a Title by *Lapse*; the Plaintiff replied, that his Testator presented one *Symms*, within six Months, &c. and the Bishop refused him; the Defendant rejoined, that he gave three Days to prepare for Examination, and that he never came, and traversed, that he refused *Symms* at the Presentation of the Testator; and Issue being taken upon this Traverse, there was a Verdict for the Plaintiff and Judgment; and now upon Error in *B. R.* it was insisted against the Plaintiff, that he had made no Title, because the Agreement to present by Turns did not operate as a Partition, and sever the Right, but merely as a Composition or Agreement, which being broken, the Plaintiff hath a proper Remedy by Action; but adjudged, that if either Privies in Blood, as *Coparceners* or Strangers, as * *Tenants in Common and Jointenants*, agree by Deed to present by Turns, this is good, and if this Agreement be once executed on all Sides, he who brings a *Quare Impedit* need not mention the Composition, which shews, that the Inheritance is severed, and that a separate Interest is vested in each of them to present by Turns. 1 *Salk. 43 Bishop of Salisbury versus Phillips.* See 2 *Salk. 754. The Pleadings.* See *Dyer 29.*

* One Tenant in Common presented, whereas they ought to join, yet held good, so they join in the next.

1 *And. 63. Harris v. Nichols.*

(F)

Who may present to a Benefice, and who not.

1. **A**N Alien born cannot present in his own Right; for if he purchase an Advowson, and the Church becomes void, the King shall present after Office found that the Patron is an Alien.
2. But an Infant may present in his own Name, and if he doth not present within six Months after the Avoidance, a Lapse shall incur upon him.
3. A Feme Covert cannot present by her self, but her Husband may in his own Name, without naming her, or he may present in both their Names.
4. If the Lessor of an Advowson doth present his Lessee for Years upon an Avoidance, this is no Surrender of the Term, tho' the Lessee accepts the Presentment. *Godb. 173. Topsfield's Case.*
5. An *Antenatus* born in *Scotland* before the Union, was capable of a Benefice in *England*; and so was one born in *France* or *Spain*, or in any other Kingdom in League with *England*; and such Incumbent shall maintain any Action for any Thing concerning the Glebe or Possession of the Church, as Priors Aliens might have done, because such Action is not in his own Right, in his natural Capacity, but in Right of his Church, and in his Politick Capacity. *Mich. 8 Jac. Dr. Seaton's Case.*
6. In a *Quare Impedit*, the Case upon the Pleadings was, The Incumbent was likewise seised of the Advowson in Fee, and died, and the Question upon a Demurrer was, who should present either his Heir at Law, or his Executor; it was objected against the Heir, that he could not present, because the Advowson did not descend to him till after the Death of his Ancestor, and that immediately upon his Death the Church was void, and therefore that Avoidance was severed and vested in the Executor; but adjudged, that the Heir shall present, because the Descent to him, and the Avoidance to the Executor, happened at one and the same Instant; and where two Titles concur in an Instant, the elder Title shall be preferred. 3 *Lev. 47. Holt versus Bishop of Winchester.*

(G)

By what Words the next Presentation shall pass, and by what not.

1. **Q**Uare Impedit, &c. the Plaintiff made a Title under an Outlary of the Patron in Debt; and that whilst he was outlawed, the Church became void, so that it belonged to the King to present, who granted *omnia Bona & Catalla*, &c. to the Person who presented the Plaintiff; and it was insisted in his Behalf, that the Presentation was a Chattel vested in the King, and by Consequence shall pass by these general Words; but adjudged, that it did not pass; for by a Grant of Goods a Chattel Real will not pass, and a Man cannot be said to have a Chattel, unless he hath it in Possession; but in this Case there was no Possession, but only a Right, or

jus præsentandi, which did not pass by the Grant. 1 Leon. 201. *Archbishop of Canterbury versus Fane and Hudson*.

(I)

Grants of the next Presentation avoided.

1. IN a *Quare Impedit*, the Plaintiff declared, that the Earl of Oxford was seised of the Advowson of the Church of B. as in Gross, and presented the Defendant, who was instituted and inducted, and that the same became void by his Acceptance of another Benefice with Cure, of the Value of 8*l. per Annum*, and that the said Patron granted to the Plaintiff the first and next Presentation *cum primo & proxime vacare contigerit*; adjudged, that the Church *being then void*, when this Grant of the next Presentation was made, that Avoidance, by Reason of this Plurality, did not pass to the Grantee. *Dyer* 130. *Agard's Case*.

2. The Church *being void*, the Patron granted *primam & proximam presentationem & advocacionem Ecclesie de B. jam vacantem, &c.* and afterwards the Church continued void for six Months, and then the Bishop collated by Lapse, and the Church became void again; adjudged, that this Grant of the next Presentation was void, because it was a meer personal Thing in Expectancy and a Thing in Action; and therefore the Grantee shall not have the second Avoidance. *Pasch.* 11 *Eliz.* *Dyer* 283.

3. In a *Quare Impedit*, the Case was, That the Corporation of B. being seised of an Advowson, granted the next Presentation to E.W. and afterwards granted *proximam advocacionem* to the Plaintiff, the Church became void, and E.W. presented his Clerk, who was admitted, instituted and inducted, and then the Church became void again, and the Plaintiff presented, &c. but adjudged, that he had no Title, for the second Grant to him was void; for when the Patron had granted the next Presentation to one, he cannot grant it to another, because 'tis expressly contrary to his Grant. *Cro. Eliz.* 790. *Williams versus Bishop of Lincoln*. 2 And. 173: S. C.

4. In a *Quare Impedit*, the Plaintiff declared upon a Grant of the next Presentation; and upon Oyer of the Deed it appeared to be a Letter written by the Patron to the Father of the Plaintiff, that he had given his Son the next Presentation; adjudged, that it would not pass by such Letter without a formal Deed. *Owen* 47. *Cripps versus Archbishop of Canterbury*.

5. The King was seised of a Manor to which an Advowson was appendant; the Church became void; and before the King presented, he granted the Manor with the Advowson to another; adjudged, that this Presentation did not pass to the Grantee, because it was vested in the King before he made the Grant. *Owen* 53. *Sir Tho. George versus Bishop of London*.

6. In a *Quare Impedit*, the Case was thus: *ff.* The Dean and Chapter of Hereford granted the next Presentation of a Church to B. B. and the Question was, whether this was a good Grant by the Statute 13 *Eliz.* to bind the Successor; and two Judges against the Chief Justice *Anderson*, held, that it was not; for tho' it was not a Thing of which any Profit might be made, neither could a Rent be reserved upon it, yet 'tis an *Hereditament*, and the Statute prohibits Ecclesiastical Persons to make any Grants of Hereditaments; but the Chief Justice was of Opinion, that the Statute restrains them to make Grants of such Things only which are profitable, and by Reason thereof some Prejudice may happen to the Successor, which cannot be in this Case. *Cro. Eliz.* 440. *Dean and Chapter of Hereford versus Ballard*.

7. In a *Quare Impedit*, the Plaintiff made a Title to present upon a Grant of the next Avoidance, setting forth, that the Incumbent was made Bishop of *Offory*, and that the King granted that he might retain the Church in *Commendam* for six Years; that the Incumbent died, so that the Church being void, he presented, &c. adjudged, that when the Incumbent is made a Bishop, and the King presents or grants that he shall hold the Church in *Commendam*, which is *quasi* a Presentation, that in such Case the Grantee of the next Avoidance hath lost it; for he ought to have the next Presentation, and no other; and here the King had the next Presentation. 2 *Cro.* 691. *Woodley versus Bishop of Excester and Manwaring*.

8. Tenant in Tail of an Advowson, and his Son and Heir joined in a Grant of the next Presentation to B. B. the Tenant in Tail died; adjudged, that the Grant was void as to the Son and Heir, because he had nothing in the Advowson, either in Possession or in Right at the Time that he joined with his Father in the Grant. *Hob.* 45. *Sir Marmaduke Wivill's Case*.

9. In a *Quare Impedit*, the Defendant pleaded, that the Patron granted the next Presentation to B. B. who died, and made his Executor, who presented the Defendant; Issue was taken upon *Non concessit*, and the Jury found, that the Patron granted the next Presentation to B. B. during his Life, and that he died before the Church became void; adjudged, that this was not an absolute Grant of the next Presentation, but restrained during the Life of the Grantee, and therefore it shall not go to his Executors, unless the Church become void in the Life-time of the Testator. *Cro. Car.* 363. *Mann versus Bishop of Bristol and Hide*.

10. Error of a Judgment in a *Quare Impedit*; the Defendant having pleaded a Grant of the next Avoidance, and the Plaintiff having traversed the Grant, and Issue being taken on the Traverse; 595. the Jury found, that the Grant was to him and his Assigns for Life, and that it should be lawful to him, during Life, to present, *quandocunque primo vacare contigerit*; adjudged, that this was not an absolute, but a limited Grant to present upon a Vacancy, if it should happen in his Life; if not, that his Executors should not have it. *W. Jones* 407 *Hide versus Mann*.

Principal and Interest.

(A)

1. **D**Ecreed, that where Lands are made subject to pay Debts, &c. either by Deed or Will, if there is a Bond-Debt owing, and the Interest hath out-run the Penalty, it shall not carry Interest beyond it; for the Design of subjecting his Lands to pay Debts, was not to encrease them beyond what was due, but to give Security that they should be paid; however, if the Devisee or Trustee neglect to pay the Principal and Interest in a reasonable Time, he shall then pay Interest beyond the Penalty. 1 Salk. 154.

2. The Interest-Money on a Mortgage was paid to a Scrivener, who put out the Principal, and he broke; the Question was, who should bear the Loss; it was decreed, that if the Scrivener was entrusted with the Deed, the Mortgagee shall bear it; so it is likewise if he hath the Bond, and the Obligor pay both Principal and Interest to him, for being entrusted with the Security, he hath Power over the Money; but if he is entrusted with the *Mortgage-Deed*, he hath only Authority to receive the *Interest*, because the giving up such Deed doth not restore the Mortgagor to his Estate, for there must be a Reconveyance, that if the Scrivener hath neither the Mortgage-Deed or Bond, yet if the Mortgagee or Obligee agree that he shall receive the Interest, that it may be well paid to him as long as they live; that if after their Death the Executor receives any Interest of the Scrivener, which he had received; and if after such Receipt the Scrivener breaks, the Mortgagor shall not bear the Loss, because the Scrivener was trusted by the Mortgagee; and if the Agreement between them was determined by the Death of the Mortgagee, it was renewed by the Executor, by receiving the Interest from the Scrivener; but this was rather an Agreement than an Authority, and could not die with the Mortgagee. 1 Salk. 157. *Whitlock versus Waltham*.

Prison and Prisoners.

(A)

1. **T**HE Way to charge a Man in Custody is to file a Bill against him, if in Term-time, and deliver a Declaration to the Turn-key, and then he shall not be discharged, even upon common Bail, till after two Terms; but if 'tis in Vacation-time, then the Plaintiff must make an Entry in the *Marshal's Book* in the Office, *Quod W. R. remanet in Custodia ad seclam, &c.* 1 Salk. 345. *Tisdale versus Palfreman*.

Mod. Cases 241.

2. The Defendant was out upon Bail in an Action in *B. R.* and was taken upon an Extent at the Queen's Suit; and being brought up by *Habeas Corpus* by the Bail, they prayed that he might be committed to the Marshal, so that they might be discharged, and he was turned over accordingly, because the Suit in *B. R.* was precedent to the Queen's Extent. 1 Salk. 353. *French's Case*. See Bail.

3. Action against the Defendant in *B. R.* and pending that Action he was taken upon a Warrant in a criminal Matter and committed to the Counter, and afterwards was there charged with an Extent at the Suit of the Queen; and being brought up by *Habeas Corpus* at the Suit of the Plaintiff in the Action, that he might be in Custody of the Marshal, it was opposed, because he might let him escape as he did *French*; and by the late Act the Plaintiff may declare against him in *Custodia Vicecomitis*; whereas if *French* had not been turned over, his Bail would have been without Remedy, so the Defendant was remanded. 1 Salk. 353. *Crackal versus Thompson*.

Prisage. See Customs of the King. (A) 3.

Privilege.

Privilege.

Of Peers and Ambassadors allowed. (A)
Of Attornies and Clerks, and others, allowed to be good. (B)
Of Attornies, and Clerks and others, not good. (C)

Of Privilege of Courts by Priority of Suit; and of going and returning to and from Courts. (D)
Privilege of the Universities allowed. (E)
Privilege of the Universities not allowed. (F)

(A)

Of Peers and Ambassadors allowed, &c.

1. **A**N Ambassador sent by the Emperor of *Morocco* to the States of *Holland* took a *Spanijh* Ship at Sea *jure Belli*, and sixteen Chests of Sugar, and afterwards came into *England* and sold the Sugars to some Merchants here; the *Spanijh* Ambassador libelled against him and those who had bought the Sugars, in the Admiralty-Court, and obtained a Sentence; and afterwards he would have the *Morocco* Ambassador tried here upon the Statute 28 *H. 8. cap. 15.* for a *Pirate*; the *Civilians* insisted, that he could not be tried here as a *Pirate*, because the Privilege which he had as an *Ambassador* exempted him from all Punishments upon Penal Statutes, to which the Court agreed; but withal they resolved, that if he offend *contra jus Gentium*, then he might be proceeded against as a *Pirate*; the *Morocco* Ambassador perceiving the Opinion of the Court as to that Matter, prayed a Prohibition to the Admiralty, but that was denied; for if it should be granted, then the other could have no Remedy against him. 3 *Bulst. 28. Pelagii* and *Spanijh Ambassador*. 1 Roll. Rep. 175. S. C.

2. The Earl *Rivers* was arrested by a Bill of *Middlesex*, and not putting in Bail was committed to the *Marshalsey*; and being brought up by *Habeas Corpus*, he insisted on his Privilege as a Peer, which he pleaded; and the Plaintiff in the Action demurred to his Plea; the Question was, that since the House of Peers was then taken away by Act of Parliament, whether the Privilege of Peerage was not also taken away; and adjudged, that it was not, for the Defendant is still a Peer, and in respect of his Dignity no *Capias* will lie against him. *Style 222. More versus Earl Rivers.*

3. The Defendant snipp'd Goods at *Brazil*, without paying Customs, which he promised to pay at *Lisbon*; but instead of Sailing thither he came to *England*, and offering to sell the Goods, the *Portugal* Ambassador complained to the King in Council, and he was by them committed; and moving for Bail, it was opposed, because it might cause a Breach between that King and ours; but the Court could not deny to bail him; and if the Matter could be proved, he might be indicted. *Sid. 143. The King versus Indicalmois.*

(B)

Of Attornies and Clerks, and others, allowed good. See Attorney. (B) per totum.

1. **A** Serjeant at Law claimed his Privilege to be sued in the Court of Common Pleas, and it was allowed; this was *Serjeant Jenny's Case*; a Serjeant's Clerk likewise claimed that Privilege, and it was allowed; this was the Case of *Serjeant Hetley's Clerk*; the first is reported in *Dyer. Trin. 6 Ed. 6. 71*, and 28 *H. 8. Dyer 24. Cro. Car. 59. Serj. Hetley's Case. See pl. 19.*

2. An Attorney of the Common Pleas brought an Action in that Court against a Stranger, by Reason of his Privilege, and had a Verdict; but upon a Writ of Error brought, the Judgment was reversed for Want of *finding Pledges de prosequendo. Pasch. 12 Eliz. Dyer 288. Floteman v. Bygott.*

3. An Attorney of the Common Pleas was indebted to *B.* who was indebted to *D.* who, according to the Custom of *London*, attached the Money in the Attorney's Hands; and he brought a Writ of Privilege, which was allowed by the Court, because the Attorney was not indebted to *D.* but only by Custom; and the Privilege of these attending the Courts at *Westminster* shall not be impeached by any Custom whatsoever. 2 *Leon. 156. Lodge's Case.*

4. An Attorney of the King's Bench brought an Action of Trespass against the Warden of the Fleet, who desired the Advice of the Court of Common Pleas, whether he should insist on his Privilege; who all agreed, that because the Plaintiff had his Privilege in one Court as well as the Defendant in another, he shall have the Benefit of his Privilege who first begins the Suit. *Mich. 30 Eliz. 2 Leon. 41. Payer's Case.*

5. An

5. An *Accountant* in the *Exchequer* to the King was sued in *B. R.* and a *Baron of the Exchequer* came into the Court, and prayed the *Privilege* of the Court of *Exchequer*, that the Suit might be stayed; the Court doubted, because he ought to plead his *Privilege*; but the Secondary informing them that the *Precedents* were otherwise, the *Privilege* was allowed without Pleading it, upon this Prayer and Averment of the *Baron*. 2 *Bullst.* 36. *Mich.* 10 *Jac.*

6. Resolved, that all Proceedings in an inferior Court are void, and *coram non judice* after a Writ of *Privilege* delivered to the Court; and if they should afterwards proceed to Execution, the Courts at *Westminster* will discharge the Party. *Mich.* 9 *Jac.* 2 *Brownl.* 101. 8 *Rep.* 141. *Dr. Drury's Case.* S. P.

7. An Attorney of the Court of Common Pleas brought an Action in that Court against the Deputy Marshal of the King's Bench, for an Escape, who pleaded his *Privilege* to be sued in the King's Bench; but adjudged, that an Attorney is to be preferred before the Deputy Marshal; and since both of them have a *Privilege*, and the Court of Common Pleas was first possessed of the Suit, the *Privilege* of the Attorney shall take Place against the *Privilege* of the other. 2 *Brownl.* 267. *Guy versus Sir Geo. Reynolds.* *Godbolt* 81. S. P. *Mich.* 24 *Eliz.* 4 *Leon.* 193. *Basil Johnson's Case.* S. P.

8. A Writ of *Privilege* was signed by all the Justices of the Court of Common Pleas, for *B. B.* a Clerk in the Office of *Custos Brevium*, to exempt him from being pressed as a Soldier, reciting, that 'tis the Custom and *Privilege* of that Court, that the Attornies and Clerks shall not be pressed nor chose into any Office *sine voluntate*, but ought to attend the Service of that Court; and this *Privilege* was allowed. *Cro. Car.* 8. *Venable's Case.*

9. An Attorney of *B. R.* was elected Constable of *B. B.* in which Town there was a Custom alledged, that every one should be Constable in his Turn, according to their several Houses, and that this Attorney having purchased several Houses in the Town, was chosen Tithingman at the Leet there; he brought his Writ; and it was insisted, that it might not be allowed, because here was a special Custom alledged, which ought to be preferred before his *Privilege*; but adjudged, that this Custom should not prevail against an Attorney, who by his Office is bound to attend the Court. *Cro. Car.* 283. *Prowse's Case.*

10. Error of a Judgment in an Action of Debt brought by an Attorney of the Common Pleas, and the Judgment being given against him, upon a Demurrer, it was entered *Quod querens nil capiat per Breve*, whereas the Action was brought by Bill of *Privilege*, which is not an original Writ, and therefore it ought to be *nil capiat per Billam*; adjudged an Error, and not amendable, because it was in the Judgment, which is the Act of the Court, and therefore it shall not be accounted the Misprision of the Clerk. *Trin.* 15 *Car.* *Cro. Car.* 419. *Raymond versus Bembridge.*

2 *Roll.*
Rep. 368. 11. An Attorney of *B. R.* was chosen Church-warden, and he brought a Writ of *Privilege* to the Spiritual Court, insisting upon his *Privilege*, not to be sworn into that Office; and that Court refusing to obey the Writ, he moved for a Prohibition, and had it. *Palm.* 392. *Stamps's Case.*

12. An Attorney of *B. R.* was sued in an inferior Court for a Debt under 5 *l.* and had a Writ of *Privilege* allowed, for the Statute 21 *Jac. cap.* 23. never intended to take away the *Privilege* of those Attornies. *Palm.* 405. *Armington's Case.*

W. Jones
462. 13. The Lord of a Manor prescribed to have a Court-Leet, and one *Abdy*, an Alderman of *London*, lived within the Precincts of the Leet, and was presented by the Homage to be Constable; and this Presentment being removed by *Certiorari* into *B. R.* the Alderman was discharged; for he is privileged as an Alderman to attend at *London*, for the better Government of the City. *Cro. Car.* 585. *Alderman Abdy's Case.* See *pl.* 18.

14. Trespass against an Attorney of the Common Pleas; he pleaded his *Privilege per Attornatum*, to which Plea the Plaintiff demurred, because he ought to have pleaded it *in propria persona*, for Pleading it by Attorney, destroys the very Reason of his *Privilege*, which is his Attending the Court in Person; but the Plea was adjudged good, for he may be sick, or have Business in another Court to attend. *Style* 413. *Higgs versus Harrison.*

15. Debt was brought against the Defendant upon an Escape of one in Execution, who appeared & defendit vim & injuriam quando, &c. and then imparled specially, saving to himself all Advantages and Exceptions *quoad Billam præd'*; and the Question was, whether he could plead his *Privilege* as Marshal of *B. R.* after such an Imparlance; adjudged, that there were three Sorts of *Privilege* in the *Exchequer*, as Debtor, as Accountant, and as Officer of the Court; against the first of these any Man who hath a *Privilege* in another Court, shall be allowed that *Privilege*, because the *Privilege* as Debtor is only a general *Privilege*; but if an Accountant begin his Suit here, he hath in such Case a special *Privilege*, and no other *Privilege* shall be allowed against him, because of his Attendance to pass his Account, in which the King hath a particular Concern; and 'tis the same in an Officer of the Court who commences a Suit here, for by that Means his *Privilege* is attached, and no *Privilege* shall prevail against him; but where the Account is closed and reduced to a Debt, there the Accountant hath only a general *Privilege* as Debtor; the like of a Servant to an Officer or Minister of the Court, has no *Privilege* against a privileged Person elsewhere; adjudged likewise, that after such a special Imparlance, as in this Case, (*viz.*) *Quoad Billam*, *Privilege* shall be allowed; but if it had been *Quoad billam, breve seu narrationem*, it shall not. *Hardr.* 365. *Clapham versus Lenthal.* See *Latch* 2. S. P.

16. *Serjeant Morton* was Plaintiff in the Admiralty, and the Defendant moved for a Prohibition, and had it; and the Court held, that a *Serjeant* ought to sue and be sued in the Common Pleas; that a Prohibition was not honorary, but grantable *ex debito justitiæ*, and not in the Discretion of the

the Court, whether to grant or not, as in *Hob. 69.* to prove this Matter, the Case of 2 *Cro. 351. Wors versus Clifton*, was cited; that this Court may grant a Prohibition after an Appeal, and after Sentence, see 12 *Rep. 77. Hob. 79.* and the Custom of the Court of Common Pleas concerning the Privilege, being certified by the Secondaries, the Court refused to allow it, because it ought to be certified by the Pronotaries. *Sid. 65. Serjeant Morton's Case.*

17. In Debt upon Bond, the Defendant imparled specially, (*viz.*) *salvis omnibus & omnimodis* Lev. 54. *advantagis*, and then his Privilege as an Officer of the Exchequer; and upon Demurrer, it was S. C. adjudged ill; for after a full Defence he shall never be allowed to defeat the Jurisdiction of the Court. Note, 'Tis a Rule in pleading of Privilege, that the Defendant must aver his Plea. *Sid. 318. Trussell versus Martin.*

18. Motion for a Writ of Privilege to excuse him from the Office of Expenditor in *Romney-Marsh*, for that he was an Ecclesiastical Person, and all the Land he had in the Marsh was in Lease for 99 Years; the Writ was granted, two Judges only in Court. 1 Lev. 303. *Archdeacon of Rochester's Case. Dr. Lee's Case.* * See *Cro. Car. 515. Alderman Abdy's Case.*

19. In Assault and Battery against *Sir William Scroggs*, the King's Serjeant at Law, and one *Gilly*; he pleaded *Son assault Demesne*, and the Serjeant pleaded his Privilege to be sued in C. B. to which the Plaintiff demurred, because he is not the sole Defendant, but joined with another; but as to that it was ruled, that where the Action may be severed (as this may) the Want of Privilege of one shall not take away the Privilege of the other; and as to *Serjeants at Law* they are not confined to practise in the C. B. but may and do practise in any Court at *Westminster*; therefore, if they are sued in any inferior Court, they shall have their Privilege, but may be sued in any of the four Courts at *Westminster*. 2 Lev. 129. *Deakins versus Sir Wm. Scroggs & al.* See *Cro. Car. 84. Serjeant Huskyn's Case.* See pl. 1.

20. Debt on a Bond in C. B. the Defendant pleaded his Privilege of B. R. as *Custos Brevirum* of that Court; the Plaintiff replies, that he ought not to have this Privilege, for that upon the Return of the *Capias* against him, he had put in special Bail, (*viz.*) *T. S. and T. K.* and upon Demurrer, it was insisted for the Plaintiff, that upon putting in Bail the Defendant had admitted the Jurisdiction of the Court, as much as if he had imparled; but the Privilege was allowed. 3 Lev. 343. *Dashwood versus Foulks.*

21. In a Writ of Privilege by an Attorney, he declared, upon a *Quantum meruit* for his Labour and Pains in soliciting his Clients Suits, and laid the Promise to pay *Quantum meruit* in the Parish of *St. Clements Danes in the County of Middlesex*; the Defendant pleaded in Abatement another Writ against him for the same Cause directed to the Sheriff of *Wilts*, which was still in force, and averred his Plea, & *petit judicium de isto posteriori Brevis*; the Plaintiff replied, and confessed the Writ into *Wilts*, but averred, that nothing was done upon it; and that afterwards he brought an Attachment of Privilege, directed to the Sheriff of *Hampshire*, to which the Defendant appeared, and the Plaintiff declared against him, and he averred his Replication & *petit judicium*, and that the Defendant might answer to the last Writ; and upon Demurrer to this Replication it was adjudged against the Plaintiff, because he having laid his Action in *Middlesex*, it must be intended, that it was founded on a Writ directed to the Sheriff of that County; and in his Replication he sets forth, that the Defendant appeared to a Writ directed to the Sheriff of *Hampshire*, so that by his own Shewing he had falsified his Writ. 1 *Lutw. 31. Bowler versus Spachurst.*

22. Debt upon the Statute 23 *H. 6. cap. 8.* brought by an Informer against the Defendant, (who Pleas. (S) was an Attorney) for executing the Office of an Under-Sheriff two Years together; it was brought 16. S. C. by Original, wherein the Plaintiff recites the Statute, and the Offence, and avers, that the Office of High Sheriff of that Place was not inheritable, and that the Defendant had no Estate in the Office of Under-Sheriff; he pleaded in Abatement, that he was an Attorney of the Common Pleas, and ought not to be sued by Original, but by Bill; the Plaintiff demurred; adjudged, that where the Proceedings are meerly at the Suit of the King, as upon *Indictments* or Informations brought by the Attorney General, in such Cases Privilege shall not be allowed; but where the Proceedings are at the Suit of the King and the Party, as they are in this Case, the Plaintiff being a Common Informer, there the Defendant may have a Writ of Privilege, because in such Actions the Party may be nonsuited; neither is he barred, if the Attorney General should enter a *Nolle prosequi*. *Lutw. Abr. 61. Baker qui tam, &c. versus Duncalfe.* 1 *Lutw. 193.* See 4 *Leon. 46.*

23. Debt upon Bond against an Attorney of the C. B. brought by the Plaintiff in B. R. the Defendant pleaded, that he is an Attorney of the Court of C. B. &c. and that there is a Custom in that Court, that the Attornies thereof shall not be compelled to answer, &c. unless per Billam, and so pleads his Privilege to be sued per Billam, and not by Original, unless he is forejudged; the Plaintiff replied, that for five Years last past, before the Original filed, the Defendant had no Clients, but had withdrawn himself from the Office and Practise of an Attorney; and upon a Demurrer to this Replication, it was objected against the Plea, that the Defendant did not set forth, that he had any Clients, or that he prosecuted or defended any Suits, for that is the true Reason why an Attorney should have this Privilege; besides, he had alledged this Custom *in fieri*, and not *in facto*; for 'tis, that an Attorney should not be compelled to answer, &c. he should have gone on, and alledged, *nec a tempore cujus contrarium memoria hominum non existit compelli consuevit*, and this would have been an Allegation of an Usage in Fact, which is always essential to make a Custom, and must be set forth in pleading; but adjudged, as to the first Objection, that as long as the Defendant is an Attorney upon Record, he ought to have his Privilege; and as to the

the second Objection, the Court is able to take Notice of the Privilege of Attornies, and therefore a *Custom* in such Case ought not to be so strictly alledged as other Customs must be. 2 *Lutw.* 1664. *Routh* versus *Weddall*. See *Moor* 125. *Cro. Eliz.* 392. 1 *Lev.* 262. *S. P.*

5 Mod. 24. An Attorney of *C. B.* being sued in *B. R.* gave Bail to the Action, and the Plaintiff declared
310. S. C. against him *in Custodia Muri*, and in the same Term one *Jones* delivered a Declaration against him, to which he pleaded his Privilege; the Plaintiff replied, that the Defendant was *in Custodia Muri*, &c. and was out upon Bail, and pending that Suit he exhibited his Bill according to the Course of the Court; and upon a Demurrer to this Replication, it was adjudged, that the Defendant might have pleaded his Privilege to the first Action, and 'tis absurd, that he should be in a worse Condition as to the second Action, than he was to the first; but having waived his Privilege as to the first Action, by giving Bail, by which he acknowledged the Jurisdiction of the Court, 'tis waived as to the second Action. 1 *Salk.* 1. *Jones* versus *Bodiner*.

Farr. 97. 25. Action against an Attorney, who pleaded, that he was an Attorney of the *C. B.* and
S. C. ought not to be sued elsewhere, without his Consent; the Plaintiff replied, that the Defendant *did consent*, &c. but laid no *Venue* where he consented; and for this Reason the Replication was held ill. 1 *Salk.* 4. *Ode* versus *Norcliffe*.

(C)

Of Attornies and other Clerks and Persons, not allowed to be good, and not well pleaded. See Antea (B) 17.

1. ONE who was Receiver General of the Revenues of the Crown in *W.* being sued in the Common Pleas, brought a Writ of Privilege out of the Exchequer; but it was disallowed by the Court. *Mich.* 16 *Eliz.* *Dyer* 328. *Hunt's Case*.

2. The Defendant was taken in Execution by Virtue of a *Ca. sa.* issuing out of *B. R.* and thereupon a Prerogative Writ issued out of the Exchequer, to have his Body in that Court; the Sheriffs of *London*, in whose Custody he was, brought in his Body accordingly, and returned the Cause of detaining him; and upon shewing to the Court, that the Prisoner was indebted to the Crown, he was committed to the Fleet, as well for that Debt, as in Execution at the Suit of the Party; and upon an *Habeas Corpus* to bring up his Body to the Court of *B. R.* the Warden of the Fleet brought him thither, and this Matter appearing to that Court, he was remanded. *Dyer* 179, 197. *Laffells* and the *Lord Dacre's Case*.

3. Debt against *B. B.* and his Wife, as *Executrix* to her first Husband, from whom the Money was due; the Husband pleaded his Privilege, as Servant to the Lord Keeper of the Great Seal; but adjudged he could not have any Privilege, because he was joined with the Wife in this Action; and because she could not have any Privilege, therefore her Husband shall have none. *Noy* 68. *Etherington* versus *Ajhton*. *Godb.* 10. *Pole's Case*. *Dyer* 377. *S. C.* and *S. P.* *Cro. Car.* 149. *Lewett* versus *Faulshaw. S. P.*

4. The Defendant being arrested by Process out of *B. R.* did after the Arrest procure himself to be an Attorney of the *C. B.* and then pleaded, that *Die impetrationis Billæ*, he was an Attorney of the Court of *C. B.* and prayed his Privilege: *Sed per Curiam*, a Privilege which accrues *pendente lite* shall not be allowed, and he was not an Attorney of the *C. B.* before Bail put in, and afterwards he is in *Custodia marescalli*. 2 *Roll. Rep.* 432. *Goldborough* versus *Perriman*.

5. The Queen's Attorney of the Marshes in *Wales*, brought his Action there, as Executor to another, and insisted upon his Privilege, because of his Attendance there; but the Court disallowed it, because the Action was brought by him as Executor. *Latch.* 199. *Sir Fra. Ewer's Case*.

6. The Plaintiff exhibited his Bill as Clerk of the Court of Exchequer, to be relieved against a Bond; the Defendant pleaded his Privilege as an Officer of the Court of Chancery; and upon Demurrer, the Plea was over-ruled; for when both Parties are privileged, that shall take Place who sues first; besides, the Attendance of the Plaintiff is more requisite than the Attendance of the Defendant, because he is Debtor and Accountant to the King, as suggested by the Bill, and this cannot be done by Attorney. *Hardr.* 117. *Baker* versus *Lenthall*.

7. The Defendant being sued in *B. R.* pleaded his Privilege, as one of the Auditors of the Exchequer, (*viz.*) that *omnes*, &c. omitting the Word *Quilibet*, ought not to be sued in any other Court but in the Exchequer; for tho' *omnes*, &c. ought not, yet *Quilibet*, &c. might; besides, he did not conclude with an Averment of his Plea, because 'tis illuable, whether he is the same Person who is Auditor there; and the Court was of this Opinion. *Hardr.* 164. *Barrington's Case*.

8. Bill in the Exchequer by the Plaintiff, as Debtor to the King, and Treasurer of the Navy; the Defendant pleaded his Privilege, as one of the *six Clerks in Chancery*, under the Great Seal; adjudged by Ch. Baron *Hale*, and the Court, that a General Privilege as Debtor may be good against a General Privilege, but not against a Special Privilege in another Court, as Officer of the Court; but a Privilege as * Accountant will be good against such special Privilege, tho' the Party hath not entered upon the Account, for that shall be intended, unless the contrary is shewed; but in this Case the Plaintiff being Treasurer of the Navy, is *eo nomine* an Accountant. *Hardr.* 316. *Carteret* versus *Massam*.

9. *Indebitatus assumpsit, &c.* the Defendant pleaded his Privilege, as Auditor of the Exchequer in these Words, *ff.* That the Barons of the Exchequer, their Clerks, nor other Officers of the Exchequer, are not to be impleaded elsewhere ; and upon Demurrer to this Plea, it was held ill ; first, because the Privilege was pleaded in the Negative ; for 'tis, that they are not to be impleaded elsewhere, and doth not say, that 'tis usual for them to be sued there ; besides 'tis too general to say, that the Barons and *their Clerks*, are not to be sued elsewhere, for that doth not prove but one of them may be sued there. 2 *Sid.* 164. *Foster versus Barrington.*

10. Information against *Pagett* the *Custos Breviarum* of *B. R.* for several Abuses in his Office, he insisted not to appear in Person, but by Attorney ; but adjudged, that he shall appear in Person, because he is an Officer of the Court, and presumed to be always present ; and if he doth not appear, Judgment shall be given against him without any other Process. *Sid.* 134. *The King versus Pagett.*

11. Debt in *B. R.* against an Attorney of the Common Pleas, who imparled specially, *salvis sibi omnibus exceptionibus* ; and afterwards pleaded his Privilege ; and upon Demurrer, it was held, that this Plea to the Jurisdiction is ill after such an Imparance ; for *salvis sibi omnibus exceptionibus tam ad Breve quam ad Billam* is only as to the Person and the Action, and not to the Jurisdiction of the Court. 1 *Lev.* 54. *Neave versus Nelson.*

12. In an Action brought against an Attorney of *B. R.* he pleaded his Privilege of an Attorney of *B. R.* that *omnes Attornati* of that Court ought to be impleaded there, and not elsewhere ; and upon Demurrer to this Plea, it was held ill, for tho' *omnes Attornati* of that Court ought not to be sued elsewhere, yet *aliquis* may. 1 *Lutw.* 639. *Camfield versus Warren.*

13. The Defendant pleaded in Abatement, that *tempore quo memoria non extat*, all the Clerks of the Queen's Court of Exchequer had a Privilege from being sued elsewhere, &c. and that the Defendant was Clerk to *R. A. un' Barron de Scaccario nostro* ; and upon Demurrer to this Plea, it was held by the Court, that there were two Ways of pleading Privilege ; one is, if the Party is an Officer on Record, then to go to Issue, and at the Trial to produce the Record ; if he is no Officer, but Attendant on the Court, that must be tried by a Jury ; the other is, if he is an Officer on Record, then to produce a Writ of Privilege at the Time of the Plea pleaded, upon which there can be no Issue joined ; but here the Custom is ill pleaded ; for 'tis Nonfence *tempore cujus contrarii memoria hominum non existit* ; besides the Defendant did not aver, that he was Clerk to one of the Barons of the Exchequer, but *de Scaccario nostro* ; so Judgment was given to answer over. *Mod. Cases* 305. *Phipps versus Jackson.*

14. The Defendant being sued in *C. B.* pleaded, that he is an Attorney of *B. R.* but did not say, that he was so *tempore impetrationis brevis* ; and for this Cause the Plea was held ill, and a *Respondeas Ouster* awarded. 1 *Salk.* 1. *Pease versus Parsons.*

15. In *Assumpsit, &c.* against the Defendant, as Executor of *T. S.* he pleaded in Abatement, that he is an Attorney of the Common Pleas, and prayed his Privilege ; but adjudged, that he should answer over ; for his Privilege extends only to Actions brought against him *in his own Right*, and not in the Right of another. 1 *Salk.* 2. *Newton versus Rowland*, and *Lawrence versus Martin* 7. *S. P.*

(D)

Of Privilege of Courts by Priority of Suit, and of going and returning to and from Courts.

1. **A** *Assault, &c.* the Action was brought in the Common Pleas, and upon Not guilty pleaded, the Parties were at Issue, and after the Trial, when the Jury went out to consider of their Verdict, the Defendant in this Action arrested the Plaintiff by Process out of *B. R.* for an Assault made before that Time on him ; and this appearing in the Court, they ordered him to release the Party from the Arrest, and they set a Fine on him, which he immediately paid in Court, for his Contempt thereof ; for they said, that the Suitors ought safely to come and go by the Privilege of the Court, without Vexation elsewhere. *Goldf.* 33. *Leigh's Case.* *Mich* 29 *Eliz.*

2. *Trover, &c.* was brought in the Court of Exchequer ; the Defendant pleaded, that the Plaintiff had an Action depending against him in the King's Bench for the same Trover ; adjudged, that the Plea was good, for it doth not appear, that either of them have Privilege of the Exchequer ; and if so, then by the Statute *De articulis super Chartas*, 'tis enacted, that no Common Pleas shall be in the Exchequer. *Mich.* 33 *Eliz.* 5 *Rep.* 61. *Sparrie's Case.*

3. An Action was brought against the Defendant in the Court of Common Pleas ; and as he was going to *Westminster* to attend his Cause, he was arrested in *London* ; he brought a Writ of Privilege, and was discharged from the Arrest by the Court. *Mich.* 30 *Eliz.* *Goldf.* 64. *Powell's Case.*

4. *Sir Edw Waterhouse* was arrested by *Latitat* at the Suit of one *Ingram* for 1000 *l.* on a Bond, and upon a Motion the Money was brought into Court ; but before the Return-Day of the *Latitat*, *Sir Edward* was attached in the *Sheriffs Court* of *London*, for divers Sums ; it was moved, that the Money might be taken out of the Court, to satisfy the Plaintiff *Ingram*, for that the Court of King's Bench had the Priority of Suit ; but adjudged, that if it appear, he was a Debtor to those in *London* before he became indebted to *Ingram*, that the Money shall remain in Court

subject to the Payment of their Debts; and that the Court should not be made a Means to strip others of their just Debts. 1 *Bullst.* 217. *Ingram versus Waterhouse*.

5. *Trespass* in *B. R.* and it was laid in *Cornwall*; the Defendant pleaded in Abatement, and set forth the Charter of King *Ed. 1.* granted to the Stannary-Court, by which the Workmen in the Stannaries are to sue and be sued in that Court, and so prayed the Privilege, that this *Trespass* might be tried; upon Demurrer to this Plea adjudged, that *B. R.* shall try the Cause, notwithstanding the Charter, because the Defendant is supposed to be in *Custodia Marechalli*, and the Plaintiff may declare against him in what Manner he will. 2 *Bullst.* 122. *Parke versus Lock*.

6. Debt upon Bond; the Defendant after *Imparance*, pleaded, that he was one of the Privy-Chamber, and as such, ought not to be sued in any Court without a special License of the Lord Chamberlain; and upon Demurrer he was ruled to answer over, for such Plea is ill in itself; but if it was not, it cannot be pleaded in Abatement after an *Imparance*. *Raym.* 36. *Barrington versus Venables*.

Sid. 243.
1 Lev.
159.
Hardr.
389. S. C. 7. Information for a Riot in *Canterbury*; Upon Not guilty pleaded, a *Venire facias* issued to the Sheriff of *Canterbury*, which is a County of it self, and he returned *duodecim*; then a *Distingas* went out, and upon that the Sheriff returned, that the City of *Canterbury* is an antient City, &c. and that King *James* by Letters Patents *Anno 6* of his Reign, granted to the said City and Citizens, &c. that they should not be compelled to go out of the City upon any Cause whatsoever, &c. this Return was adjudged ill, because the Sheriff having returned *duodecim probos & legales homines* upon the *Venire facias*, he contradicts himself by the Return of the *Distingas*, that they are not to appear; besides, the Person returned, and not the Sheriff, should claim this Privilege of Exemption; and lastly, he ought to have averred, that there are no Inhabitants of that City, besides Men of the Corporation; the Return was quashed, and the Sheriff fined 100 *l.* and an *alias Distingas* issued. *Raym.* 113. *The King versus City of Canterbury*.

8. In *Trespass* in *B. R.* &c. one of the Defendants pleaded his Privilege, as a Clerk to a Prothonotary of the *C. B.* the Plaintiff replied, that he prosecuted an Original against *Cook* the Defendant and two others jointly, for a *Trespass* done by them jointly, and that this Declaration was against them all upon this Original, and that he still prosecuted the same against *Cook* and the other two Defendants; and upon Demurrer adjudged, that the Defendant *Cook* shall not have his Privilege, because he was joined in this Action with two others, who could not pretend to any Privilege. 1 *Vent.* 298. *Molyn versus Cook & al.*

9. An Attorney sued the Defendant by Writ of Privilege *a tempore quo non extat memoria usitata*, &c. for that he (the Defendant) being a Justice of Peace, made a Warrant directed to the Constable, charging him (the Plaintiff) to be outlawed for High Treason, when in Truth he was not, &c. and upon Demurrer to this Declaration it was insisted, that this Prescription for his Privilege was insensible, for instead of *a tempore quo*, &c. it should be *tempore cujus contrarium*, &c. but adjudged, that the Words sufficiently express Time out of Mind. 2 *Vent.* 130. *Whitaker versus Thorogood*.

10. The Warden of the *Fleet* moved for a Writ of Privilege, alledging, that he was obliged to attend the House of Peers, (sitting the Parliament) and producing Precedents, where Writs of the like Nature had been granted, the Court inclined to grant this Writ; but it afterwards appearing, that he was sued for Escapes, and that it was in their Discretion, whether to grant the Privilege, or not, (for they could not judicially take Notice of his Privilege) the Court ordered him to plead it, if he would; or otherwise, if he thought his Privilege infringed by any Prosecution, he might complain to the House of Lords. 2 *Vent.* 154. *The Warden of the Fleet's Case*.

11. The Privilege of a Clerk in Chancery was pleaded by Prescription; and upon Demurrer to the Plea, it was held ill, because *no Place* was alledged; besides, he did not conclude his Plea with *hoc paratus est verificare*; both which are Matters of Fact, and traversable. 1 *Vent.* 264. *Fawkeners versus Annis*.

Sid. 362.
S. C. 12. By Articles of Agreement, *Turbill* an Attorney of *B. R.* covenanted to pay *Nevison* 200 *l.* upon a Purchase of Lands, when he should make him a good Title; *Nevison* made a Conveyance of the Lands, but there being some Incumbrances, the Money was not paid, but afterwards attached in *Turbill's* Hands, at the Suit of the Creditors of *Nevison*, in the Sheriffs Court in *London*; whereupon *Turbill* brought his Writ of Privilege, and the Court was moved in the Behalf of the Creditors, that this Writ of Privilege would not lie in *B. R.* because the Plaintiffs in the Sheriffs Court, who were the Creditors of *Nevison*, could have no Remedy against *Turbill* in that Court, or elsewhere, out of the *Sheriffs Court*, because this was a customary way of proceeding there, not warranted by the Common Law; the Privilege was disallowed. 1 *Saund.* 67. *Turbill's Case*. See *Edwards versus Tebury*, and *Lodges Case contra*. 2 *Leon.* 156. denied to be Law.

13. In an Action *qui tam*, &c. the Defendant *dicit*, that he is an Attorney of the Common Pleas, and that Attornies of *C. B.* are not suable elsewhere; and upon Demurrer it was objected, that this Plea was ill, because the Defendant made no Defence; he said only *Dicit*, without *Venit* as he ought; besides, the Plea is in the Negative, and therefore when he pleads, that Attornies are not suable elsewhere, he should give Jurisdiction to some other Place; but adjudged, that there was no Difference between *Venit* and *Dicit*, and *Dicit* only, which is a sufficient Defence in this Case, because the Privilege is not traversable or triable by Jury, but a Matter of Law, of which the Courts at *Westminster* take Notice. 2 *Salk.* 543. *Kirkham versus Wheely*, 544. *Seppens versus Arthur*. S. P.

14. An Attorney pleaded his Privilege thus, *Et præd' T. P. in propria persona sua dicit*; and upon Demurrer to this Plea it was objected, that it ought to be concluded with a *Proferit hic in Curia* the Writ of Privilege testifying him to be an Attorney, which is very true, and that he ought to have said *prout patet per Recordum*; but that must be in such Case where he sets forth the Writ, which was not done here; and he may declare either Way, either upon the Writ, or without it. 2 *Silk.* 545. *Dillon versus Harper.* 545. *Stawen versus Garret.* S. P.

15. The Defendant being an Attorney of the Common Pleas, was arrested near *Westminster-Hall* Gate, sitting the Court, at the Suit of an Attorney of *B. R.* by an Attachment of Privilege, and both the Officer and the Prisoner were brought into Court; and the one was committed, and the other was sent up to *B. R.* who being informed of the Case, discharged him upon common Bail. 2 *Mod.* 181. *Long's Case.*

(E)

Of the Universities allowed.

1. **T**HE Defendant being sued in *B. R.* brought Letters under the Seal of the Chancellor of the University, certifying, that he was a Commoner of *Excester College*, as it appeared to him by a Certificate of *Dr. Prideaux*, who was Rector of that College; and thereupon he prayed his Privilege; it was objected, that this was not a good Certificate, because it certified what another certified to the Chancellor; thereupon a new Certificate was obtained, against which it was objected, that it came too late, for it being after an Imparlance, it was then too late for him to pray his Privilege; besides, it certifies that the Defendant now is a Commoner, &c. and doth not say at the Time of the Action brought; but notwithstanding these Objections, the Privilege was allowed. *Godbolt* 404. *Fryer versus Dewy.*

2. The Wife of the Principal of *St. Mary-Hall* in *Oxford*, libelled in the Vice-chancellor's Court against *Wilcocks*, for calling her Bawd and old Bawd, and her Daughter libelled against him there, for calling her Scurvy Whore and Jade; the Defendant prayed a Prohibition, and thereupon the Agent for the University produced the Charter 14 *R.* 2. and 14 *H.* 8. both confirmed by the Parliament 13 *Eliz.* by which it was granted to the University, that they might enquire of all Trespases, Injuries, &c. and other Pleas, except Pleas of Freehold, where a Scholar, or any of their Servants *sunt una partium*, &c. it was insisted in this Case, that the Privilege should be disallowed, because the Plaintiffs were no Scholars, &c. and the Defendant, tho' a Scholar, did not desire it; but adjudged, that since by the Charter they are to sue there, if *una pars est Scholaris*, the Privilege shall be allowed to the other who are not Scholars. *Cro. Car.* 52. *Wilcocks versus Paradell.*

3. *Indebitatus Assumpsit* against the President and Scholars of *Magdalen College* in *Oxford*, for 60 *l.* due for Butter and Cheese sold to the College, &c. The Chancellor of the University demanded Cognisance by Virtue of Letters Patents of Privileges confirmed by Act of Parliament, by which they have Power to hold Pleas in personal Actions, where Scholars or other *personæ privilegiatæ* are concerned, and concludes with an express Demand of Conusance in this particular Case; it was objected, that this Action being brought against a Corporation, the Words *personæ privilegiatæ* did not comprehend them; that a Corporation cannot be arrested, nor make Stipulation; that the Proceedings in the Vice-chancellor's Court being according to the Civil Law, they cannot issue out a *Distingas* against the Lands, nor can a Corporation be *excommunicated*: But adjudged, that Servants and Officers to Colleges have been allowed this Privilege; *a fortiori*, their Masters may have it; that when a Corporation is sued, they must give Bond and Stipulators to satisfy the Judgment, and if they do perform the Condition, the Stipulators may be committed; that the Word *Persona* includes a Corporation upon the Statute of *Cottages.* 2 *Inst.* 256. so the Privilege was allowed both as to Matter and Form. 1 *Mod.* 145. The Case of *Magdalen College.*

(F)

Of the Universities not allowed.

1. **D**EBT upon Bond; the Defendant pleaded the Privilege of the University of *Cambridge* granted to them by *Q. Elizabeth*, for Scholars, Batchelors and Masters of Arts there, and their Servants, to sue and be sued in the Vice-chancellor's Court there, upon Contracts made within the University; then he set forth, that he was a Servant of the Scholars, (*viz.*) *Bailiff* of *King's College*, &c. and inhabiting within the Town of *Cambridge* and Precincts of the University, &c. but upon Demurrer to this Plea it was adjudged, that a *Bailiff* of a College was not capable of this Privilege. 1 *Brownl.* 75. *Carryl versus Pask.*

2. At *Sturbridge-Fair* some lewd Persons came to *Chesterton*, a Vill near *Cambridge*, and the Proctors committed them, for that the said Vill was within their Jurisdiction; afterwards the Proctors were indicted for a Riot, and the Grand Jury found the Bill; thereupon they petitioned the *King in Council*; and Order was made, that the Attorney General should surcease the Prosecution upon this Indictment, for that the Vill was *infra mille passus* of the University, and within

the Circuit of their Charter ; and this Indictment being removed into *B. R.* and Process issuing upon it, the Court, upon Motion, stayed it, tho' they agreed that the *Privy Council* had nothing to do with Riots or Charters, nor with any private Interest. 1 *Roll. Rep.* 245. *The Proctors of Cambridge Case.*

3. Ejectment, &c. for an House in *Oxford* ; the Defendant pleaded, that he was a Scholar of the University and Principal of *Glocester-Hall*, and a privileged Person, &c. that he ought to be sued before the Vice chancellor of *Oxford*, *secundum morem Universitatis*, according to the Charters granted to them, by which they had a Jurisdiction of all Contracts, Covenants and Leases, &c. excepting Freehold, &c. adjudged, that the Vice-chancellor had no Jurisdiction in this Action, it being an Ejectment, in which, if the Plaintiff should recover, he may have a Writ of *Habere facias possessionem* to the Sheriff, and thereby he who hath a Freehold may be put out of Possession ; but if it had been an Action of Covenant, or upon a Contract, in which Damages only are to be recovered, then it had been otherwise. *Cro. Car.* 62. *Hally's Case.* *Antea Pleas.* (A) 3. *S. C.*

4. Upon a Bill in Equity, as *Debtor and Accountant*, the Defendant pleaded his Privilege as a Scholar of the University of *Oxford*, and sets forth a Charter of Exemption from the Justices of the one Bench and the other, and from *other Justices*, but the *Exchequer* is not mentioned ; but adjudged by *Hale Ch. Baron*, and the Court, that the Privilege of the University shall not be allowed, because the general Privilege of a Person as a Member of the University, or a Clerk in Chancery, doth not take away the particular Privilege of the Court of Exchequer, where the Person is *Debtor and Accountant* to the King, especially since in this Charter there are not these Words *Licet tangat nos*, &c. *Hardr.* 189. *Wilkins versus Shalcroft.*

5. *Assumpsit* by *Quo minus*, &c. for Goods sold and delivered ; the Action was laid in *London* ; the University of *Oxford* demanded Conusance of the Cause by Virtue of a Charter granted to them by *H. 8. Anno 14.* of his Reign, and confirmed by a Statute *Anno 13 Eliz.* by which Conusance of all Suits arising any where against a *Scholar, Servant, or Minister of the University*, depending before the Justices of *B. R.* or *C. B.* and *others* there mentioned, and before any other Judge is given to them, *licet tangat nos*, &c. but the Court of Exchequer is not named in that Clause, but in another, whereby all Fines are granted to them imposed on Scholars, &c. in any Court, &c. there the Court of Exchequer is named ; and the Question was, whether Conusance shall be allowed ; it was insisted for the Plaintiff, that it should, because he is a Person privileged as Debtor and Accountant to the King ; and where two Privileges concur, the first which attaches shall prevail ; besides, the Conusance in Question doth not extend to this Court, because 'tis not named in the Charter of Exemption, and 'tis not included by the Words, *before any other Judge*, because these Words come after the Mentioning *other inferior Courts* ; so that by the Words *Any other Judge*, it must be intended *any Judge of other inferior Court*, for 'tis not consistent with the Dignity of this Court to be included by the Words *other Courts*, after the naming *other inferior Courts* : But adjudged, that there are three Sorts of Persons privileged in this Court, (*viz.*) *Debtors, Officers and Accountants* ; that the Two last shall have their Privilege, if sued elsewhere ; but not the first, because a Debtor by *Quo minus* has a Privilege only for the King's Benefit, that is, where a Debt was confessed to the King ; but this is now disused, and a *Quo minus* is now no more than a common Action, and is not a Writ or Bill of Privilege as formerly : There are likewise three Sorts of Conusances of Pleas, (*viz.*) *Tenere placita*, and this only makes a concurrent Jurisdiction with other Courts, *cognitio placitorum*, as where a Plea is commenced here, the Conusance whereof belongs to another Court ; and lastly, there is a Conusance of Pleas with an exclusive Jurisdiction, as in the principal Case, which is a *Supersedeas* to all other Courts ; and here the Patent is *general*, that they shall have Conusance *ubicumq* ; &c. and Power to proceed according to the Common or Civil Law, which Patent would have been void at Common Law, because it gives them Power to proceed according to the *Civil Law* ; but being confirmed by Act of Parliament, that makes it good. *Hardr.* 505. *Castle versus Litchfield.*

Probate.

What an Executor may do before Probate, what not. (A)	Cases where an Executor dies before Probate. (C)
Whether a Probate once granted may be suspended, revoked or traversed, or not. (B)	Of Probate where the Will is of Lands and Goods. (D)
	Of Fees for Probate of Wills. (E)

(A)

Of Probates, and what an Executor may do before Probate, and what not.

1. **T**HE Probate of a Will is usually made in the Spiritual Court, and this is done by granting Letters testamentary under the Seal of that Court, by which the Executor is enabled to bring an Action; and if such Letters Testamentary are granted to the Party, who exhibits the Will merely upon his Oath, by Swearing, that he believeth it to be the Last Will of the Deceased; this is called Proving it in *common Form*, and such a Probate may be controverted at any Time; but where the Executor, besides his own Oath, produces Witnesses to prove it to be the Last Will of the Deceased; and this in the Presence of the Parties who claim any Interest, or in their Absence, if summoned, and they do not appear; this is called a Probate *per Testes*, which can never be controverted after thirty Years.

2. There was a Grant of the next Avoidance to the Testator, who made *W. R.* his Executor, and died; the Executor, before Probate, granted the Presentation to the Plaintiff, who in a *Quare Impedit* set forth, that the Church became void, and that the Executor presented him, and averred it to be the next Avoidance, but did not set forth the Will; and adjudged that he need not, for the Grant was good, tho' the Will had never been proved. *Mich. 4 Mar. Dyer 135. Smithley versus Cholmley.*

3. And this Release he may execute before Probate, but then the Will must afterwards be proved. *5 Rep. 28. Middleton's Case. Postea Release. (C) 6. S. C. Refusal. (A) 2. S. C.*

4. He may take Possession of the Testator's Goods before Probate; and if Administration should afterwards be granted to another, and such an Administrator should take the Goods from the Executor before the Will is proved, he may afterwards prove it, and then bring an Action of Trespass against the Administrator, because the Executor hath the Right to the Possession; and as soon as the Will is proved, the Administration is void. *2 And. 151. Plow. Com. 277. In Greysbrooke versus Fox. S. P.*

5. The Executor may possess himself of the Testator's Goods before Probate, he may also receive Debts due to his Testator, and may pay and discharge any Legacies; he may likewise release any Debt, because the Right of Action is in him before the Probate, for that gives him no Interest, it being a Solemnity requisite to the Confirmation of the Will. *5 Rep. 27. Ruffel's Case.*

6. Where a Man is made Executor, he is so before Probate, and may pay Debts, and be sued if he doth not pay; he may also maintain an Action before Probate, but then he must prove the Will before he delivers the Declaration; for he being Executor before Probate, his Proving the Will after the Action brought, and before the Delivery of the Declaration, removes that which was the Impediment *ab initio*. *1 Vent. 207. 1 Roll. Abr. 917.*

7. In Ejectment, the Title was for a Lease for Years in *Ireland*, which the Plaintiff claimed under an Administration under the Seal of the *Primate*, and the Defendant gave in Evidence a Probate of a Will in the Prerogative Court of *Canterbury*, (the Testator dying in that Province) and also in the Court of the Bishop of *Fernes*; and because the Court of *C. B.* in *Ireland* would not direct the Jury that it was conclusive Evidence, but only that it was good Evidence, and left it to the Jury, therefore a Bill of Exceptions was taken to it: *Et per Curiam*, the Judgment which was for the Plaintiff in *Ireland* was confirmed. *T. Jones 146. Phillips versus Chichester.*

8. An Executor brought an Action of Debt against the Administrator for a Debt due from the Intestate to the Plaintiff's Testator; the Defendant pleaded, that the Plaintiff released to him all the Right and Title to the Estate of the Testator, and this was before Probate of the Will; and upon a Demurrer to this Plea it was objected, that this Release did not bar the Plaintiff of this Action, because the Executor had only a Possibility to be entitled to the Testator's Estate, and no Interest till Probate; 'tis true, such a Release of all Actions had been, because an Executor hath a Right of Action before Probate; but the better Opinion was, that the Release was good. *2 Mod. 108. Morris versus Philpot.*

9. An Executor may bring an Action before Probate, and if he shews the Probate in the Declaration by a *Profert hic in Curia*, 'tis well enough; so if he hath a Reversion of a Term of Years on which a Rent is reserved, he may distrain and avow before Probate. *1 Vent. 370. Duncomb versus Walter.*

2 Lev.
214.
T. Jones
104. S. C.

Raym.
49. S. C.
3 Lev.
57. S. C.

10. *Mundamus* to the Judge of the *Prerogative Court* to grant a *Probate* of a Will; he returned, that the Executor was a Person who absconded, and *incapax*, &c. adjudged an ill Return, because, since the Testator thought him a proper Person, the Ordinary shall not adjudge him otherwise upon any Disability arising by the Canon Law; neither can the Ordinary insist upon Security from the Executor, because the Testator thought him sufficient, and he hath a temporal Right, which he cannot sue for before Probate; so a peremptory *Mundamus* was granted. 1 *Salk.* 299. *The King* versus *R. Raynes*.

(B)

Whether a Probate once granted may be suspended, revoked or traversed, or not.

1. **T**HE Probate of a Will may be suspended by an Appeal, but it cannot be revoked by the Ordinary; as for Instance, the Testator made *Adiel Mills* Executor, and *Gillam Hills* and others Residuary Legatees, and died; the Executor proved the Will and afterwards became a Bankrupt; then he was cited by *Hills*, one of the Residuary Legatees, to shew Cause why the Probate granted to him should not be revoked, and Administration with the Will annexed, granted to *Hills*; because *Mills* being only a bare Executor, and having no Interest by the Will, and having made himself incapable to manage his own Estate, either for Want of Honesty or Conduct, was therefore incapable of being Executor to another; and that he was made an Executor upon a Supposition of his Ability; therefore if his Circumstances alter, in such Case the Ordinary should do what the Testator himself would have done, if he had been now living; 'tis true, for these Reasons this Probate was revoked in the Spiritual Court, and the Administration, with the Will annexed, was granted to *Hills*; but a Prohibition was granted, because the Probate was not to be revoked, for that would alter the Will, and in Effect make a new Will; that the *Mens Testandi* of the Deceased was as strong for making *Mills* Executor, as it was for making *Hills* Residuary Legatee; that Bankruptcy *quoad* the Executor, is no Disability or Breach of Trust; for what he hath as Executor, is protected by the Law from all Forfeitures which may at any Time occur, either by his own Acts or Omissions; that this Grant of the Probate to him was only to make him capable to sue; for he might release or pay Debts before Probate; and if *Hills* should bring an Action against any one, the Defendant might plead, that the Testator made an Executor, who is still living; 'tis true, if *Mills* had been an Administrator, and not an Executor, such Administration might have been repealed if he had afterwards become a Bankrupt, because he was made Administrator by the Act of the Court; but an Executor is made by the Act of the Party himself, and then the Law entitles him to the Probate of the Will. 1 *Roll. Rep.* 226. *Shower* 293. *Hills* versus *Mills*. 1 *Salk.* 36. *S. C.*

2. In Debt by an Executor, the Defendant by Way of Plea appealed from the Will; adjudged, that notwithstanding the Appeal, the Plaintiff is complete Executor by the Probate; and that this was an ill Plea, because the Defendant might have traversed the Probate, if the Executor did not conclude with a *Proscit hic in Curia*, or he might have demanded Oyer of the Will. *Trin.* 13 *Jac.* 3 *Bulst.* 72. *Hornegold* versus *Brian*.

Raym. 405. *S. C.* 3. A Probate of a Will was given in Evidence at a Trial to prove such a Person Executrix, and the Defendant offered to prove that the Will was forged, but he was not admitted to give any Proof thereof, because it was directly against the Seal of the Ordinary in a Matter where he had a proper Jurisdiction; but the Defendant might have given Evidence, that the Seal it self was forged, or that the Testator had *Bona notabilia*, or he might have been relieved on an Appeal. 1 *Lev.* 235. *North* versus *Wells*.

(C)

Cases where an Executor dies before Probate.

1. **W**HERE an Executor dies before Probate, there his Testator is dead without an Executor, for the Executor of an Executor cannot be Executor of the first Testator, unless the first Executor had proved the Will, because the Spiritual Court cannot take Notice who is Executor any otherwise than by the Probate.

2. But if a Term for Years is devised to one who is also made Executor, and he enters, and afterwards dies before Probate, his Executor shall have the Term, because by the Entry the Will was executed. *Dyer* 367.

3. So if he was made Residuary Legatee as well as Executor, and afterwards had died before Probate, Administration shall be granted to his Executor, or his Administrator shall have a Title to the Goods; but if he was not made Residuary Legatee, then Administration must be granted to the next of Kin of the first Testator. *Dyer* 372. *Isted* versus *Stanley*.

4. So where the Husband made his Wife Executrix and Residuary Legatee, and she died before Probate; adjudged, that the Administrator of the Husband should have the Residuary Part, because the Wife neglected to prove the Will. *Hetley* 105. *Denn* versus *Burroughs*.

(D)

Of Probate, where the Will is made of Lands as well as Goods.

1. **W**HERE a Will is made both of *Lands* and *Goods*, the Temporal Courts will not prohibit it to be proved in the Ecclesiastical Courts; as for Instance, in a Prohibition the Plaintiff suggested, that *W. R.* libelled in the Spiritual Court, setting forth, that *R. F.* made a Will, by which he was made Executor, and that the Testator devised *his Lands* to him to sell, and that he sued in that Court to have it proved, when in Truth the said *R. F.* made no Will; upon which the Parties were at Issue, and the Plaintiff in the Prohibition was nonsuited; but yet it was insisted for him, that the Defendant ought not to have a Consultation, because he did not set forth in his Libel, that the Testator *had Goods*, and a Will of Lands ought not to be proved in that Court; but adjudged, that the Will might be proved there; for otherwise he can have no Action for the Goods, if there are any. *Cro. Car. 118. Hill versus Thornton.*

2. 'Tis true, this was against the Opinion of Justice *Croke* in a parallel Case, because *the Land* *W. Jones* being the principal Thing, therefore the Spiritual Courts can have no Authority in such Cases; 355. S. C. and it would be very inconvenient if they should, because then the Sentence given in those Courts might influence any Suits which might happen in the Temporal Courts concerning the Lands. *Cro. Car. 391. Netter versus Brett. 395. S. C. 1 Bulst. 199. Egerton versus Egerton. S. P. 2 Cro. 346. Westby versus Allen. S. P. Cro. Car. 94. S. P.*

3. Afterwards it was held, that a Special Prohibition should go *quoad the Lands*, *Cro. Car. 81. Dennis's Case*; and so my Lord Ch. Just. *Hale* tells us, it was done in *Minshul* and *Spicer's Case*. *Hardr. 131. 2 Sid. 143. Combe versus Combe.*

4. But now such Prohibitions are always denied, because the Party can be at no Prejudice in Respect to the Lands, if the Will is proved in the Spiritual Court; for such a Probate is no Evidence against him at Law, in any Suit which might be brought concerning the Lands; but it would be prejudicial to Executors, if Prohibitions in such Cases should be granted, because they would be hindered from proving Wills, and could not maintain an Action for a just Debt, and by that Means Part of the Testator's Estate might be lost. *Hardr. 313. Hobert versus Barrow.*

(E)

Of Fees for Probate of Wills.

1. **B**Y the Statute 21 H. 8 cap. 5. 'tis enacted, that *six Pence*, and no more, shall be taken by the Registrar where the Goods of the deceased do not exceed five Pounds; but then the Transcript of the Will must be brought to him ready engrossed, and with Wax to be sealed; and when the Goods of the deceased are above the Value of 5 l. and under 40 l. then the Fee to the Judge shall be 2 s. 6 d. and to the Register one Shilling; and when the Goods exceed the Value of 40 l. the Judge's Fee is 2 s. 6 d. and to the Register 2 s. 6 d. which he may refuse, and take a Penny for ten Lines of the Will, each Line being ten Inches in Length; and so for Administrations, where the Intestate's Goods exceed five Pounds, and are under 40 l. the Officer's Fees are only 2 s. 6 d. and he who takes more than his due Fees, forfeits what is taken more to the Party grieved, and 10 l. more to be divided between the King and the said Party.

2. An Information for Extortion was brought upon this Statute against a Commissary of an Archdeacon, for taking more of an Executor than appointed by this Law; who brought the Transcript of the Will ready engrossed, and the Commissary only annexed the Probate to it; and adjudged that no Fee was due to him for such Transcript. 4 Inst. 336. *Neale versus Rowse. Coke Envr. 166. S. C.*

3. By the Statute 4 & 5 Annæ, 'tis declared, that the Power of granting Probates and Administrations of the Goods of Persons dying for Wages or Work done in her Majesty's Docks and Yards, shall be in the Ordinary of the Diocese where the Party dieth, or in him to whom such Power is given by the Ordinary, and that the Salary and Wages for the Pay due to such Person from the Queen, &c. for Work done in any Docks or Yards, shall not be deemed Bona Notabilia, to entitle the Prerogative Court to any Jurisdiction in such Case. 4 & 5 Annæ.

Procedendo.

(A)

Where it shall be granted. See *Bail*.

1. *Lev. 93.* **U**P^TO^N was indicted for Barratry in the County of *Somerset*, where he lived, and the Bill was found by the Grand Jury, which being removed by him into *B. R.* it was moved for a *Procedendo*, but the Court was informed, that the Return was filed, and so it could not be remanded; yet a *Procedendo* was granted against the Opinion of *Twiflen*, and the Course of the Court. 1 *Sid. 108. The King versus Upton.* Reported in *Levinz* by the Name of *Upham's Case*.

2. Ruled upon an *Habeas Corpus*, to remove a Cause out of *Canterbury* in Ejectment, and the Record returned, that a *Procedendo* shall not be granted after Bail filed in *B. R.* because by giving Bail here, the Bail below is discharged; and if the *Procedendo* should be granted, then there would be a Cause depending in *Canterbury* without Bail. *Sid. 313. Allen versus Foreman.*

Procurations.

(A)

1. **T**HE Archdeacon of London exhibited his Bill in the Exchequer, against the Defendants, being Parsons and Vicars in London, for certain Sums of Money due to him by *Prescription for Proxies*; the Defendants demurred to the Bill, for that the Thing in Demand was merely of Ecclesiastical Cognizance, unless the Prescription alledged did alter the Case; and if it did, then the Plaintiff ought to have his Remedy at Law, and not in Equity; it was the Opinion of the Court, that there were three Sorts of Proxies; *Ratione Visitationis, Consuetudinis, and Pacti*; that the two last were triable at Law; and because it was doubtful which of these was claimed by the Plaintiff, therefore the Defendants were ordered to answer, and that the Matter should be saved to them at the Hearing. See *Statute 34 H. 8. concerning Proxies. Hardr. 180. Parker versus Seabrook.*

2. The Defendant being excommunicated for not paying Procurations and Proxies, suggested for a Prohibition the Statute 34 *H. 8. cap. 19.* by which 'tis enacted, that Spiritual Persons, who have a Right to any Proxies against those to whom the King should grant any Lands charged therewith, with a Clause in the Grant, that the said Lands should be discharged, should sue for the same in the Court of Augmentations (now annexed to the Exchequer) and not elsewhere; and that the Lands were granted to *T. S.* (under whom the Defendant claimed) discharged of Proxies, &c. But the Prohibition was denied, because this Statute extends only where particular Estates are granted for Life or Years, and not where the Fee is granted, as it was in this Case. *Hardr. 388. King versus Lake.*

3. *Libel* in the Spiritual Court for Procurations, setting forth, that for ten, twenty, &c. Years, there hath been due and paid 6 s. yearly, by *Kirton* and his Predecessors, to the Archdeacon of *York*, who suggested for a Prohibition, that the said Duty hath been payable, and denied the Prescription, and that the Ecclesiastical Court cannot try Prescriptions; but adjudged, that Procurations are payable of Common Right, as Tithes are, and that no Action will lie for the same at Common Law; a Consultation was granted; but if he had denied the *quantum*, then a Prohibition might go. *Kaym. 360. Kirton versus Guilden.*

Profits. See *Issues and Profits*.



